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VOLUME XXII.

THE

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BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

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

AND OTHER LAWYERS.

VOLUME XXII.

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PATENTS AND INVENTIONS.
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PEERAGES AND DIGNITIES.
PERPETUITIES.
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For Annuities - - - - *See title* INSURANCE; RENTCHARGES AND ANNUITIES.
Bills of Exchange - - ,, BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS.
Carriers - - - - ,, CARRIERS.
Contracts by Post - - CONTRACT.
Criminal Law - - - CRIMINAL LAW AND PROCEDURE.
Insurance - - - - INSURANCE.
Mail Ships - - - SHIPPING AND NAVIGATION.
Messengers - - - - STREET AND AERIAL TRAFFIC.
National Insurance - - WORK AND LABOUR.
Negligence - - - - NEGLIGENCE.
Old Age Pensions - - POOR LAW.
Public Authorities Protection Act - - - - PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
Railways - - - - RAILWAYS AND CANALS.
Revenue - - - - REVENUE.
Savings Bank - - - BANKERS AND BANKING.
Shop Hours Act - - - FACTORIES AND SHOPS.
Telegraphs and Telephones - TELEGRAPHS AND TELEPHONES.
Weights and Measures - - WEIGHTS AND MEASURES.

POUND AND POUND BREACH.
See ANIMALS.

POWER OF APPOINTMENT.
See POWERS.

POWER OF ATTORNEY.
See AGENCY.

ABBREVIATIONS

USED IN THIS WORK.

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

Bar. & Arn.	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com.	Blackstone's Commentaries
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.) ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr. . ..	Sir J. Brooke's Abridgment
Bro. C. C. . ..	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep. . ..	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.) . ..	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas. . ..	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush. ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1810
C. A.	Court of Appeal
C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. A.	Court of Criminal Appeal
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	Common Law Reports, 3 vols., 1853—1855
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas. ..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas. ..	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B. ..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. *temp.* Finch ..	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680
Cas. *temp.* King ..	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733
Cas. *temp.* Talb... ..	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date) ..	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)
Ch. App...	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890
Ch. Rob..	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808

Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas. ..	Charley's Chamber Cases, 1 vol., 1875—1876
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe . ..	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent.	Coke's Entries
Co. Inst.	Coke's Institutes
Co. Litt.	Coke on Littleton (1 Inst.)
Co. Rep.	Coke's Reports, 13 parts, 1572—1616
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846
Coll. Jurid.	Collectanea Juridica, 2 vols.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas.	Commercial Cases, 1895—(current)
Com. Dig.	Comyns' Digest
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas. ..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg... ..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. *temp.* Brough. ..	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834
Coop. *temp.* Cott. ..	C. P. Cooper's Cases *temp.* Cottenham, Chancery 2 vols., 1846—1848 (and miscellaneous earlier cases
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1909—(current)
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846

Craw. & D. Abr. C. ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol. 1837—1838
Cress. Insolv. Cas. ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829
Cripps' Church Cas. ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844
Dalr.	Dalrymple's Decisions, Court of Session (Scotland) fol., 1 vol., 1698—1720
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816
Dav. Ir.	Davys' (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611
Day	Day's Election Cases, 1 vol., 1892—1893
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835
Dears. & B.	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832
De G.	De Gex's Reports, Bankruptcy, 1 vol., 1844—1848
De G. F. & J.	De Gex, Fisher, and Jones's Reports, Chancery, 4 vols., 1859—1862
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859
De G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865
De G. M. & G.	De Gex, Macnaghten, and Gordon's Reports, Chancery, 8 vols., 1851—1857
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798
Dig.	Justinian's Digest or Pandects
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776
Doug. (K. B.)	Douglas' Reports, King's Bench, 4 vols., 1778—1785
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849

Dow. & Ry. (K. B.) ..	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827
Dow. & Ry. (M. C.) ..	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827
Dow. & Ry. (N. P.) ..	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841
Dowl. (N. S.)	Dowling's Practice Reports, New Series, 2 vols., 1841—1843
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1839
Drury *temp.* Nap. ..	Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859
Drury *temp.* Sug. ..	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844
Dugd. Orig.	Dugdale's Origines Juridiciales
Dunl. (Ct. of Sess.) ..	Dunlop, Court of Session Cases (Scotland), 2nd series, 24 vols., 1838—1862
Dunning..	Dunning's Reports, King's Bench, 1 vol., 1753—1754
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1223—1825
East	East's Reports, King's Bench, 16 vols., 1800—1812
East, P. C.	East's Pleas of the Crown
Ecc. & Ad. .. .	Spinks' Ecclesiastical and Admiralty Reports, 2 vols. 1853—1855
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754
Eng. Pr. Cas.	Roscoe's English Prize Cases, 2 vols., 1745—1858
Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744
Eq. Rep.	Equity Reports, 3 vols., 1853—1855
Esp.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810
Exch.	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856
Ex. D.	Law Reports, Exchequer Division, 5 vols., 1875—1880
F. & F.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867
F. (Ct. of Sess.) ..	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906
Fac. Coll. (with date) ..	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), fol., 1st and 2nd series, 21 vols., 1752—1825

Fac. Coll. (N. S.) (with date)	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), New Series, 16 vols., 1825—1841
Falc.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751
Falc. & Fitz.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838
Ferg.	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817
Fitz-G.	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1728—1731
Fitz. Nat. Brev. ..	Fitzherbert's Natura Brevium
Fl. & K.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842
Fonbl.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852
For.	Forrest's Reports, Exchequer, 1 vol., 1800—1801
Forb.	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713
Fort. De Laud. ..	Fortescue, De Laudibus Legum Angliæ
Fortes. Rep.	Fortescue's Reports, fol., 1 vol., 1692—1736
Fost.	Foster's Crown Cases, 1 vol., 1743—1760
Fount.	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712
Fox & S. Ir.	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825
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Personal Property - - ,, PERSONAL PROPERTY.
Real Property - - - ,, REAL PROPERTY AND CHATTELS REAL.
Receivers - - - - ,, RECEIVERS.

Part I.—Definition and Nature.

SECT. 1.—*Definition.*

1. Partnership is the relation which subsists between persons (*a*) carrying on a business in common with a view to profit (*b*), Partnership

(*a*) An ordinary partnership is an association composed of definite individuals, bound together by contract between themselves to continue combined for some joint object either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another (*Smith* v. *Anderson* (1880), 15 Ch. D. 247, C. A., *per* JAMES, L.J., at p. 273). In this it differs from a company or association in which the members are constantly changing (*ibid.*); and see title COMPANIES, Vol. V., pp. 12 *et seq.*, 44, 45. For a review of the authorities which define a partnership, see *Pooley* v. *Driver* (1876), 5 Ch. D. 458, *per* JESSEL, M.R., at pp. 471 *et seq.* As to whether executors are partners, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 314; *Re Fisher & Sons*, [1912] 2 K. B. 491.

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 1. This Act is merely

[SECT. 1. Definition.

other than those who constitute a company, registered under the Companies Acts (*c*), or incorporated by statute, letters patent or royal charter, or working within the Stannaries (*d*).

SECT. 2.—*Nature.*

Essentials of partnership.

2. The above definition involves a contract between the partners to engage in a commercial business with a view to profit (*e*). As a rule, each partner contributes either property, skill, or labour, but this is not essential. A person who contributes property without labour, and has the rights of a partner, is usually termed a sleeping or dormant partner. A sleeping partner may, however, contribute nothing (*f*).

Relation between partners.

The relation between partners is not that of debtor and creditor, unless and until the partnership accounts have been finally taken after dissolution and a balance has been ascertained to be owing from one to another (*g*). Nor are the partners, as such, trustees for each other or for their firm (*h*).

Business.

3. The existence of a business is essential, and for this purpose "business" includes every trade, occupation, or profession (*i*). In some professions, however, etiquette makes partnership impracticable, for example, that of an English barrister (*j*).

Charitable and other associations.

4. In the definitions of partnership the idea involved is that of joint operation for the sake of gain (*k*); therefore a society for religious or charitable purposes is not a partnership (*l*).

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declaratory (*British Homes Assurance Corporation, Ltd.* v. *Paterson*, [1902] 2 Ch 404, *per* FARWELL, J., at p. 410; and, where not inconsistent with the express provisions of the Act, the rules of common law and equity in relation to partnership are still in force (Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 46).

(*c*) See title COMPANIES, Vol. V. p. 36.

(*d*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 1 (2); and see title COMPANIES, Vol. V., pp. 36, 662, 744, 751.

(*e*) "I have always understood the definition of partnership to be a mutual participation in profit or loss" (*Green* v. *Beesley* (1835), 2 Bing. (N. C.) 108, *per* TINDAL, C.J., at p. 112). But this cannot now be regarded as an exhaustive or authoritative definition.

(*f*) *Pooley* v. *Driver* (1876), 5 Ch. D. 458, 472, 473.

(*g*) *Richardson* v. *Bank of England* (1838), 4 My. & Cr. 165, 171, 172; *De Tastet* v. *Shaw* (1818), 1 B. & Ald. 664.

(*h*) *Piddocke* v. *Burt*, [1894] 1 Ch. 343.

(*i*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 45. "To constitute a partnership the parties must have agreed to carry on business, or to share profits in some way in common" (*Mollwo, March & Co.* v. *Court of Wards* (1872), L. R. 4 P. C. 419, *per* Sir MONTAGU SMITH, at p. 436).

(*j*) See title BARRISTERS, Vol. II., p. 370. As to Fellows of the Royal College of Physicians, see title MEDICINE AND PHARMACY, Vol. XX., p. 310.

(*k*) *R.* v. *Robson* (1885), 16 Q. B. D. 137, C. C. R., *per* Lord COLERIDGE, C.J., at p. 140; and see p. 6, *post*.

(*l*) Instances of other associations for a common object which are not partnerships, properly so called, are—clubs (*Wise* v. *Perpetual Trustee Co.*, [1903] A. C. 139, 149, P. C.; *Flemyng* v. *Hector* (1836), 2 M. & W. 172, 178—187; see title CLUBS, Vol. IV., pp. 406 *et seq.*); trade protection societies (*Caldicott* v. *Griffiths* (1853), 8 Exch. 898; *Todd* v. *Emly* (1841), 8 M. & W. 505); building and other benefit societies (*Brownlie* v. *Russell* (1883), 8 App. Cas. 235; see titles BUILDING SOCIETIES, Vol. III., pp. 351, 352; FRIENDLY SOCIETIES, Vol. XV., p. 121, note (*a*)). These latter are not partnerships either within the Partnership Act, 1890 (53 & 54 Vict.

Arrangement with creditors.

A partnership does not exist between the trustees of a deed for the benefit of creditors and the debtor when the latter is employed to carry on the business under the supervision of the trustees (*m*), especially if the object of the arrangement is to wind up the business, and not to continue it with a view to future profits (*n*).

Firm.

5. The word "firm" is a short, collective name for the individuals who constitute the partners, and the name under which they trade is their firm name (*o*). It is not the name of a corporation; it is a short name for X., Y. and Z. carrying on business in partnership (*p*). In English law, a firm is not a *persona* (*q*).

Part II.—Considerations affecting the Question whether a Partnership Exists.

SECT. 1.—*Co-ownership of Property.*

Co-ownership and partnership distinguished.

6. Co-ownership of any property does not, in itself, constitute a partnership between the co-owners, whether they share any profits arising from it or not (*r*). Whether co-owners are also partners is a question of evidence. The mode in which the property has been dealt with and divided and the way in which it and the proceeds and income thereof have been treated in the books are important. Persons who are only co-owners keep books on a totally different footing from those who are also partners (*s*).

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c. 39), or the general acceptation of the term (*Re Lead Company's Workmen's Fund Society, Lowes* v. *Governor and Company for Smelting Down Lead with Pit and Sea Coal*, [1904] 2 Ch. 196, disapproving of the misuse of the term "partnership" in *Lloyd* v. *Loaring* (1802), 6 Ves. 773; *Beaumont* v. *Meredith* (1814), 3 Ves. & B. 180; *Silver* v. *Barnes* (1839), 6 Bing. (N. C.) 180). As to the nature of trade unions, see title TRADE AND TRADE UNIONS.

(*m*) *Price* v. *Groom* (1848), 2 Exch. 542.

(*n*) *Coates* v. *Williams* (1852), 7 Exch. 205, following *Jones* v. *Whitbread* (1851), 11 C. B. 406.

(*o*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 4; the firm name is a mere expression, not a legal entity (*Sadler* v. *Whiteman*, [1910] 1 K. B. 868, *per* FARWELL, L.J., at p. 889; cited with approval, *R.* v. *Holden*, [1912] 1 K. B. 483, C. C. A.).

(*p*) *Re Smith, Fleming & Co., Ex parte Harding* (1879), 12 Ch. D. 557, 567, C. A.

(*q*) *Re Sawers, Ex parte Blain* (1879), 12 Ch. D. 522, C. A., *per* JAMES, L.J., at p. 533; *Re Vagliano Anthracite Collieries, Ltd.* (1910), 79 L. J. (CH.) 769; compare *Re Shand, Ex parte Corbett* (1880), 14 Ch. D. 122, 126, C. A. In Scotland a firm is a legal person distinct from the partners of which it is composed (Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 4 (2); Bell's Principles of the Law of Scotland, s. 357). As to proceedings by and against partners in the firm name, see p. 38, *post*.

(*r*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (1). As to co-ownership generally, see title PERSONAL PROPERTY. Co-owners of a racehorse, who share equally the expenses of keeping, training, and running it, are not necessarily partners as regards the horse, although there may be a partnership between them in the business of running it for profit (*French* v. *Styring* (1857), 2 C. B. (N. S.) 357, 366; compare *Green* v. *Briggs* (1848), 6 Hare, 395).

(*s*) *Re Hulton, Hulton* v. *Lister* (1890), 62 L. T. 200, C. A.

SECT. 1. Co-ownership of Property.

Co-owners of land.

7. Co-owners of land, who merely share the expenses of management and divide the income arising from their land in specified shares, are not thereby constituted partners. Nor is it a partnership if two co-owners agree that one shall manage, and provide funds for the repair of, a house, and that the net rent shall be divided between them equally (*t*).

Partnership in land.

But if co-owners use their land or other property for the purpose of carrying on any business, they are partners as regards the business (*u*), and *primâ facie* also as regards the property employed (*v*), though not necessarily so as regards the latter (*a*). Thus, if land is bought by two persons with the object of improving and selling it in building lots, there may be a partnership between them as regards the land (*b*); and a third person (for example, a surveyor) who contributes skill and labour, but neither land nor money, may, if he is entitled to share in the profits, be a partner with them, especially if he shares losses as well as profits (*c*). To constitute a partnership the property of the co-owners must be employed for some purpose which produces a return in the shape of profits or which adds to its value (*d*).

Joint adventure.

8. If two or more persons agree that each shall buy or provide his own goods and export them for sale as a joint adventure, dividing the profits of the transaction in specified shares, there is no partnership as regards the separate parcel of goods provided by each, until they are brought into the common stock (*e*). Conversely, if the parties are jointly concerned in the purchase, they are not partners unless they are also jointly concerned in the future sale (*f*). But where they agree to embark in a joint adventure for

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(*t*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (2); and see pp. 52, 53, *post*. As to co-owners of land generally, see title REAL PROPERTY AND CHATTELS REAL.

(*u*) Thus, the working of a colliery of which the owners are tenants in common constitutes a partnership between them as regards the business of the colliery (*Jefferys* v. *Smith* (1820), 1 Jac. & W. 298; *Fereday* v. *Wightwick* (1829), 1 Russ. & M. 45; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, 637, C. A.). As to the respective rights of co-owners of mines, see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 511, 525, 526, 638.

(*v*) *Forster* v. *Hale* (1798), 3 Ves. 696; (1800) 5 Ves. 308, 309 (if a partnership in a colliery is found to exist, the property necessary for the purposes of that partnership is, by operation of law, held for the purposes of the partnership (*ibid.*)); *Waterer* v. *Waterer* (1873), L. R. 15 Eq. 402; *Syers* v. *Syers* (1876), 1 App. Cas. 174; *Davies* v. *Games* (1879), 12 Ch. D. 813; and see pp. 52, 53, *post*.

(*a*) *Crawshay* v. *Maule* (1818), 1 Swan. 495, 518; *French* v. *Styring* (1857), 2 C. B. (N. S.) 357; *Meyer* v. *Sharpe* (1813), 5 Taunt. 74; *Davis* v. *Davis* [1894] 1 Ch. 393.

(*b*) *Dale* v. *Hamilton* (1846), 5 Hare, 369, 393; *Darby* v. *Darby* (1856), 3 Drew. 495; *Re Hulton*, *Hulton* v. *Lister* (1890), 62 L. T. 200, C. A.; and see title COMPANIES, Vol. V., p. 58.

(*c*) *Moore* v. *Davis* (1879), 11 Ch. D. 261, 265.

(*d*) *Kay* v. *Johnston* (1856), 21 Beav. 536, 537; compare *Re Leslie*, *Leslie* v. *French* (1883), 23 Ch. D. 552; *Leigh* v. *Dickeson* (1883), 12 Q. B. D. 194; affirmed (1884), 15 Q. B. D. 60, C. A.; *Robinson* v. *Ashton*, *Ashton* v. *Robinson* (1875), L. R. 20 Eq. 25; and see p. 4, *ante*.

(*e*) *Saville* v. *Robertson* (1792), 4 Term Rep. 720, 725; *Heap* v. *Dobson* (1863), 15 C. B. (N. S.) 460.

(*f*) *Coope* v. *Eyre* (1788), 1 Hy. Bl. 37, *per* Lord LOUGHBOROUGH, C.J.,

SECT. 1. Co-ownership of Property.

the purchase and sale of goods, there is a partnership as regards all the goods bought in pursuance of the agreement, and each is liable for the price of the goods bought by the others (*g*); and, if goods bought for a joint adventure by two persons are wholly paid for by one of them, while the other contributes skill and labour in return for a share of the profits, there may be a partnership between them of such a nature that the goods are partnership property (*h*).

Partnership without joint ownership.

9. On the other hand, persons may be partners, either generally or in some particular business or isolated transaction, although all or part of the property used for the purposes of such business transaction may not be the subject of joint ownership, but may belong to some or one of them individually (*i*).

SECT. 2.—*Sharing Gross Returns.*

Receipt of shares of gross returns not *primâ facie* evidence of partnership.

10. Persons who share the gross returns of a business or adventure are not necessarily partners, whether the property producing such returns belongs to all, or some, or only one of them (*k*). Receipt of a share of gross returns, as distinguished from receipt of a share of profits, is not even *primâ facie* evidence of partnership (*l*).

Thus, if one of two joint owners of a ship takes the exclusive management of it, bearing all the expenses, and pays one-third of the gross earnings to the other joint owner, the joint owners are

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at p. 49 (where the property purchased was to be divided *in specie*); compare *Hoare* v. *Dawes* (1780), 1 Doug. (K. B.) 371; *Gibson* v. *Lupton* (1832), 9 Bing. 297.

(*g*) *Gouthwaite* v. *Duckworth* (1810), 12 East, 421; *Lowe* v. *Dixon* (1885), 16 Q. B. D. 455. Where a sole patentee and a capitalist who supplied the necessary funds worked a patent in partnership for four years and were advertised as joint patentees, the patent was held to have become partnership property (*Kenny's Patent Buttonholeing Co.* v. *Somervell* (1878), 26 W. R. 786).

(*h*) *Reid* v. *Hollinshed* (1825), 7 Dow. & Ry. (K. B.) 444; *Alexander* v. *Young* (1884), 1 T. L. R. 145.

(*i*) Thus, where two persons carried on the business of running a stage coach, or a stage waggon, each supplying his own horses for part of the journey and dividing the profits according to the mileage worked by their teams, they were held to be partners (*Fromont* v. *Coupland* (1824), 2 Bing. 170; *Russell* v. *Austwick* (1826), 1 Sim. 52). In the first case all the fares were received by one partner, who accounted to the other; in the latter case each received the fares earned in his district and accounted to the other, but there was no partnership as regards the horses; and therefore one partner was not liable for goods supplied to the other for the use of the horses which were his separate property; and see *Barton* v. *Hanson* (1809), 2 Taunt. 49; compare *Wilson* v. *Whitehead* (1842), 10 M. & W. 503; *Osborne* v. *Jullion* (1856), 3 Drew. 596; *Moore* v. *Davis* (1879), 11 Ch. D. 261, 265; and see, further, the cases cited at p. 53, *post*.

(*k*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (2). "The authorities clearly show that two people merely receiving payment out of the gross profits of a business does not make a partnership between them, even as against the world" (*Lyon* v. *Knowles* (1863), 3 B. & S. 556, *per* CROMPTON, J., at p. 564; affirmed (1864), 5 B. & S. 751, Ex. Ch.).

(*l*) Compare Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3); pp. 8, 9, *post*. As to the effect of association of promoters of a company, see title COMPANIES, Vol. V., p. 58.

SECT. 2. Sharing Gross Returns.

not partners (*m*), and if a ship belongs to one person and is worked by another who receives half the gross earnings, these persons are not partners (*n*). In the former case the share of earnings paid to one owner represents rent for his share of the ship; in the latter the share paid to the manager represents wages for his work. Even where the expenses are jointly borne, the same rule seems to apply (*o*).

So the owner of a theatre who pays certain outgoings and receives half the gross receipts of public performances given by the occupier is not a partner; at any rate, if the management is in the hands of the occupier (*p*).

SECT. 3.—*Sharing Profits.*

Sharing profits not conclusive.

11. The fact that a person receives a share of the net profits, or a payment contingent on, or varying with, the net profits, pursuant to some arrangement with the owner or owners of a business, does not, of itself, make him a partner in such business (*q*). The

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(*m*) *Burnard* v. *Aaron* (1862), 31 L. J. (C. P.) 334. As to the ownership of ships generally, see title SHIPPING AND NAVIGATION.

(*n*) *Dry* v. *Boswell* (1808), 1 Camp. 329; compare *Wish* v. *Small* (1808), 1 Camp. 330, n. (where a share of profits was held to represent rent for pasturage of cattle). In both cases, if the net profits had been shared, the parties would have been partners.

(*o*) *French* v. *Styring* (1857), 2 C. B. (N. S.) 357, where two joint owners of a racehorse shared the gross winnings, the horse being kept, trained and run by one only; and see note (*r*), p. 5, *ante*.

(*p*) *Lyon* v. *Knowles* (1863), 3 B. & S. 556; affirmed (1864), 5 B. & S. 751, Ex. Ch.

(*q*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3). This enactment, which repeals but substantially re-enacts the Partnership Amendment Act, 1865 (28 & 29 Vict. c. 86), commonly called "Bovill's Act," declares and settles the law according to the principles laid down in *Cox* v. *Hickman* (1860), 8 H. L. Cas. 268, overruling *Waugh* v. *Carver* (1793), 2 Hy. Bl. 235, in which it was held (following *Grace* v. *Smith* (1775), 2 Wm. Bl. 998; *Coope* v. *Eyre* (1788), 1 Hy. Bl. 37), as also in *Ex parte Langdale* (1811), 18 Ves. 300; *Cheap* v. *Cramond* (1821), 4 B. & Ald. 663; *Ruppell* v. *Roberts and Dempsey* (1834), 4 Nev. & M. (K. B.) 31; and other cases, that the receipt of a share of profits *ipso facto* constituted the recipient a partner, even when all the loss was borne by the other party. The ground of these old decisions was that "by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts" (*Waugh* v. *Carver*, *supra*, at p. 247; *Grace* v. *Smith*, *supra*, at p. 1000). The rule was applied although there was no common stock (*Ex parte Hodgkinson* (1815), 19 Ves. 291), and notwithstanding an express stipulation negativing the usual incidents of partnership (*Barry* v. *Nesham* (1846), 3 C. B. 641). On this ground transactions which would otherwise have been invalid under the laws against usury were frequently supported as partnerships (*Gilpin* v. *Enderby* (1822), 5 B. & Ald. 954; *Fereday* v. *Hordern* (1821), Jac. 144); compare *Bloxam* v. *Pell* (1775), cited in *Grace* v. *Smith*, *supra*, at p. 999. Where losses were also shared, the presumption of partnership was stronger (*Noakes* v. *Barlow* (1872), 26 L. T. 136, Ex. Ch.). But the principle adopted in some of the earlier cases—especially *Waugh* v. *Carver*, *supra*—that, whatever the intention, a participation in net profits was, in law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation unless rebutted by other circumstances," is too artificial, for it takes one term of the contract only and at once raises a presumption upon it, whereas the whole scope of the agreement and all its terms ought

question is whether the business is conducted on behalf of the person sought to be charged as a partner. Receipt of profits is still an important element, but it is not decisive (*r*). The terms of the arrangement between the parties must be fairly considered as a whole, and if the receipt of profits is only one of such terms it is not conclusive, and the court will give effect to the entire arrangement (*a*).

Agency the determining factor.

But the receipt of a share of profits, or of an income fixed by reference to profits, is *primâ facie* evidence of partnership (*b*); and if it is the only circumstance from which the intention of the parties can be inferred, they are partners (*c*).

Sharing profits *primâ facie* evidence of partnership.

12. If losses as well as profits are shared, the presumption of partnership is stronger (*d*), and this is so although the agreement may stipulate that each party shall bear only an aliquot share of loss (*e*). But the fact that losses are shared is not conclusive as to the existence of a partnership (*f*).

Sharing profits and losses.

There is no joint ownership, and no partnership, where each of several joint adventurers supplies a separate parcel of goods which

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to be looked at before any presumption of intention can properly be made at all" (*Mollwo, March & Co.* v. *Court of Wards* (1872), L. R. 4 P. C. 419, *per* Sir MONTAGU SMITH, at p. 433). "They had no intention to become partners, and as the law now stands a partnership cannot be constituted without such an intention" (*Sutton & Co.* v. *Grey*, [1894] 1 Q. B. 285, C. A., *per* Lord ESHER, M.R., at p. 286); see also *Kelly's Directories, Ltd.* v. *Gavin and Lloyds*, [1901] 1 Ch. 374; affirmed, [1902] 1 Ch. 631, C. A. (author and printer).

(*r*) The test is "whether it is such a participation in profits as to constitute the relationship of principal and agent between the person taking the profits and those actually carrying on the business" (*Bullen* v. *Sharp* (1865), L. R. 1 C. P. 86, Ex. Ch., *per* BLACKBURN, J., at p. 112; see also *Re English and Irish Church and University Assurance Society* (No. 2) (1863), 1 Hem. & M. 85; *Cox* v. *Hickman* (1860), 8 H. L. Cas. 268, 304, 312; *Holme* v. *Hammond* (1872), L. R. 7 Exch. 218; *Shaw* v. *Galt* (1864), 16 I. C. L. R. 357, 375; *Kilshaw* v. *Jukes* (1863), 3 B. & S. 847).

(*a*) *Davis* v. *Davis*, [1894] 1 Ch. 393. "The whole question to consider is—what, on the contract between the parties, are the rights which that contract has, *inter se*, given to one as against the other" (*Walker* v. *Hirsch* (1884), 27 Ch. D. 460, C. A., questioning *Pawsey* v. *Armstrong* (1881), 18 Ch. D. 698); see *Walker* v. *Hirsch*, *supra*, *per* COTTON, L.J., at p. 470, dissenting from the proposition laid down by KAY, J., in *Pawsey* v. *Armstrong*, *supra*, "that if there was an agreement to share profits and losses, whatever the intention of the parties, as expressed in the agreement, might be, that of necessity imposed upon them the position of partners" with the consequential rights of partners; "the question is what is the true construction of the document, and what are the rights arising from it" (*ibid.*, *per* LINDLEY, L.J., at p. 472); see also *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238, 258, 263, C. A.; *Re Young, Ex parte Jones*, [1896] 2 Q. B. 484; *Ross* v. *Parkyns* (1875), L. R. 20 Eq. 331; *White & Co.* v. *Churchyard* (1887), 3 T. L. R. 428; *London Financial Association* v. *Kelk* (1884), 26 Ch. D. 107, 143.

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3).

(*c*) *Davis* v. *Davis*, *supra*.

(*d*) *Noakes* v. *Barlow* (1872), 26 L. T. 136, Ex. Ch.; *Brett* v. *Beckwith* (1856), 26 L. J. (CH.) 130; *Green* v. *Beesley* (1835), 2 Bing. (N. C.) 108.

(*e*) *Brown* v. *Tapscott* (1840), 6 M. & W. 119; *McInroy* v. *Hargrove* (1867), 15 W. R. 777.

(*f*) *Walker* v. *Hirsch*, *supra*; see also *Sutton & Co.* v. *Grey*, *supra*; and see note (*a*), *supra*.

SECT. 3. **Sharing Profits.**

are to be sold, and the profits are divided rateably among them (*g*); nor where one person buys and pays for the goods and the profit or loss is to be shared by himself and another (*h*).

Share of profits by way of annuity, after sale of business or death of partner.

13. A person is not constituted a partner in a business by reason only of the receipt by way of annuity or otherwise of a share of profits as purchase-money for the goodwill, or share of goodwill, of a business formerly belonging wholly or partly to him (*i*); or by reason only of the receipt by way of annuity of a portion of the profits of a business formerly belonging to the recipient's deceased husband or father (*k*).

Share of profits as remuneration.

14. A contract for the remuneration of a servant or agent by a share of profits of a business does not, of itself, make him a partner (*l*).

(*g*) *Heap* v. *Dobson* (1863), 15 C. B. (N. S.) 460; see p. 6, *ante*.

(*h*) *Alfaro* v. *De la Torre* (1876), 24 W. R. 510; distinguish *Reid* v. *Hollinshead* (1825), 4 B. & C. 867 (where both parties were interested both in the purchase and sale, though one found all the money and the other gave his time and skill). To constitute a partnership the parties "must be jointly interested in the purchase and also jointly interested in the future sale" (*Hoare* v. *Dawes* (1780), 1 Doug. (K. B.) 371; compare *Gibson* v. *Lupton* (1832), 9 Bing. 297; *Coope* v. *Eyre* (1788), 1 Hy. Bl. 37).

(*i*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3) (e), re-enacting the Partnership Amendment Act, 1865 (28 & 29 Vict. c. 86), s. 4; see *Hawksley* v. *Outram*, [1892] 3 Ch. 359, C. A. (where the vendors were entitled to receive a share of profits in respect of purchase-money left in the business, but the agreement as a whole was inconsistent with the inference that the purchasers were carrying on the business on behalf of themselves and the vendors). "The true test of whether a partnership was intended is this: whether there was a joint business, or whether the parties were intending to carry on the business as the agents of each other" (*ibid.*, *per* LOPES, L.J., at p. 377); compare *Chitty* v. *Boorman* (1890), 7 T. L. R. 43. It was formerly held that a partner who had retired, reserving an annuity varying with the profits, had not ceased to be a partner (*Re Colbeck & Co.*, *Ex parte Wilson*, *Ex parte Todd* (1817), Buck, 48). If the agreement does not state that the annuity is to be paid out of profits, the vendor may prove in the bankruptcy of the purchaser, in competition with other creditors, for the capitalised value of the annuity (*Re Gieve*, *Ex parte Shaw* (1899), 80 L. T. 737, C. A.).

(*k*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3) (c), re-enacting the Partnership Amendment Act, 1865 (28 & 29 Vict. c. 86), s. 3; *Re Jones*, *Ex parte Harper* (1857), 1 De G. & J. 180, C. A.

(*l*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3) (b), re-enacting the Partnership Amendment Act, 1865 (28 & 29 Vict. c. 86), s. 2; and see *Pott* v. *Eyton* (1846), 3 C. B. 32; *Andrews* v. *Pugh* (1854), 24 L. J. (CH.) 58; *Walker* v. *Hirsch* (1884), 27 Ch. D. 460, C. A., disapproving of *Pawsey* v. *Armstrong* (1881), 18 Ch. D. 698; *Re Ellins*, *Ex parte Hickin* (1850), 3 De G. & Sm. 662; title MASTER AND SERVANT, Vol. XX., p. 68. The receipt of a share of profits as remuneration for services had, in several old cases, been held to make the recipient a partner with all the consequent rights and liabilities (*Re Blenkin*, *Ex parte Digby* (1835), 1 Deac. 341; *Ex parte Hodgkinson* (1815), 19 Ves. 291; *Katsch* v. *Schenk* (1849), 13 Jur. 668). This was especially the case where the circumstances pointed to a joint adventure (*Coppard* v. *Page* (1800), For. 1; *Smith* v. *Sherwood* (1846), 10 Jur. 214). But if the agreement for a share of profits was merely a mode of calculating wages, it was not held to constitute a partnership (*Perrott* v. *Bryant* (1836), 2 Y. & C. (EX.) 61; *Stocker* v. *Brockelbank* (1851), 3 Mac. & G. 250; *R.* v. *Wortley* (1851), 2 Den. 333). The true criterion was whether the servant looked to the general credit of his master, or shared the profits of the trade with him, *i.e.*, took a share of profits as such (*Radcliffe* v. *Rushworth* (1864), 33 Beav. 484).

Thus a broker (*m*) or other agent (*n*), or a clerk or servant (*o*), who receives a share of profits, or a periodical payment measured by profits, by way of remuneration instead of a fixed commission or salary, is not necessarily a partner; although he may have an option to become a partner, and may do acts which either a partner or manager might do (*p*). But if he also bears losses he may be a partner (*q*).

Partnership rights imply partnership liabilities.

If his agreement gives him rights usually given to a partner or contains provisions applicable to a partner, for example, that he shall not pledge his co-adventurer's credit, the inference of partnership is conclusive (*r*).

Receipt of debt out of profits.

15. The receipt by a person of a debt or other liquidated amount, by instalments or otherwise, out of the profits of a business does not of itself make him a partner (*s*).

Share of profits as interest or loan.

16. The advance of money by way of loan to a person engaged in or about to engage in business on the terms that the lender shall receive a rate of interest, varying with profits, or a share of profits instead of such interest, does not of itself make the lender a partner, if the loan is made pursuant to a contract in writing signed by or on behalf of all the parties thereto (*t*). It is immaterial whether

(*m*) *Benjamin* v. *Porteus* (1796), 2 Hy. Bl. 590; explained in *Re Nevill, Ex parte White* (1871), 6 Ch. App. 397, *per* MELLISH, L.J., at pp. 404, 405.

(*n*) *Meyer* v. *Sharpe* (1813), 5 Taunt. 74; *Stocker* v. *Brockelbank* (1851), 3 Mac. & G. 250.

(*o*) *R.* v. *Holme* (1811), 2 Lew. C. C. 256; *Burnell* v. *Hunt* (1841), 5 Jur. 650; *Edmundson* v. *Thompson* (1861), 31 L. J. (EX.) 207.

(*p*) *Re Closson, Ex parte Harris* (1845), De G. 165; *Edmundson* v. *Thompson, supra.* The distinction formerly drawn between a payment out of profits and a payment measured by profits (*Ex parte Hamper* (1811), 17 Ves. 403, 404; *Harrington* v. *Churchward* (1860), 6 Jur. (N. S.) 576) was disapproved of in *Bullen* v. *Sharp* (1865), L. R. 1 C. P. 86, Ex. Ch., by BRAMWELL, B., at p. 126.

(*q*) *Smith* v. *Watson* (1824), 2 B. & C. 401; *Reid* v. *Hollinshead* (1825), 4 B. & C. 867; compare *Walker* v. *Hirsch* (1884), 27 Ch. D. 460, C. A.

(*r*) *Moore* v. *Davis* (1879), 11 Ch. D. 261; *Pole* v. *Leask* (1863), 9 Jur. (N. S.) 829. Where the vendor of a medical practice received a lump sum for the goodwill and a share of the first year's profits after the sale, during which he was to introduce the purchaser to his patients, he was not a partner; the share of profits was a form of remuneration (*Rawlinson* v. *Clarke* (1846), 15 M. & W. 292, 302, Ex. Ch.).

(*s*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3) (a). This clause extends the law to agreements not touched by the Partnership Amendment Act, 1865 (28 & 29 Vict. c. 86).

(*t*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3) (d); *Re Young, Ex parte Jones*, [1896] 2 Q. B. 484; *Re Howard, Ex parte Tennant* (1877), 6 Ch. D. 303, C. A.; *Re Whittaker, Ex parte Macmillan* (1871), 24 L. T. 143. A person who agreed to pay to a business firm money to be used in buying goods for the business in consideration of a fixed rate of interest and a share of the profits of a specified branch of the business was held not to be a partner (*Meyer* v. *Schacher* (1878), 38 L. T. 97). But such an agreement may constitute a breach of a covenant by the lender with his partners not to engage directly or indirectly in any other business (*Cooper* v. *Page* (1876), 34 L. T. 90). It has been suggested that if there is no agreement in writing the intending lender must be regarded as a partner (*Re Fort, Ex parte Schofield*, [1897] 2 Q. B. 495, C. A., *per* A. L. SMITH, L.J., at p. 501). But this *dictum* has not yet received authoritative confirmation.

SECT. 3. Sharing Profits.

the amount payable as interest increases or decreases, or whether a maximum rate is fixed which is liable only to decrease in proportion to the profits, if the agreement to that effect is clear (*u*). But if it is vague and unintelligible it may be void for uncertainty, in which case the lender can prove as an ordinary creditor (*v*).

Option of partnership.

The fact that the lender has an option to become a partner (*x*) or to require his nominee to be taken into partnership within a specified period does not make him a partner (*a*).

When a lender is a partner.

But if, on the true construction of the agreement, the real relationship between the parties is not purely and *bonâ fide* that of debtor and creditor, the effect of an advance in consideration of a share of profits may easily be to place the intending lender in the position of a partner with all its consequences and liabilities (*b*), even though this may not be the intention of the parties and though the agreement may contain an express declaration to the contrary (*c*). If the agreement gives the supposed lender the rights and privileges of a partner (*d*), no device or contrivance will enable him to escape the liabilities of a partner (*e*). If he is not a partner, he is merely a creditor whose rights are limited by statute (*f*). A lender may, however, stipulate for large powers, some of which might be consistent with the position either of a creditor or a sleeping partner; and, if such powers are reasonably necessary for the protection of his interest as a lender, they will not be held to make him a partner (*g*).

Lender postponed to ordinary creditors.

17. A lender who receives a rate of interest varying with the profits of a business, or a share of the profit of a business carried on by the borrower, cannot prove in competition with trade or other creditors for valuable consideration in the bankruptcy of the

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As to the necessity for the agreement to be in writing, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 420.

(*u*) *Re Vince, Ex parte Trustee in Bankruptcy*, [1892] 1 Q. B. 587.

(*v*) *Re Vince, Ex parte Baxter*, [1892] 2 Q. B. 478, C. A.; compare *Re Fort, Ex parte Schofield*, [1897] 2 Q. B. 495, C. A. As to the position of the lender in the bankruptcy of the borrower, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 223.

(*x*) *Re Vanderplank, Ex parte Turquand* (1841), 2 Mont. D. & De G. 339.

(*a*) *Re Harris, Ex parte Davis* (1863), 4 De G. J. & Sm. 523.

(*b*) *Syers* v. *Syers* (1876), 1 App. Cas. 174.

(*c*) *Re Megevand, Ex parte Delhasse* (1878), 7 Ch. D. 511, C. A.

(*d*) *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238, C. A.; *Debenham* v. *Phillips* (1887), 3 T. L. R. 512.

(*e*) "If a partnership in fact exists, a community of interest in the adventure being carried on in fact, . . . no verbal equivalent for the ordinary phrases of profit and loss, no indirect expedient for enforcing control over the adventure will prevent the substance and reality of the transaction from being adjudged to be a partnership" (*Adam* v. *Newbigging* (1888), 13 App. Cas. 308, *per* Lord HALSBURY, L.C., at p. 315; and see *Pooley* v. *Driver* (1876), 5 Ch. D. 458); compare *Courtenay* v. *Wagstaff* (1864), 16 C. B. (N. S.) 110; *Re Megevand, Ex parte Delhasse, supra*; *Frowde* v. *Williams* (1886), 56 L. J. (Q. B.) 62; *Stewart* v. *Buchanan* (1903), 6 F. (Ct. of Sess.) 15.

(*f*) *Re Howard, Ex parte Tennant* (1877), 6 Ch. D. 303, C. A.; *Kelly* v. *Scotto* (1880), 49 L. J. (CH.) 383; *Aktie Bolaget Iggesunds Bruk* v. *Von Dadelssen* (1887), 3 T. L. R. 517, C. A.

(*g*) *Hollom* v. *Whichelow* (1895), 64 L. J. (Q. B.) 170.

borrower (*h*), whether the agreement is written or oral (*i*). The creditors to whom he is postponed are those at the date of the insolvency, not of the loan (*j*). Accordingly, the lender cannot prove *pari passu* with other creditors by virtue of a pretended repayment and new advance or by any other device to evade the statute (*k*). But if the loan is repaid, and a new advance *bonâ fide* made on different terms, or if further advances are made on different terms, the lender may be in a position to prove *pari passu* with other creditors (*j*). If the lender takes a security by way of mortgage, he has the ordinary rights of a secured creditor, and may retain (*l*) or foreclose (*m*) his security.

Vendor of goodwill.

18. A seller of the goodwill of a business in consideration of a share of profits cannot prove in the bankruptcy of the buyer in competition with the creditors for value (*n*).

SECT. 4.—*Holding out as Partners.*

Holding out or representation.

19. A person who represents himself, or knowingly suffers himself to be represented, as a partner is liable, as if he were actually a partner, to anyone who has, on the faith of such representation, given credit to the firm (*o*); but the liability does not appear to extend to torts (*p*). He is estopped from denying the truth of such representation, and is therefore subject to the same liabilities as if he were, in fact, a partner (*q*), although he contributes neither

Liability founded on estoppel.

(*h*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 3, substantially re-enacting the Partnership Amendment Act, 1865 (28 & 29 Vict. c. 86), s. 5; see *Re Mason, Ex parte Bing*, [1899] 1 Q. B. 810 (where the loan to a firm was continued to the surviving partner).

(*i*) *Re Fort, Ex parte Schofield*, [1897] 2 Q. B. 495, C. A.

(*j*) *Re Tew, Ex parte Mills* (1873), 8 Ch. App. 569.

(*k*) *Re Hildesheim, Ex parte the Trustee*, [1893] 2 Q. B. 357, C. A.; *Re Grason, Ex parte Taylor* (1879), 12 Ch. D. 366, C. A.; *Re Stone* (1886), 33 Ch. D. 541; *Re Mason, Ex parte Bing, supra.*

(*l*) *Re Lonergan, Ex parte Sheil* (1877), 4 Ch. D. 789, C. A., overruling *Re Ramsden, Ex parte Macarthur* (1871), 40 L. J. (BCY.) 86.

(*m*) *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238, C. A.

(*n*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 3.

(*o*) *Ibid.*, s. 14 (1). "There can be no doubt that persons may be partners towards the world and yet not be partners as between themselves" (*Re Stanton Iron Co.* (1855), 21 Beav. 164, *per* ROMILLY, M.R., at p. 169; see also *Waugh* v. *Carver* (1793), 2 Hy. Bl. 235, 246; *Jacobsen* v. *Hennekenius* (1714), 5 Bro. Parl. Cas. 482; *Mulford* v. *Griffin* (1858), 1 F. & F. 145). Each partner is the agent of the others to make contracts on behalf of the firm; therefore the members of the firm are deemed the agents of a person who holds himself out as a partner (*Reynell* v. *Lewis, Wyld* v. *Hopkins* (1846), 15 M. & W. 517, 527).

(*p*) *Smith* v. *Bailey*, [1891] 2 Q. B. 403, C. A., disapproving of *Stables* v. *Eley* (1825), 1 C. & P. 614, as reported; and see title TORT. As to the ordinary liability of partners for torts, see pp. 30 *et seq.*, *post*. As to the effect of admissions or representations made by a partner, see title EVIDENCE, Vol. XIII., p. 460.

(*q*) "The doctrine of holding out is a branch of the doctrine of estoppel" (*Re Fraser, Ex parte Central Bank of London*, [1892] 2 Q. B. 633, C. A., *per* Lord ESHER, M.R., at p. 637). "Where a man holds himself out as a partner or allows others to do it . . . . he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so doing may be rightly held liable as a partner by estoppel" (*Mollwo, March & Co.* v. *Court of*

SECT. 4. Holding out as Partners.

capital nor labour, and has no interest in the profits of the business, or is indemnified against all possibility of loss (*r*), or although he is employed therein merely as a clerk or servant (*a*), or, having been a partner, has retired without giving proper notice of that fact (*b*).

Representation of intention insufficient.

A representation that a person is willing or intends to become a partner is not enough, and persons to whom it is made ought to inquire whether he subsequently became a partner (*c*).

By whom liability enforceable.

20. The estoppel can only be relied upon, and the liability be enforced, by persons to whom the representation has been made and who have acted upon the faith of it (*d*). A general representation to the public is not sufficient unless the person giving credit can satisfy the court or jury that he heard of and acted upon it (*e*).

Modes of holding out: (1) communication;

21. The representation may be made or communicated either by words, spoken or written, or by conduct; and may be so made or communicated either by the *quasi*-partner or by a third person (*f*).

Wards (1872), L. R. 4 P. C. 419, *per* Sir MONTAGU SMITH, at p. 435; see also titles AGENCY, Vol. I., pp. 158, 201; ESTOPPEL, Vol. XIII., p. 390; compare *Glossop* v. *Colman* (1815), 1 Stark. 25).

(*r*) *Waugh* v. *Carver* (1793), 2 Hy. Bl. 235, 246; *Bond* v. *Pittard* (1838), 3 M. & W. 357.

(*a*) *Kirkwood* v. *Cheetham* (1862), 2 F. & F. 798; *Ex parte Watson* (1815), 19 Ves. 459, 461; *Peacock* v. *Peacock* (1809), 2 Camp. 45; compare *Cornelius* v. *Harrison* (1862), 2 F. & F. 758; *Hardman* v. *Booth* (1863), 1 H. & C. 803.

(*b*) See pp. 38, 96, *post.*

(*c*) *Bourne* v. *Freeth* (1829), 9 B. & C. 632; compare *Reynell* v. *Lewis*, *Wyld* v. *Hopkins* (1846), 15 M. & W. 517, 529; and see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 659.

(*d*) *Re Fraser, Ex parte Central Bank of London*, [1892] 2 Q. B. 633, 637, C. A.; *M'Iver* v. *Humble* (1812), 16 East, 169, 174; *Carter* v. *Whalley* (1830), 1 B. & Ad. 11, 14; *Lloyd* v. *Ashby* (1825), 2 C. & P. 138. The name of a nominal firm affords no information with regard to the partners composing it, and a party contracting with it takes his chance who they may be (*Bonfield* v. *Smith* (1844), 12 M. & W. 405). A representation subsequent to the transaction sued upon is not enough to fix liability on the *quasi*-partner (*Baird* v. *Planque* (1858), 1 F. & F. 344); and a representation, limited to a particular concern or class of business, may not constitute a general partnership so as to create liability in matters not connected with such particular concern or class of business (*De Berkom* v. *Smith* (1793), 1 Esp. 29).

(*e*) As regards the effect of notice of private stipulations between partners, see *Gallway* (*Viscount*) v. *Mathew* (1808), 10 East, 264; *Alderson* v. *Pope* (1808), 1 Camp. 404, n.; compare *Brown* v. *Leonard* (1816), 2 Chit. 120; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 8. As to what is a sufficient representation, see *Dickinson* v. *Valpy* (1829), 10 B. & C. 128, 140; *Ford* v. *Whitmarsh* (1840), H. & W. 53; *Martyn* v. *Gray* (1863), 14 C. B. (N. S.) 824, 839. The liability would arise in the case of a person ceasing to be a partner if he "had done business with the plaintiff before as a member of a firm or had so publicly appeared as a partner as to satisfy a jury that the plaintiff must have believed him to be such partner, or if he had suffered the plaintiff to continue in and act upon that belief by omitting to give notice that he had ceased to be a partner" (*Carter* v. *Whalley*, *supra*, *per* PARKE, J., at p. 14). "Each case of this nature must depend on its own circumstances with reference to the effect of the defendant's language and conduct on the plaintiff's mind" (*Lake* v. *Argyll* (*Duke*) (1844), 6 Q. B. 477; see also *Wood* v. *Argyll* (*Duke*) (1844), 6 Man. & G. 928).

(*f*) *Dickinson* v. *Valpy*, *supra*, at pp. 140, 141; *Martyn* v. *Gray*, *supra*, at p. 839; see *Walter* v. *Ashton*, [1902] 2 Ch. 282 (cycles advertised as

In the latter case the supposed partner is not bound unless the representation has been made with his knowledge and assent (*g*). But if he has himself made, or expressly or impliedly authorised, such a representation, he is liable, although he may not know that it has been communicated to the person who has acted upon it (*h*). In the case of a representation by a third person it is sufficient if the *quasi*-partner has been so described as to be clearly identified, though his name has not been mentioned and may even have been refused (*i*).

(2) conduct.

In the case of representation by conduct the acts relied upon must not be ambiguous (*k*). A former partner is not held out as a partner by the mere continued use by the firm from which he has retired of a firm name consisting of his surname with the addition of the words "& Co." (*l*).

Holding out of retired partners.

The rule of estoppel applies to a former partner who has retired without giving proper notice of dissolution (*m*). The representation is a continuing one as regards persons who have dealt with the old firm unless and until such notice is given, but not as regards new customers or creditors who never knew that he was a partner (*n*).

Deceased partner.

But where, on the death of a partner, the business is continued by the surviving partners under the old name, the rule does not apply so as to impose liability upon the personal representatives of the late partner for transactions of the surviving partners after his death, even as regards old customers or creditors who have no notice of his death (*o*); and on this ground the court has refused to restrain the surviving partners from using his name (*p*).

Enforcement of liability of persons held out.

22. Where judgment has been obtained against a firm, execution may issue (*q*) against a person whose liability arose from

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"Times cycles"). As regards the general distinction between representations of intention and of fact, see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 659.

(*g*) *Fox* v. *Clifton* (1830), 6 Bing. 776, 794. Assent will bind him, although it was obtained by promises of irresponsibility or by misrepresentation, if the person to whom he was held out was not a party to such promises or misrepresentation (*Collingwood* v. *Berkeley* (1863), 15 C. B. (N. S.) 145; *Ellis* v. *Schmoeck* (1829), 5 Bing. 521; *Maddick* v. *Marshall* (1863), 16 C. B. (N. S.) 387; affirmed (1864), 17 C. B. (N. S.) 829, Ex. Ch.). In *Vice* v. *Anson* (*Lady*) (1827), 7 B. & C. 409, a person was held not to be liable as partner who erroneously believed herself to be such, and held herself out as such, but not to the plaintiff.

(*h*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 14 (1).

(*i*) *Martyn* v. *Gray* (1863), 14 C. B. (N. S.) 824, 841.

(*k*) *Edmundson* v. *Thompson* (1861), 2 F. & F. 564.

(*l*) *Burchell* v. *Wilde*, [1900] 1 Ch. 551, C. A.; *Townsend* v. *Jarman*, [1900] 2 Ch. 698, 705; compare *Rosher* v. *Young* (1901), 17 T. L. R. 347.

(*m*) As to proper notice, see p. 96, *post*.

(*n*) *Ex parte Watson* (1815), 19 Ves. 459, 461; *Waugh* v. *Carver* (1793), 2 Hy. Bl. 235; *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, 349, 356; *Newsome* v. *Coles* (1811), 2 Camp. 617 (followed by KAY, L.J., in *Re Fraser, Ex parte Central Bank of London*, [1892] 2 Q. B. 633, C. A.); *Williams* v. *Keats* (1817), 2 Stark. 290.

(*o*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 14 (2); *Devaynes* v. *Noble, Houlton's Case* (1816), 1 Mer. 529, 616; *Vulliamy* v. *Noble* (1817), 3 Mer. 593, 614.

(*p*) *Webster* v. *Webster* (1791), 3 Swan. 490, n.

(*q*) By leave, under R. S. C., Ord. 48, r. 8; see p. 46,

SECT. 4. Holding out as Partners.

"holding out" (*r*); and, if two persons hold themselves out as partners, they may be jointly adjudicated bankrupts, and, in the bankruptcy, property employed in the business may be treated as their joint estate, although as between themselves it was the separate property of one of them (*s*).

Part III.—Creation and Duration of Partnership.

SECT. 1.—*Legality of Partnership.*

SUB-SECT. 1.—*In General.*

Illegality.

23. A partnership may be illegal either because its members exceed the number permitted by statute or because it is formed for an illegal purpose. An unregistered partnership or association of more than ten members carrying on the business of banking or of more than twenty members carrying on any other business for the purpose of gain is illegal (*t*).

Breach of statute.

Usurpation of rights of corporation.

Although a partnership firm may, subject to the rights of other persons, adopt any style or title and may describe itself as a "company," it must not assume to be, nor usurp the rights and powers of, a corporation (*u*).

Business contrary to public policy.

A partnership formed for making profits by a business which is contrary to public policy, or which cannot be carried on without a breach of the common or statute law, is illegal (*x*).

(*r*) See *Davis* v. *Hyman & Co.*, [1903] 1 K. B. 854, C. A., and p. 13, *ante*, p. 46, *post*.

(*s*) *Re Rowland and Crankshaw* (1866), 1 Ch. App. 421; explained and discussed in *Re Pulsford, Ex parte Hayman* (1878), 8 Ch. D. 11, C. A. As to the doctrine of reputed ownership in bankruptcy in the case of partners, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 175, and the cases there cited.

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1; *Harris* v. *Amery* (1865), L. R. 1 C. P. 148; compare *Blundell* v. *Winsor* (1837), 8 Sim. 601; *Harrison* v. *Heathorn* (1843), 6 Man. & G. 81; and see title COMPANIES, Vol. V., pp. 44, 765.

(*u*) *Re Mexican and South American Co., Grisewood and Smith's Case, De Pass's Case* (1859), 4 De G. & J. 544, C. A.; *Maugham* v. *Sharpe* (1864), 17 C. B. (N. S.) 443. The fact that shares in the partnership are transferable by delivery of certificates does not render it illegal (*Re Mexican and South American Co., Aston's Case* (1859), 4 De G. & J. 320, C. A.; compare *Re General Company for Promotion of Land Credit* (1870), 5 Ch. App. 363, affirmed *sub nom. Reuss (Princess)* v. *Bos* (1871), L. R. 5 H. L. 176); and see title COMPANIES, Vol. V., p. 764.

(*x*) But a joint venture for blockade running is not illegal (*Re Grazebrook, Ex parte Chavasse* (1865), 4 De G. J. & Sm. 655). Partnerships formed for the following purposes have been held illegal:—the sale of smuggled goods (*Biggs* v. *Lawrence* (1789), 3 Term Rep. 454; compare *Waymell* v. *Reed* (1794), 5 Term Rep. 599, and *Clugas* v. *Penaluna* (1791), 4 Term Rep. 466); bookmaking or betting if carried on contrary to the Betting Act, 1853 (16 & 17 Vict. c. 119) (*Higginson* v. *Simpson* (1877), 2 C. P. D. 76; and, as to wagering contracts, see title GAMING AND WAGERING, Vol. XV., pp. 267 *et seq.*); secret pawnbroking (*Armstrong* v. *Armstrong, Lewis* v. *Armstrong* (1834), 3 My. & K. 45, 64; *Gordon* v. *Howden* (1845), 12 Cl. &

SUB-SECT. 2.—*Effect of Illegality.*

SECT. 1. Legality of Partnership.

Court declines to recognise illegal partnerships.

24. An agreement for an illegal partnership will not be specifically enforced, even though partly performed (*y*), nor can damages be recovered for breach of it (*a*), and, if the whole purpose of the partnership is illegal the court will not recognise it, or enforce any rights which the supposed partners would otherwise have (*b*), especially where the parties have agreed to enter, as partners, into a transaction which they know to be illegal (*c*). Therefore an action will not lie for an account of profits of illegal underwriting (*d*), even though defendant does not plead the illegality, if it is brought to the notice of the court (*e*); and if the plaintiff's case discloses the illegality of the transaction the court will not help him (*f*). It is no part of the duty of the court to aid either in

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Fin. 237, H. L.). Partnerships for underwriting were formerly illegal (stat. (1719) 6 Geo. 1, c. 18, repealed by stat. (1824) 5 Geo. 4, c. 114, on this point; *Mitchell* v. *Cockburne* (1794), 2 Hy. Bl. 379; *Watts* v. *Brooks* (1798), 3 Ves. 612; *Knowles* v. *Haughton* (1805), 11 Ves. 168; *Aubert* v. *Maze* (1801), 2 Bos. & P. 371; *Re Scott, Ex parte Bell* (1813), 1 M. & S. 751; *Everth* v. *Blackburne* (1817), 2 Stark. 66; *Booth* v. *Hodgson* (1795), 6 Term Rep. 405; *Lees* v. *Smith* (1797), 7 Term Rep. 338). But the persons insured could sue the supposed partners (*Brett* v. *Beckwith* (1856), 3 Jur. (N. S.) 31). An agreement by a solicitor to take into partnership an unadmitted person is illegal and void (*Williams* v. *Jones* (1826), 5 B. & C. 108, where evidence that the agreement was not intended to take effect until such person was admitted was rejected); but it is not illegal for a solicitor who holds public offices to agree that his emoluments shall form part of the profits of his firm (*Clarke* v. *Richards* (1835), 1 Y. & C. (EX.) 351; *Sterry* v. *Clifton* (1850), 9 C. B. 110); or for a solicitor to agree to pay part of the profits of his business to an unqualified person (*Candler* v. *Candler* (1821), Jac. 225, 231; *Bunn* v. *Guy* (1803), 4 East, 190); or for a retired solicitor to permit the use of his name by his former partners (*Aubin* v. *Holt* (1855), 2 K. & J. 66); and see, further, title SOLICITORS.

(*y*) *Ewing* v. *Osbaldiston* (1837), 2 My. & Cr. 53. As to the incidents of illegal contracts, see, generally, title CONTRACT, Vol. VII., pp. 407 *et seq.* As to specific performance generally, see title SPECIFIC PERFORMANCE.

(*a*) *Duvergier* v. *Fellows* (1830), 5 Bing. 248; affirmed (1832), 1 Cl. & Fin. 39, H. L.

(*b*) *Higginson* v. *Simpson* (1877), 2 C. P. D. 76.

(*c*) *De Begnis* v. *Armistead* (1833), 10 Bing. 107; *Saffery* v. *Mayer*, [1901] 1 K. B. 11, C. A.; *Holman* v. *Johnson* (1775), 1 Cowp. 341; *Cousins* v. *Smith* (1807), 13 Ves. 542; *Lees* v. *Smith* (1797), 7 Term Rep. 338.

(*d*) *Knowles* v. *Haughton* (1805), 11 Ves. 168; and see title CONTRACT, Vol. VII., p. 487.

(*e*) *Scott* v. *Brown, Doering, McNab & Co., Slaughter and May* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A.

(*f*) *Gedge* v. *Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214; compare *Thomson* v. *Thomson* (1802), 7 Ves. 470; and see, generally, title CONTRACT, Vol. VII., pp. 407—409. Where partners are engaged in illegal contracts, one of them, who pays the whole of a partnership debt without the express request of his partners, cannot enforce contribution (*Faikney* v. *Reynous* (1767), 4 Burr. 2069, and *Petrie* v. *Hannay* (1789), 3 Term Rep. 418, which were to the contrary effect, were overruled by *Cannan* v. *Bryce* (1819), 3 B. & Ald. 179). Where certain directors knew at the time of issuing a prospectus, relying on which a person bought shares in the company, that the project was impracticable, it was held that the plaintiff was entitled only to the relief which he might have had if the project had been a bubble *ab initio*, namely, to be repaid his purchase-money (*Harvey* v. *Collett* (1846), 15 Sim. 332). As to the disabling effect of an association being illegal, see, further, titles COMPANIES, Vol. V., p. 767; TRADE AND TRADE UNIONS.

SECT. 1. **Legality of Partnership.**

carrying out an illegal contract or in dividing the proceeds arising from an illegal contract between the parties to that illegal contract; and no action can be maintained either for the one purpose or for the other (*g*).

But the court will enforce rights of innocent parties.

But after an illegal transaction has come to an end the court will interfere to prevent those who have, under the illegal contract, obtained money belonging to other persons on the representation that the contract was legal, from keeping that money (*g*). A receiver has been appointed *pendente lite* where the defendant set up a claim, founded on alleged illegality, to the property of a partnership although he had accounted to the plaintiff for many years on the footing of partnership (*h*).

Partial illegality.

25. If the fundamental objects of a partnership or society are legal, the fact that the articles or rules contain illegal provisions does not invalidate the whole (*i*); and, if the objects of the partnership can, and are intended to, be carried out without any breach of the common or statute law, the fact that one partner has been guilty of illegal acts in the conduct of the business does not make the partnership illegal or prevent an innocent partner from enforcing the partnership obligations (*k*).

Winding up.

26. An illegal association cannot be wound up under the Companies Acts (*l*), at any rate at the instance of a creditor or shareholder who knew of the illegality (*m*).

(*g*) *Sykes* v. *Beadon* (1879), 11 Ch. D. 170, *per* JESSEL, M.R., at pp. 193, 196. In some old cases a distinction was drawn between enforcing an illegal contract and asserting rights to money which had arisen from it. If a partnership is not illegal in itself, the fact that the partners have evaded a statute is not a bar to an action by one of them against the others for an account (*Sharp* v. *Taylor* (1848), 2 Ph. 801; compare *Tenant* v. *Elliott* (1797), 1 Bos. & P. 3; *Farmer* v. *Russell* (1798), 1 Bos. & P. 296; *Thomson* v. *Thomson* (1802), 7 Ves. 470; but see *Re South Wales Atlantic Steamship Co.* (1876), 2 Ch. D. 763, C. A.).

(*h*) *Hale* v. *Hale* (1841), 4 Beav. 369. Though the members of an illegal association have no corporate rights and do not form a legal partnership, they do not lose their legal rights as owners of property (*R.* v. *Frankland* (1863), Le. & Ca. 276, C. C. R.). As to the embezzlement of property belonging to persons who are members of an illegal association, see titles COMPANIES, Vol. V., p. 768; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 635, 652, 653; FRIENDLY SOCIETIES, Vol. XV., p. 189.

(*i*) *Collins* v. *Locke* (1879), 4 App. Cas. 674, P. C.; *Swaine* v. *Wilson* (1889), 24 Q. B. D. 252, C. A.; and see title COMPANIES, Vol. V., p. 766. Where the principal object of an association of more than twenty members was the management and investment of a trust fund, it was held not to be illegal (*Smith* v. *Anderson* (1880), 15 Ch. D. 247, C. A., in which *Re Arthur Average Association for British, Foreign, and Colonial Ships, Ex parte Hargrove & Co.* (1875), 10 Ch. App. 542, was doubted; and see *R.* v. *Whitmarsh* (1850), 15 Q. B. 600; title COMPANIES, Vol. V., p. 45).

(*k*) *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496; *Harvey* v. *Hart*, [1894] W. N. 72, following *De Mattos* v. *Benjamin* (1894), 63 L. J. (Q. B.) 248, and distinguishing *Higginson* v. *Simpson* (1877), 2 C. P. D. 76.

(*l*) See title COMPANIES, Vol. V., pp. 394, 768.

(*m*) See cases cited, title COMPANIES, Vol. V., p. 768, note (*a*). But it may be doubted whether the court would not interfere at the instance of an innocent creditor or shareholder (*Doolan* v. *Midland Rail. Co.* (1877), 2 App. Cas. 792, *per* Lord BLACKBURN, at p. 806); see title COMPANIES, Vol. V., p. 768.

SECT. 2.—*Personal Capacity.*

SECT. 2. Personal Capacity.

Clergymen.

27. Clergymen, though generally prohibited by statute from engaging in trade, may be partners in firms exceeding six persons and in businesses which have devolved on them in certain specified modes (*n*). Contracts made by them as partners are not void (*n*), although they may be trading contrary to the statute (*o*).

Aliens.

28. A partnership between a British subject and an alien, other than an alien enemy resident in an enemy's country (*p*), is valid (*q*). But if any partner, whether a British subject or an alien, be resident in a hostile country, neither he nor his partner resident in England can recover money owing to his firm in the English courts (*r*). If a duly accredited member of a foreign embassy resident in England, whether a British subject or an alien, is a partner in an English firm, he cannot be sued in the English courts without his consent (*s*); but if he submits to the jurisdiction he is estopped from subsequently objecting to it (*a*).

Convicts.

29. If a partner becomes a convict, his share in the partnership is subject to the Forfeiture Act, 1870 (*b*).

Infants.

30. An infant is not bound by a contract of partnership made by him during minority. But if he agrees with adults to be their partner and subsequently on behalf of the partnership enters into contracts with third persons, those contracts bind his adult partners, and they are entitled to insist that the partnership assets shall be applied in payment of the partnership liabilities before he receives anything (*c*). On attaining twenty-one the infant may repudiate the partnership contract (*d*), but he cannot, on such repudiation,

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(*n*) Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 29—31; see title ECCLESIASTICAL LAW, Vol. XI., p. 557. As to the position of Protestant Nonconformist ministers, see *ibid.*, p. 813.

(*o*) *Lewis* v. *Bright* (1855), 4 E. & B. 917; *Hall* v. *Franklin* (1838), 3 M. & W. 259.

(*p*) *Ex parte Boussmaker* (1806), 13 Ves. 71; *Evans* v. *Richardson* (1817), 3 Mer. 469.

(*q*) *Wells* v. *Williams* (1698), 1 Salk. 46. As to the rights and duties of aliens, see title ALIENS, Vol. I., pp. 306 *et seq.*

(*r*) *M'Connell* v. *Hector* (1802), 3 Bos. & P. 113; *The Indian Chief* (1801), 3 Ch. Rob. 12; compare *The Jonge Klassina* (1804), 5 Ch. Rob. 297, and *The Portland* (1800), 3 Ch. Rob. 41. As to commercial domicil, see title CONFLICT OF LAWS, Vol. VI., pp. 195, 196.

(*s*) *Macartney* v. *Garbutt* (1890), 24 Q. B. D. 368; *Magdalena Steam Navigation Co.* v. *Martin* (1859), 2 E. & E. 94; see *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352, 362, C. A.; and see title CONSTITUTIONAL LAW, Vol. VI., pp. 431, 432.

(*a*) *Taylor* v. *Best* (1854), 14 C. B. 487.

(*b*) 33 & 34 Vict. c. 23, ss. 12, 21; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429; *Re Bateman's Trust* (1873), L. R. 15 Eq. 355; *Carr* v. *Anderson*, [1903] 2 Ch. 279, C. A.

(*c*) *Burgess* v. *Merrill* (1812), 4 Taunt. 468; and see, further, title INFANTS AND CHILDREN, Vol. XVII., pp. 53, 55.

(*d*) *Goode* v. *Harrison* (1821), 5 B. & Ald. 147. "There is nothing to prevent an infant trading or becoming a partner with a trader, and until his contract of partnership be disaffirmed he is a member of the trading firm. But it is equally clear that he cannot contract debts by such

SECT. 2. Personal Capacity.

recover a premium paid by him under a partnership contract on which he has acted (*e*), if he has derived any real benefit from the contract. It is otherwise if there has been an entire failure of consideration (*f*). If he adopts the contract and continues the partnership after attaining twenty-one, he is liable for the firm's debts contracted during his minority (*g*). An infant partner who commits a wrong, for example, by falsely representing his firm to be connected with a stranger's business, may be restrained by injunction and ordered to pay costs (*h*): so, also, an infant is liable in equity for fraudulent misrepresentation (*i*), as by holding himself out as a person of full age (*k*).

Lunatics.

31. An agreement for partnership or otherwise entered into by a person apparently sane, and not known by the other parties to be otherwise, is binding upon him, although he may in fact have been insane at the time; but if the other parties knew him to be insane the agreement will be set aside (*l*).

Married women.

32. A married woman, whether she has separate property or not, can enter into contracts (*m*). She may, therefore, become a partner either with her husband or with other persons, and her contracts, as such, bind her partners and the partnership assets (*n*); but, with certain exceptions (*o*), she is not personally liable in respect

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trading" (*Lovell and Christmas* v. *Beauchamp*, [1894] A. C. 607, *per* Lord HERSCHELL, L.C., at p. 611).

(*e*) *Re Burrows, Ex parte Taylor* (1856), 8 De G. M. & G. 254, C. A.; *Wilson* v. *Kearse* (1800), Peake, Add. Cas. 196; *Holmes* v. *Blogg* (1818), 8 Taunt. 35.

(*f*) *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589; compare *Corpe* v. *Overton* (1833), 10 Bing. 252.

(*g*) *Goode* v. *Harrison* (1821), 5 B. & Ald. 147; *Ex parte Moule* (1808), 14 Ves. 602. "A trading of a sort is deposed to, but that was during infancy; if, however, that trading was carried on after the trader became adult, though in a much less degree, the quantity of trading would not make him the less a trader" (*Ex parte Moule, supra, per* Lord ELDON, L.C., at p. 603).

(*h*) *Woolf* v. *Woolf*, [1899] 1 Ch. 343; *Chubb* v. *Griffiths* (1865), 35 Beav. 127; *Lempriere* v. *Lange* (1879), 12 Ch. D. 675; and see title INFANTS AND CHILDREN, Vol. XVII., pp. 75, 144.

(*i*) *Re Jones, Ex parte Jones* (1881), 18 Ch. D. 109, 120, C. A.

(*k*) *Re Lees, Ex parte Lees, Ex parte Heatherly* (1836), 1 Deac. 705; compare *Ex parte Watson* (1809), 16 Ves. 265, and *Re Bates, Ex parte Bates* (1841), 2 Mont. D. & De G. 337. "But no representation that the infant who so trades is of full age arises out of the mere fact of his carrying on the trade" (*Re King, Ex parte Unity Joint-Stock Mutual Banking Association* (1858), 3 De G. & J. 63, C. A.).

(*l*) *Molton* v. *Camroux* (1848), 2 Exch. 487; *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599, C. A.; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 397. As to dissolution on the ground of insanity, see p. 90, *post*.

(*m*) See title HUSBAND AND WIFE, Vol. XVI., p. 411.

(*n*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1.

(*o*) By the custom of the City of London a married woman may trade within the City and contract as if she were a *feme sole* (*Ex parte Carington* (1739), 1 Atk. 206; *Beard* v. *Webb* (1800), 2 Bos. & P. 93, 98, Ex. Ch.; *Re Grissell, Ex parte Jones* (1879), 12 Ch. D. 484, 488, C. A.; see title HUSBAND AND WIFE, Vol. XVI., p. 352); and a married woman, whose husband is a convicted felon (*Re Franks, Ex parte Franks* (1831), 7 Bing. 762; *Re Grissell, Ex parte Jones, supra*), or is an alien enemy resident

of her contracts (*p*). So far as she is concerned, the contracts and liabilities of a firm in which she is a partner can only be enforced, so long as she is under coverture, against her separate property which she is not restrained (*q*) from anticipating (*r*), whether such separate property is acquired by her before or after the contract or liability is made or incurred (*s*).

A married woman who is in partnership with her husband cannot be made a bankrupt (*a*); but if she carries on a trade separately from him in partnership with others, she becomes subject to the bankruptcy laws in respect of her separate property (*b*).

If she advances money to a partnership of which her husband is a member, she may prove in competition with other creditors (*c*).

SECT. 3.—*Evidence of Formation.*

SUB-SECT. 1.—*Writing.*

Evidence in writing.

33. The formation and terms of a partnership may be evidenced by partnership articles under seal, by an agreement signed by the partners, by an unsigned document drafted by one partner and adopted and acted on by the others (*d*), and even by an informal

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abroad (*Derry* v. *Mazarine* (*Duchess*) (1697), Ld. Raym. 147), can contract as a *feme sole*; compare *Barden* v. *Keverberg* (1836), 2 M. & W. 61 (where the husband was an alien resident abroad, but not an enemy); or where she is living apart from her husband under a decree of judicial separation or a protection order; see title HUSBAND AND WIFE, Vol. XVI., p. 346. For cases in which husband and wife were living apart, but not pursuant to any judicial order, see *Cecil* v. *Juxon* (1738), 1 Atk. 278; *Haddon* v. *Fladgate* (1858), 1 Sw. & Tr. 48; *Lamphir* v. *Creed* (1803), 8 Ves. 599.

(*p*) *Marshall* v. *Rutton* (1800), 8 Term Rep. 545; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 12, 19; Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1, which altered the rule laid down in *Palliser* v. *Gurney* (1887), 19 Q. B. D. 519; *Re Shakespear, Deakin* v. *Lakin* (1885), 30 Ch. D. 169; *Scott* v. *Morley* (1887), 20 Q. B. D. 120, C. A.; and see title HUSBAND AND WIFE, Vol. XVI., p. 411.

(*q*) If she is restrained from anticipation her contracts may be enforced against income which has actually become payable to her, but not against future income which is subject to the restraint when the contract is made, although she may become a widow, or be divorced before receiving it, unless she is made a bankrupt; see, generally, title HUSBAND AND WIFE, Vol. XVI., pp. 368, 369, 456.

(*r*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1; Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1; *Whittaker* v. *Kershaw* (1890), 45 Ch. D. 320, C. A.; *Holtby* v. *Hodgson* (1889), 24 Q. B. D. 103, C. A.; *Re Lynes, Ex parte Lester & Co.*, [1893] 2 Q. B. 113, C. A.

(*s*) Married Women's Property Act, 1893 (56 & 57 Vict c. 63), s. 1. For form of judgment against a married woman, see *Scott* v. *Morley*, *supra*, at p. 132; title HUSBAND AND WIFE, Vol. XVI., p. 455.

(*a*) *Re Helsby, Ex parte Helsby* (1893), 63 L. J. (Q. B.) 261.

(*b*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (5); see also *Re Dagnall, Ex parte Soan and Morley*, [1896] 2 Q. B. 407; titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 9, 10; HUSBAND AND WIFE, Vol. XVI., pp. 352, 353; and see p. 46, *post*.

(*c*) *Re Tuff, Ex parte Nottingham* (1887), 19 Q. B. D. 88.

(*d*) *Baxter* v. *West* (1860), 1 Drew. & Sm. 173; *Worts* v. *Pern* (1708), 3 Bro. Parl. Cas. 548. For a collection of forms of articles of partnership, applicable to various circumstances, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 458 *et seq.*

SECT. 3. Evidence of Formation.

document initialled by the partners and intended only to form instructions for a formal document (*e*). But a partnership agreement which is not to be performed within a year from its date, for example, a partnership for more than a year, cannot be enforced unless it is evidenced by writing (*f*), or there has been part performance (*g*).

A document signed by one person only, which would otherwise have been invalid for want of mutuality, may become evidence of the terms of a partnership if acted upon (*h*).

Proof by parol.

A partnership has been established by parol evidence even where articles of partnership were in existence (*i*); and an agreement of partnership may be proved by parol, although the partnership is to deal with land (*k*); but an agreement to share the profits of a particular piece of land, where no other partnership is shown, cannot be so proved (*l*).

SUB-SECT. 2.—*Mode of Dealing.*

Mode of dealing.

34. The mode of dealing adopted by partners is evidence of the formation and original terms of a partnership if such terms are not set forth in any document. Partners are bound by the duties and obligations which are implied in every partnership contract if, and so far as, the express contract does not deal with them (*m*).

Variation of written terms.

The original terms of a partnership, even if evidenced by a written instrument, may be varied by mutual consent; and the mode of dealing adopted or acquiesced in by all the partners is sufficient evidence of such variation (*n*). The rights and duties

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(*e*) *England* v. *Curling* (1844), 8 Beav. 129.

(*f*) Statute of Frauds (29 Car. 2, c. 3), s. 4; *Williams* v. *Jones* (1826), 5 B. & C. 108; *Tomkins* v. *Randell* (1871), 19 W. R. 413; see titles CONTRACT, Vol. VII., pp. 361, 365; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 420.

(*g*) *Baxter* v. *West* (1860), 1 Drew. & Sm. 173; *Crowley* v. *O'Sullivan*, [1900] 2 I. R. 478; see title CONTRACT, Vol. VII., pp. 379 *et seq.*

(*h*) *Heyhoe* v. *Burge* (1850), 9 C. B. 431.

(*i*) *Alderson* v. *Clay* (1816), 1 Stark. 405. Similarly admissions made by a person in a former action that he is a partner (*Studdy* v. *Sanders* (1823), 2 Dow. & Ry. (K. B.) 347), or a verdict on an issue directed to try whether he is a partner, may be used as evidence to establish a partnership (*Whately* v. *Menheim* (1798), 2 Esp. 608). Even the advertisement of a dissolution may be so used (*Ex parte Matthews* (1814), 3 Ves. & B. 125).

(*k*) *Gray* v. *Smith* (1889), 43 Ch. D. 208, C. A., *per* KEKEWICH, J., at p. 211; *Re De Nicols, De Nicols* v. *Curlier*, [1900] 2 Ch. 410, citing *Forster* v. *Hall* (1798), 3 Ves. 696; *Dale* v. *Hamilton* (1846), 5 Hare, 369; compare *Essex* v. *Essex* (1855), 20 Beav. 442.

(*l*) *Caddick* v. *Skidmore* (1857), 3 Jur. (N. S.) 1185 (a colliery); *Isaacs* v. *Evans*, [1899] W. N. 261 (a mine); see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 544.

(*m*) *Smith* v. *Jeyes* (1841), 4 Beav. 503.

(*n*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 19; *England* v. *Curling*, *supra*; *Const* v. *Harris* (1824), Turn. & R. 496; *Re Vale of Neath and South Wales Brewery Co., Keene's Executors' Case* (1853), 3 De G. M. & G. 272, C. A.; *Coventry* v. *Barclay* (1864), 33 Beav. 1; *Pilling* v. *Pilling* (1865), 3 De G. J. & Sm. 162, C. A. (where the books were kept, and certain expenses were paid, otherwise than in accordance with the articles); *Austen* v. *Boys* (1858), 2 De G. & J. 626, following *Geddes* v. *Wallace* (1820), 2 Bli. 270, H. L.; and see *Peat* v. *Smith* (1889), 5 T. L. R. 306. If a parol agreement is alleged to vary the articles so as to affect the money interests of the partners, the intention to produce

of partners as defined by statute may be varied in the same way (*o*).

SECT. 3. Evidence of Formation.

SECT. 4.—*Duration of Partnership.*

Implied agreement for fixed term.

35. Where there is no express agreement to continue a partnership for a definite period there may be an implied agreement to do so (*p*). The fact that the partners have bought a lease for a fixed term is not in itself evidence of such an implied agreement (*q*), nor is the incurring of debts (*a*). The burden of proving such an implied agreement is upon the person who alleges its existence (*b*), and the provisions relied on must be clearly inconsistent with the general right to dissolve (*c*). There is no presumption that a sub-partnership is to be for the same term as the principal partnership (*d*).

Terms of extension of partnership term.

36. If a partnership is continued beyond the stipulated period it is governed, in the absence of agreement to the contrary (*e*), by the terms of the partnership as they were at the expiration of the period, so far as they are applicable to a partnership at will (*f*), such as an arbitration clause (*g*), a power to nominate a successor (*h*), or a right of pre-emption (*i*). But provisions suitable to an agreement for a term of years are not so applicable, such as clauses for expulsion (*j*), clauses in the nature of penalties (*k*), and rights of pre-emption (*l*). The mode of realisation of assets prescribed by an agreement for a term of years may not apply to a dissolution at the

Provisions inapplicable to partnership at will.

such an effect must clearly appear by the evidence (*Lawes* v. *Lawes* (1878), 9 Ch. D. 98). In *Martindale* v. *Martindale* (1855), 1 Jur. (N. S.) 932, the court varied articles of partnership which were unduly onerous to the surviving partner, the new arrangement being more beneficial for infants who were interested in the estate of a deceased partner.

(*o*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 19.

(*p*) *Crawshay* v. *Maule* (1818), 1 Swan. 495. For a form of deed continuing a partnership, see Encyclopædia of Forms and Precedents, Vol. IX., p. 586.

(*q*) *Syers* v. *Syers* (1876), 1 App. Cas. 174; *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298; *Crawshay* v. *Maule, supra*; *Jefferys* v. *Smith* (1820), 1 Jac. & W. 298, 301; *Alcock* v. *Taylor* (1830), Taml. 506; *Burdon* v. *Barkus* (1862), 4 De G. F. & J. 42, C. A. On the other hand, a lease by one partner to his firm expires at the end of the term fixed for the partnership, although expressed to be for a longer period; see title LANDLORD AND TENANT, Vol. XVIII., p. 458, note (*a*); see also *Pocock* v. *Carter*, [1912] 1 Ch. 663.

(*a*) *King* v. *Accumulative Assurance Co.* (1857), 3 C. B. (N. S.) 151.

(*b*) *Burdon* v. *Barkus, supra.*

(*c*) *Baxter* v. *Plenderleath* (1824), 2 L. J. (O. S.) (CH.) 119.

(*d*) *Frost* v. *Moulton* (1856), 21 Beav. 596. See, as to a sub-partnership, p. 51, *post.*

(*e*) *Neilson* v. *Mossend Iron Co.* (1886), 11 App. Cas. 298; *Steuart* v. *Gladstone* (1879), 10 Ch. D. 626, C. A.; *Essex* v. *Essex* (1855), 20 Beav. 442.

(*f*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 27 (1); *Campbell* v. *Campbell* (1893), 6 R. 137, H. L.; *Cox* v. *Willoughby* (1880), 13 Ch. D. 863; *Daw* v. *Herring*, [1892] 1 Ch. 284; *Essex* v. *Essex, supra*; *King* v. *Chuck* (1853), 17 Beav. 325.

(*g*) *Gillett* v. *Thornton* (1875), L. R. 19 Eq. 599; *Cope* v. *Cope* (1885), 52 L. T. 607.

(*h*) *Cuffe* v. *Murtagh* (1881), 7 L. R. Ir. 411.

(*i*) *Brooks* v. *Brooks* (1901), 85 L. T. 453.

(*j*) *Clark* v. *Leach* (1862), 32 Beav. 14; affirmed (1863), 1 De G. J. & Sm. 409.

(*k*) *Hogg* v. *Hogg* (1876), 35 L. T. 792.

(*l*) *Yates* v. *Finn* (1880), 13 Ch. D. 839.

SECT. 4. Duration of Partnership.

end of a subsequent partnership at will (*m*); and a surety for one of the partners is discharged by the new agreement for partnership at will which is implied by the continuation of the firm (*n*).

Continuation of business.

37. A continuation of the business by the partners, or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuation of the partnership (*o*).

Single adventure.

38. A partnership entered into for a single adventure or undertaking lasts only until the termination of such adventure or undertaking (*p*).

Indefinite period.

39. A partnership for an indefinite period may be determined at any time by any partner on giving notice to the others (*q*). The filing of a bill (*r*), the issue of a writ, or the delivery of a defence (*s*) is a sufficient notice (*t*).

Part IV.—Relations between Partners and Third Parties.

SECT. 1.—*Power of One Partner to Bind the Firm.*

SUB-SECT. 1.—*General Principles.*

Authority of partners founded on agency.

40. Generally speaking, partners are the agents of each other and of their firm for the purpose of carrying on the partnership business in the usual way (*a*). It follows that *primâ facie* each partner has authority to do all acts incidental to the proper conduct of the business, and that such acts, subject to certain qualifications, bind his partners and his firm (*b*). An act done by any partner within the scope of his actual or implied authority renders the other partners liable to persons dealing with him as representing the firm (*c*).

Sleeping, retired, and deceased partners.

A sleeping partner is bound by contracts made by the ostensible

(*m*) *Woods* v. *Lamb* (1866), 35 L. J. (CH.) 309.

(*n*) *Small* v. *Currie* (1854), 18 Jur. 731; and see, generally, title GUARANTEE, Vol. XV., p. 546.

(*o*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 27 (2).

(*p*) *Ibid.*, s. 32 (b); see *Reade* v. *Bentley* (1858), 4 K. & J. 656; *McClean* v. *Kennard* (1874), 9 Ch. App. 336; see Encyclopædia of Forms and Precedents, Vol. IV., p. 175; Vol. IX., p. 600.

(*q*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 26 (1). For a form, see Encyclopædia of Forms and Precedents, Vol. IX., p. 603.

(*r*) *Shepherd* v. *Allen* (1864), 33 Beav. 577.

(*s*) *Syers* v. *Syers* (1876), 1 App. Cas. 174.

(*t*) As to the date from which dissolution will be ordered, see *Lyon* v. *Tweddell* (1881), 17 Ch. D. 529, C. A. "There is no technicality, no magic as to the mode of expression" (*Syers* v. *Syers*, *supra*, *per* Lord CAIRNS, L.C., at p. 183).

(*a*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 5; *British Homes Assurance Corporation, Ltd.* v. *Paterson*, [1902] 2 Ch. 404.

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 5; *Brettel* v. *Williams* (1849), 4 Exch. 623. As to the qualifications, see pp. 25, 33, *post*.

(*c*) *Bottomley* v. *Nuttall* (1858), 5 C. B. (N. S.) 122; compare Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 6; p. 32, *post*.

partners in the ordinary course of the partnership business (*d*). A partner cannot escape liability by merely giving notice that he has sold his share in the business when he has not in fact done so (*e*). The death of a partner does not preclude the surviving partner or partners from drawing on the partnership account (*f*).

Limited authority.

41. If, however, a partner's authority is limited by express agreement, the other partners, whether active or sleeping, are not liable to a person dealing with him who has notice of such limitation (*g*). But the express or implied authority of a partner cannot be limited by a private arrangement between the partners, of which the person dealing with the partner has no notice (*h*), except where the limitation is imposed upon a partner who is not known or believed by such person to be a partner (*i*).

An agreement by one partner to transact business in an unusual way does not bind his partners who have not authorised and have no notice of such agreement (*k*).

Delegation of authority.

42. A partner cannot delegate his authority without the consent of his partners (*l*).

SUB-SECT. 2.—*Instances of Implied Authority.*

Extent of implied authority.

43. The implied authority of partners extends to all matters necessary for carrying on the business of the firm in the usual way in which businesses of a like kind are carried on (*m*). But it only extends to transactions in the usual course of the partnership business (*n*).

Agency limited to agreed business.

Where the nature of the partnership business has been defined or agreed upon, no partner can compel the others to embark in a different business (*o*). Nor can a change be made in the nature

(*d*) *Beckham* v. *Drake* (1841), 9 M. & W. 79.

(*e*) *Vice* v. *Fleming* (1827), 1 Y. & J. 227. It would be otherwise if the notice were held to amount to an unqualified restriction of future liability (*ibid.*).

(*f*) *Backhouse* v. *Charlton* (1878), 8 Ch. D. 444.

(*g*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 5, 8; see note (*q*), p. 33, *post*, and *Alderson* v. *Pope* (1808), 1 Camp. 404, n.

(*h*) *Edmunds* v. *Bushell* (1865), L. R. 1 Q. B. 97; compare *Hambro* v. *Burnand*, [1904] 2 K. B. 10, C. A.

(*i*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 5. It was said in *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346 (a case of agency), that an undisclosed principal was liable for the acts of his agent, although the latter was neither held out as such, nor expressly authorised, but the *dictum* must be regarded as of doubtful authority; and see *Kinahan & Co., Ltd.*, v. *Parry*, [1910] 2 K. B. 389; reversed [1911] 1 K. B. 459, C. A.

(*k*) *Bignold* v. *Waterhouse* (1813), 1 M. & S. 255 (agreement to carry parcels free of charge).

(*l*) *Re Robinson, Ex parte Holdsworth* (1841), 1 Mont. D. & De G. 475.

(*m*) *Kirk* v. *Blurton* (1841), 9 M. & W. 284, referred to in *Forbes* v. *Marshall* (1855), 11 Exch. 166, and in *Stephens* v. *Reynolds* (1860), 5 H. & N. 513, *per* MARTIN, B., at p. 517; *Nicholson* v. *Ricketts* (1860), 2 E. & E. 497; see *Weikersheim's Case* (1873), 8 Ch. App. 831; *Niemann* v. *Niemann* (1889), 43 Ch. D. 198, C. A. (acceptance of shares). As to the implied authority of a partner to insure, see title INSURANCE, Vol. XVII., pp. 354, 355.

(*n*) *Hasleham* v. *Young* (1844), 5 Q. B. 833. A bill given by a partner in respect of transactions not relating to the partnership does not render his partners liable (*Re Prothero, Ex parte Agace* (1792), 2 Cox, Eq. Cas. 312).

(*o*) *Natusch* v. *Irving* (1824), 2 Coop. *temp.* Cott. 358; *e.g.*, by adding

SECT. 1. **Power of One Partner to Bind the Firm.**

of the partnership business without the consent of all the partners (*p*).

Acts beyond implied authority.

44. A partner in a mercantile or other firm has no implied authority to execute deeds on behalf of the firm (*q*); nor does the implied authority of a partner extend to acts not usually incidental to the scope of the partnership business, for example, the giving of guarantees by a member of a mercantile firm (*r*). A guarantee signed by one partner in the name of the firm does not bind the other partners unless it is in the regular line of business of the firm, or unless he has their express authority to give the guarantee (*s*); and a continuing guarantee given to or for a firm is, in the absence of agreement to the contrary, revoked as regards future transactions by any change in the constitution of the firm (*t*).

Deeds.

Guarantees.

Bills of exchange.

45. A partner in a mercantile firm has implied authority to draw, accept, and indorse bills of exchange and other negotiable instruments on behalf of his firm (*a*); and the firm is liable although the transaction is fraudulent and unauthorised, if the holder has no notice of such fraud (*b*). But this implied authority does not extend to firms which are not mercantile partnerships, such as solicitors (*c*), or commission agents (*d*). The fact that a bill is given for a partner's private debt raises a presumption that he had no

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marine insurance to life and fire insurances (*Singleton* v. *Knight* (1888), 13 App. Cas. 788, P. C.).

(*p*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (8); see p. 49, *post*.

(*q*) *Harrison* v. *Jackson* (1797), 7 Term Rep. 207; *Marchant* v. *Morton, Down & Co.*, [1901] 2 K. B. 829. But, although a deed executed by one partner who has implied authority to borrow money may not be valid as a legal mortgage, it may create a good equitable security (*Re Boyd, Ex parte Bosanquet* (1847), De G. 432; *Re Briggs & Co., Ex parte Wright*, [1906] 2 K. B. 209); and see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 6. As to deeds executed by a partner in his own name, see p. 32, *post*.

(*r*) *Duncan* v. *Lowndes* (1813), 3 Camp. 478; *Hasleham* v. *Young* (1844), 5 Q. B. 833; *Brettel* v. *Williams* (1849), 4 Exch. 623.

(*s*) *Crawford* v. *Stirling* (1802), 4 Esp. 207; *Sandilands* v. *Marsh* (1819), 2 B. & Ald. 673; *Brettel* v. *Williams, supra*; *Re Smith, Fleming & Co., Ex parte Harding* (1879), 12 Ch. D. 557, 557, C. A.

(*t*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18; see also title GUARANTEE, Vol. XV., pp. 498—501.

(*a*) *Harrison* v. *Jackson, supra*, at p. 210; *Williamson* v. *Johnson* (1813), 1 B. & C. 146; and see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 492.

(*b*) *Wiseman* v. *Easton* (1863), 8 L. T. 637; *Sutton* v. *Gregory* (1797), Peake, Add. Cas. 150; *Arden* v. *Sharpe* (1797), 2 Esp. 524; *Hogg* v. *Skeen* (1865), 18 C. B. (N. S.) 426; *Musgrave* v. *Drake* (1843), Dav. & Mer. 347; *Lane* v. *Williams* (1692), 2 Vern. 277; *Garland* v. *Jacomb* (1873), L. R. 8 Exch. 216, Ex. Ch.; *Bunarsee Dass* v. *Gholam Hossein* (1870), 13 Moo. Ind. App. 358, 363; *Wells* v. *Masterman* (1799), 2 Esp. 731.

(*c*) *Hedley* v. *Bainbridge* (1842), 3 Q. B. 316; *Garland* v. *Jacomb, supra*. Nor has a partner in a firm of solicitors implied authority to give a post-dated cheque (*Forster* v. *Mackreth* (1867), L. R. 2 Exch. 163). As to solicitors generally, see title SOLICITORS.

(*d*) *Yates* v. *Dalton* (1858), 28 L. J. (EX.) 69; and see, further, titles AUCTION AND AUCTIONEERS, Vol. I., p. 521; BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 492, note (*a*).

authority to sign the name of the firm for that purpose and throws the burden of proving such authority on the holder of the bill (*e*); and the holder of a bill purporting to bind a firm will be restrained from negotiating it if he knows that it is in fact unauthorised or fraudulent (*f*).

Borrowing money.

46. The implied power of a partner extends to the borrowing of money for the purposes of the business, where the business is of a kind that cannot be carried on in the usual way without such a power (*g*), but not for the purpose of providing the capital to be contributed by any individual partner (*h*). Where the limit of contribution is fixed by express agreement among the partners, a partner cannot, at all events as between himself and his partners, bind them by borrowing beyond the stipulated sum (*i*).

Pledging assets.

47. A surviving partner can give a valid security on the partnership assets for a debt incurred before the death of his partner (*k*); and a partner has authority to pledge the partnership property for partnership purposes after, as well as before, dissolution, in the course of winding up the business (*l*). But after the appointment of a receiver by the court, a partner, who has been a party to the order appointing him, cannot deal with the partnership assets so as to create a valid security (*m*).

Pledging partnership credit or assets for private debt.

48. An attempt by a partner to pledge the firm's credit for a purpose apparently not connected with its ordinary business does not bind his partners unless he has their express authority (*n*). Therefore a partner who holds shares as trustee for his firm cannot give a valid charge upon them for his private debt to a lender who

(*e*) *Frankland* v. *M'Gusty* (1830), 1 Knapp, 274, P. C.; *Leverson* v. *Lane* (1862), 13 C. B. (N. S.) 278; *Ridley* v. *Taylor* (1810), 13 East, 175.

(*f*) *Hood* v. *Aston* (1826), 1 Russ. 412. But if taken *bonâ fide* without such knowledge at the time, subsequent knowledge of the misconduct of the partner in giving the security is immaterial (*Swan* v. *Steele* (1806), 7 East, 210).

(*g*) *E.g.*, an ordinary trading partnership (*Bank of Australasia* v. *Breillat* (1847), 6 Moo. P. C. C. 152, 194; *Fisher* v. *Tayler* (1842), 2 Hare, 218). As to mining partnerships, see *Dickinson* v. *Valpy* (1829), 10 B. & C. 128; *Ricketts* v. *Bennett* (1847), 4 C. B. 686, and cases there cited. As to borrowing, for the purposes of the firm, by a partner in his own name, see p. 33, *post*; see also title MORTGAGE, Vol. XXI., p. 94.

(*h*) *Greenslade* v. *Dower* (1828), 1 Man. & Ry. (K. B.) 640.

(*i*) *Re Worcester Corn Exchange Co.* (1853), 3 De G. M. & G. 180, 187.

(*k*) *Re Clough, Bradford Commercial Banking Co.* v. *Cure* (1885), 31 Ch. D. 324.

(*l*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 38; *Butchart* v. *Dresser* (1853), 4 De G. M. & G. 542, C. A.; *Brown* v. *Kidger* (1858), 3 H. & N. 853; *Re Litherland, Ex parte Howden* (1842), 2 Mont. D. & De G. 574; *Re Bourne, Bourne* v. *Bourne*, [1906] 2 Ch. 427. But, though he has authority to pledge the partnership property, this does not enable him to bind his partners personally (*Blaine* v. *Holland* (1889), 60 L. T. 285, P. C.); nor are the other partners liable if the advances have been made solely on the credit of the borrowing partner and not on that of the partnership, and the application of the money to the purposes of the partnership does not *per se* make it liable (*Emly* v. *Lye* (1812), 15 East, 7; *Smith* v. *Craven* (1831), 1 Cr. & J. 500).

(*m*) *Hills* v. *Reeves* (1882), 30 W. R. 439; affirmed, 31 W. R. 209, C. A.

(*n*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 7; see also title MORTGAGE, Vol. XXI., p. 95.

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knows that they belong to the firm (*o*). But he can give a charge on partnership property for his own debt to a person who has no notice that the property is not his own (*p*); and, *primâ facie*, a *bonâ fide* lender to a partner on the credit of the partnership is entitled to assume that the transaction is for partnership purposes and authorised, unless he has notice of suspicious circumstances which ought to put him on inquiry (*q*). A partner who has pledged the firm's assets for his private debt cannot sue, as a member of the firm, to set aside the transaction (*r*).

Receipt of debts owing to the firm.

49. A partner has implied authority to receive and give a good discharge for debts due to his firm, but not for a debt owing to one of his partners in his personal capacity (*a*). The appointment, however, by partners of a person to receive debts due to the firm does not revoke the implied authority of any partner to receive and give a valid receipt for such debts (*b*). A payment by a debtor of the partnership to one of the partners is *primâ facie* a payment to the partnership (*c*).

Release of debts owing to and by the firm.

50. A partner has also implied authority to release a debt owing to his firm (*d*), even where it is released by deed executed by him "for self and partner" (*e*). But a covenant not to sue by one partner only does not release a partnership debt (*f*), and a partner cannot set off a debt owing to himself by way of release of a partnership debt so as to bind his partners in equity (*g*). A release, not under seal, of one partner by a creditor of the firm does not necessarily release the other partners (*h*); but a release, by receipt, of one debtor on a joint and several judgment debt has been held to release his co-debtor, where there was no ground for importing into the document an intention to reserve rights against the co-debtor (*i*). In the absence of fraud one partner may release a

Legal proceedings.

(*o*) *Wilkinson* v. *Eykyn* (1866), 14 W. R. 470.

(*p*) *Raba* v. *Ryland* (1819), Gow, 132; *Tupper* v. *Haythorne* (1815), Gow, 135, n. But such assignment is subject to the partnership debts (*Young* v. *Keighley* (1808), 15 Ves. 557).

(*q*) *Okell* v. *Eaton and Okell* (1874), 31 L. T. 330; *Loyd* v. *Freshfield* (1826), 2 C. & P. 325; *Reid* v. *Hollinshed* (1825), 7 Dow. & Ry. (K. B.) 444.

(*r*) *Brownrigg* v. *Rae* (1850), 5 Exch. 489. But an innocent partner may obtain equitable relief (*Midland Rail. Co.* v. *Taylor* (1862), 8 H. L. Cas. 751; *Piercy* v. *Fynney* (1871), L. R. 12 Eq. 69).

(*a*) *Powell* v. *Broadhurst*, [1901] 2 Ch. 160. With regard to an equitable charge vested in two joint tenants, see *Matson* v. *Dennis* (1864), 4 De G. J. & Sm. 345, C. A.

(*b*) *Bristow and Porter* v. *Taylor* (1817), 2 Stark. 50.

(*c*) *Moore* v. *Smith* (1851), 14 Beav. 393.

(*d*) *Hawkshaw* v. *Parkins* (1818), 2 Swan. 539; and see title CONTRACT, Vol. VII., p. 456.

(*e*) *Wilkinson* v. *Lindo* (1840), 7 M. & W. 81.

(*f*) *Walmesley* v. *Cooper* (1839), 11 Ad. & El. 216; *Hutton* v. *Eyre* (1815), 6 Taunt. 289.

(*g*) *Piercy* v. *Fynney*, *supra*; *Kendal* v. *Wood* (1871), L. R. 6 Exch. 243, Ex. Ch.

(*h*) *Re Armitage, Ex parte Good* (1877), 5 Ch. D. 46, C. A.; *e.g.*, where the surrounding circumstances show that the release was limited; see *Re E. W. A.*, [1901] 2 K. B. 642, C. A., *per* COLLINS, L.J., at p. 652.

(*i*) *Re E. W. A.*, *supra*; and compare title GUARANTEE, Vol. XV., p. 569.

cause of action in which he and his partners are plaintiffs (*k*); but he must have express authority to consent to judgment (*l*), or to submit a dispute to arbitration (*a*), or to compromise an action (*b*). A managing partner has implied authority to defend an action against the firm in relation to the partnership business (*c*).

Payment of debts.

51. Each partner has implied authority to pay debts owing by the firm. Part payment of a debt by a partner may be presumed to have been made by him as agent of the firm, and may, therefore, prevent a Statute of Limitation from running in favour of his partners (*d*); but part payment by a continuing partner after dissolution or other determination of the agency cannot generally be set up against a retired partner who pleads the statute (*e*). Payment of interest by continuing partners has, however, been held to bind a retired partner where it was really made on his behalf (*f*).

Powers of attorney.

52. A general power of attorney in favour of one member of a firm does not confer any authority on his partners (*g*); but a power of attorney by one partner to another, authorising him to sell all or any of the donor's property, enables him to sell the partnership property (*h*). Two powers of attorney (1) to do certain acts for him, including in general terms the indorsement of bills, and (2) to accept bills, given to his wife by a person who carried on business on his own account and also in partnership with others, were held not to authorise her to accept bills for the purposes of the partnership (*i*). A power of attorney for the purpose of exercising the powers and privileges under a specified deed of partnership has been held not to authorise a notice of dissolution and an assignment of the partnership assets (*k*).

(*k*) *Arton* v. *Booth* (1820), 4 Moore (C. P.), 192; *Barker* v. *Richardson* (1827), 1 Y. & J. 362; *Furnival* v. *Weston* (1822), 7 Moore (C. P.), 356.

(*l*) *Hambidge* v. *De la Croúe* (1846), 3 C. B. 742; compare *Munster* v. *Cox* (1885), 10 App. Cas. 680.

(*a*) *Adams* v. *Bankhart* (1838), 1 Cr. M. & R. 681; *Stead* v. *Salt* (1825), 3 Bing. 101; *Re Crowder & Co., Ex parte Nolte* (1826), 2 Gl. & J. 295; *Hatton* v. *Royle* (1858), 3 H. & N. 500. In *Thomas* v. *Atherton* (1878), 10 Ch. D. 185, C. A., the co-partners were bound by acquiescence.

(*b*) *Crane* v. *Lewis* (1887), 36 W. R. 480. A release in compromise of an action against one partner for damages for a joint tort may release all the members of the firm (*Howe* v. *Oliver* (1908), 24 T. L. R. 781; *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547, Ex. Ch.).

(*c*) *Tomlinson* v. *Broadsmith*, [1896] 1 Q. B. 386, C. A.

(*d*) *Goodwin* v. *Parton* (1880), 42 L. T. 568, C. A.; see title LIMITATION OF ACTIONS, Vol. XIX., p. 74.

(*e*) *Watson* v. *Woodman* (1875), L. R. 20 Eq. 721. It would be different if the partnership was dissolved upon terms which expressly or impliedly created an agency (*ibid.*, at p. 730).

(*f*) *Re Tucker, Tucker* v. *Tucker*, [1894] 1 Ch. 724; affirmed [1894] 3 Ch. 429, C. A.; compare *Friend* v. *Young*, [1897] 2 Ch. 421, and see title LIMITATION OF ACTIONS, Vol. XIX., p. 74; Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), ss. 13, 14.

(*g*) *Edmiston* v. *Wright* (1807), 1 Camp. 88; nor does it generally impose any liability on the firm for his wrongful acts in the exercise of the power (*Chilton* v. *Cooke & Sons* (1877), 37 L. T. 607).

(*h*) *Hawksley* v. *Outram*, [1892] 3 Ch. 359, C. A.

(*i*) *Attwood* v. *Munnings* (1827), 7 B. & C. 278; compare *Jacobs* v. *Morris*, [1902] 1 Ch. 816, C. A.

(*k*) *Harper* v. *Godsell* (1870), L. R. 5 Q. B. 422.

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One partner is not liable for the trespass of another unless committed with his knowledge or ratified by him (*i*). If a partner maliciously prosecutes a person for stealing the partnership property, it would seem that neither the firm nor the other partners are liable to an action for malicious prosecution and wrongful imprisonment merely because the property was partnership property (*a*).

Trespass.

Malicious prosecution.

A partnership firm cannot acquire property in goods obtained by the fraud of one partner to which the rest are not privy (*b*).

Goods obtained by fraud.

SUB-SECT. 4.—*Acts done by Authorised Person in Name of Firm.*

General rule.

56. All the partners of a firm are bound by acts and instruments done and executed in relation to the business by any person duly authorised, whether a partner or not, if done in the firm's name or with evident intention to bind the firm (*c*). A deed executed by one partner for himself and his partner in the presence of the latter binds both (*d*).

SUB-SECT. 5.—*Acts done in Name of Individual Partner.*

Execution and signature of documents.

57. One partner cannot bind the others by a guarantee apparently unconnected with the partnership (*e*); but he may do so where a mutual authority is proved by a previous course of practice of, or by adoption of, the partners, or by the usage of similar partnerships (*f*). An approval of a draft agreement signed by one member of a firm may bind the other partners (*g*); and a contract for a lease signed by one partner has been held to bind the others, where an analogous parol contract had been entered into and possession taken by all (*h*). A bill drawn on

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(*i*) *Petrie* v. *Lamont* (1841), Car. & M. 93; and see title TRESPASS.

(*a*) *Arbuckle* v. *Taylor* (1815), 3 Dow, 160; and see, generally, title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., pp. 669 *et seq.*

(*b*) *Kilby* v. *Wilson* (1825), Ry. & M. 178, *per* ABBOTT, C.J., at p. 181.

(*c*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 6; see cases in note (*l*), p. 33, *post*. But the general rules of law relating to the execution of deeds and negotiable instruments are not affected by this provision (Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 6); see titles BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 459 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 355 *et seq.*

(*d*) *Ball* v. *Dunsterville* (1791), 4 Term Rep. 313; *Burn* v. *Burn* (1798), 3 Ves. 573, 578. But usually an authority to execute a deed must be given by deed (*Steiglitz* v. *Eggington* (1815), Holt (N. P.), 141); see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 363.

(*e*) *Duncan* v. *Lowndes* (1813), 3 Camp. 478; *Hasleham* v. *Young* (1844), 5 Q. B. 833.

(*f*) *Brettel* v. *Williams* (1849), 4 Exch. 623, 629, 630, where *Ex parte Gardom* (1808), 15 Ves. 286, is commented on.

(*g*) *Brogden* v. *Metropolitan Rail. Co.* (1877), 2 App. Cas. 666.

(*h*) *Sharp* v. *Milligan* (1856), 22 Beav. 606; and all the partners are liable for the gas supplied to the place of business although leased to one of them only (*City of London Gaslight and Coke Co.* v. *Nicholls* (1826), 2 C. & P. 365). A deed signed by one partner only, not as an escrow, may bind him, though not binding on the others (*Bowker* v. *Burdekin* (1843), 11 M. & W. 128; and see *Cumberlege* v. *Lawson* (1857), 1 C. B. (N. S.) 709; *Lascaridi* v. *Gurney* (1863), 9 Jur. (N. S.) 302).

a firm, and accepted by one partner in the firm's name and in his own may bind the firm, but, if it does so, it does not bind him separately (*i*). A bill given for partnership purposes by one partner in his own name—and not in the firm's name—does not bind the other partner (*k*); but if given in a name which the jury finds to be intended for and substantially identical with, or habitually used as, that of the firm—though not strictly accurate—it binds the other partners (*l*).

Bills of exchange.

58. The mere fact that money, borrowed by a partner in his own name on security belonging to him personally, has been used for the purposes of his firm with the knowledge of his partners does not render them liable (*m*). There is no implication of law, from the mere existence of a trade partnership, that a partner has authority to bind the firm by opening a bank account on its behalf in his own name (*n*).

Money used by firm.

If one partner promises in his own name to pay a debt of his firm he alone is liable on such promise, and he cannot raise the defence that the debt was a joint liability (*o*).

Promise to pay firm debt.

59. A retired partner has been held not liable for the price of goods ordered by himself and his partner before his retirement, where such price was, after dissolution, secured by the acceptance of the continuing partner alone, to whom the goods were afterwards delivered (*p*).

Retired partner.

SUB-SECT. 6.—*Ratification and Repudiation.*

60. Transactions which would *primâ facie* be within the implied authority of a partner do not bind his firm or partners if he has, in fact, to the knowledge of the person dealing with him, no authority to carry out such transactions (*q*).

Unauthorised acts by partner.

(*i*) *Re Barnard, Edwards* v. *Barnard* (1886), 32 Ch. D. 447. Nor is the partner severally liable if the bill is accepted by the partner "for the partnership and self" (*Malcomson* v. *Malcomson* (1878), 1 L. R. Ir. 228).

(*k*) *Re Adansonia Fibre Co., Miles' Claim* (1874), 9 Ch. App. 635.

(*l*) *Faith* v. *Richmond* (1840), 11 Ad. & El. 339 (bill given in the name of "H. & F." instead of "H. & Co."); *Williamson* v. *Johnson* (1823), 1 B. & C. 146; *South Carolina Bank* v. *Case* (1828) 8 B. & C. 427, explained in *Nicholson* v. *Ricketts* (1860), 2 E. & E. 497, *per* CROMPTON, J., and in *Re Adansonia Fibre Co., Miles' Claim, supra, per* MELLISH, L.J., at p. 649; and see p. 110, *post*.

(*m*) *Bevan* v. *Lewis* (1827), 1 Sim. 376. But he may be entitled to be indemnified by them (*Browne* v. *Gibbins* (1726), 5 Bro. Parl. Cas. 491; *Re Oundle Union Brewery Co., Croxton's Case* (1852), 5 De G. & Sm. 432).

(*n*) *Alliance Bank, Ltd.* v. *Kearsley* (1871), L. R. 6 C. P. 433.

(*o*) *Murray* v. *Somerville* (1809), 2 Camp. 98, n.

(*p*) *Re Christopher, Ex parte Harris* (1816), 1 Madd. 583.

(*q*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 5, 8; *Galway (Lord)* v. *Matthew* (1808), 1 Camp. 402; *Heilbut* v. *Nevill* (1869), L. R. 4 C. P. 354; affirmed (1870), L. R. 5 C. P. 478, Ex. Ch. The holder of a bill indorsed or accepted by one partner cannot sue the other partners if he knew, when he took the bill, that the former had no authority to indorse or accept it (*Heilbut* v. *Nevill, supra; Hogarth* v. *Latham & Co.* (1878), 3 Q. B. D. 643, C. A.; *Galway (Lord)* v. *Matthew, supra; Arden* v. *Sharpe* (1797), 2 Esp. 524; compare *Greenslade* v. *Dower* (1828), 7 B. & C. 635). Where the name of the firm is that of one of the partners, who does not carry on a separate business, a bill drawn or accepted in such name is presumed to be a partnership bill, unless it is proved to have been given as the bill of the individual partner and not of the firm (*Yorkshire Banking*

SECT. 1. **Power of One Partner to Bind the Firm.**

But, when a partner exceeds his authority, the other partners may adopt the transaction, and are then bound by it (*r*); and they may be bound if they have notice of the transaction and raise no objection. But notice to him is not notice to them (*s*); nor is notice to a clerk employed by a partnership firm of unauthorised transactions by a partner constructive notice to an individual partner who has no actual knowledge of such transactions (*t*).

Ratification.

Acquiescence.

61. A partner who merely complains of unauthorised transactions by his partner, but takes no further step and allows a record of such transactions to remain in the partnership books, may be bound by acquiescence (*a*).

SECT. 2.—*Liability of Partners to Third Parties.*

SUB-SECT. 1.—*Nature.*

Joint liability on contracts.

62. Partners are jointly liable for the debts and obligations of the firm (*b*).

Particular cases.

63. A promissory note signed by one partner for himself and his partners *nominatim* may create only a joint liability although beginning "I promise to pay" (*c*); and a promissory note given by a firm (and a stranger as surety) has been held only to impose a joint liability on the members of the firm (*d*). An undertaking to pay the debts of a third party signed in the firm name and by each partner in his own name, so as to amount to a joint and several guarantee, creates a joint and several liability (*e*).

Joint and several liability for torts.

64. Partners are jointly and severally liable for the wrongful acts or omissions of any of them which cause loss or damage to third persons, if such acts are either done by a partner in the ordinary course of the firm's business or with the authority of his partners (*f*). They are also jointly and severally liable where a partner receives and misapplies the money or property of a third person while acting

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Co. v. *Beatson* (1), *Leeds and County Banking Co.* v. *Same* (1879), 4 C. P. D. 204; affirmed on different grounds (1880), 5 C. P. D. 109, C. A.; compare *Loyd* v. *Ashby* (1831), 2 B. & Ad. 23; *Re Blackburn, Ex parte Bolitho* (1817), Buck, 100; but see *Wintle* v. *Crowther* (1831), 1 Cr. & J. 316).

(*r*) *Willis* v. *Dyson* (1816), 1 Stark. 164.

(*s*) *Williamson* v. *Barbour* (1877), 9 Ch. D. 529, 536. With regard to the conditions which must exist to constitute a binding adoption of acts *a priori* unauthorised, see *Marsh* v. *Joseph*, [1897] 1 Ch. 13, C. A., *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 246; and see title AGENCY, Vol. I., pp. 175 *et seq.* In case of the repudiation of a contract entered into by one partner within the scope of his authority, the partnership is liable for everything done under the contract before receipt of notice of repudiation by the party contracting with the partner, or subsequently in respect of liabilities already incurred (*Smith* v. *Ure* (1833), 2 Knapp, 188).

(*t*) *Lacey* v. *Hill, Leney* v. *Hill* (1876), 4 Ch. D. 537, 549, C. A.; affirmed *sub nom. Read* v. *Bailey* (1877), 3 App. Cas. 94.

(*a*) *Cragg* v. *Ford* (1842), 1 Y. & C. Ch. Cas. 280, 285.

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 9. This provision is declaratory of the former law. With regard to the several liability of the estate of a deceased partner, see note (*p*), p. 35, *post.*

(*c*) *Re Clarke, Ex parte Buckley* (1845), 14 M. & W. 469.

(*d*) *Re Manley, Ex parte Wilson* (1842), 3 Mont. D. & De G. 57.

(*e*) *Re Smith, Fleming & Co., Ex parte Harding* (1879), 12 Ch. D. 557, C. A.

(*f*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 10, 12.

within the scope of his apparent authority, and where the firm receives, in the ordinary course of its business, money or property which is misapplied by one or more of the partners while in the firm's custody (*g*). Partners in a firm of solicitors have been held jointly and severally liable for a breach of trust committed by one partner, in which they were implicated (*h*), and for misappropriation of moneys where an undertaking, within the scope of the partnership business, had been given by one partner to apply money, paid to him by a client of the firm, for a specific purpose (*i*).

Breach of trust.

65. Where a trustee improperly lends trust money to a firm, and the partners know or ought to be treated as knowing the facts, they themselves are implicated in the breach of trust, and are jointly and severally liable for it (*j*). Where, however, one partner (not a trustee) in a firm of bankers invests trust money on improper securities with the knowledge of his partners, they are jointly liable as bankers, but not jointly and severally liable as trustees (*k*).

Right of partners to contribution.

66. Though partners are jointly liable to third persons, a partner who pays more than his share of a partnership debt, whether voluntarily or not (*l*), is entitled to contribution from his partners (*m*). Where one of two partners who are jointly liable has paid a judgment debt, he is entitled, in order to enforce his right to contribution, to an assignment of the judgment under the Mercantile Law Amendment Act, 1856 (*n*), but this right is subject to the equities subsisting between the debtors as partners (*o*).

Deceased partner.

67. The estate of a deceased partner is severally liable, in a due course of administration, for the unsatisfied debts and obligations of his firm, subject to his separate debts (*p*); but

(*g*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 11, 12; *De Ribeyre (La Marquise)* v. *Barclay* (1857), 23 Beav. 107; *Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807, C. A.

(*h*) *Blyth* v. *Fladgate, Morgan* v. *Blyth, Smith* v. *Blyth*, [1891] 1 Ch. 337.

(*i*) *Atkinson* v. *Mackreth* (1866), L. R. 2 Eq. 570.

(*j*) *Re Acraman, Ex parte Woodin* (1843), 3 Mont. D. & De G. 399.

(*k*) *Re Biddulph, Ex parte Burton* (1843), 3 Mont. D. & De G. 364; and see pp. 30, 31, *ante*.

(*l*) *Sadler* v. *Nixon* (1834), 5 B. & Ad. 936; and see title CONTRACT, Vol. VII., p. 472.

(*m*) *Boulter* v. *Peplow* (1850), 9 C. B. 493; *Sedgwick* v. *Daniell* (1857), 2 H. & N. 319; *Batard* v. *Hawes* (1853), 2 E. & B. 287. A partner could not formerly, in the absence of special circumstances, sue for contribution at law; his remedy was in equity (*Sadler* v. *Nixon*, *supra*).

(*n*) 19 & 20 Vict. c. 97, s. 5.

(*o*) *Dale* v. *Powell* (1911), 105 L. T. 291.

(*p*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 9; and see titles CONTRACT, Vol. VII., p. 460; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 309. This declares and settles the principle, which had long been acted upon in equity, that although partners were at law only jointly liable on contracts, a surviving partner could, in equity, obtain contribution from the estate of a deceased partner in respect of liabilities to which he was subject as such survivor, and that unpaid creditors might avail themselves directly of the equity which the surviving partner could thus insist upon (*Kendall* v. *Hamilton* (1879), 4 App. Cas. 504). The fact that the remedy was enforced in equity at the instance of creditors of the firm has in some old cases been treated as an adoption by the former Court of Chancery of the rule of the *lex mercatoria* that partnership debts create a several as well as joint liability; see *Devaynes* v. *Noble, Sleech's Case* (1816), 1 Mer. 529, 564. But this view was rejected by the House of Lords; see *Kendall* v. *Hamilton*, *supra*, at p. 538. As to the

SECT. 2. Liability of Partners to Third Parties.

joint covenants by partners, as lessees, are not construed as joint and several after the death of one partner, so as to render his estate liable for breaches after his death (*q*).

SUB-SECT. 2.—*Duration.*

Liability runs from date of association.

68. A person entering a subsisting firm is liable for the firm's debts incurred after he becomes a partner, but not, in the absence of contrary agreement, for previous debts (*r*). Thus the fact that a person who buys goods subsequently agrees to let another share in the profits does not enable the seller to sue such other person (*s*); and a person who, on joining a firm, becomes entitled, as between himself and the firm, to the rights of a partner from a past date cannot be sued for goods supplied to the firm between such past date and the time when he joined the firm (*t*).

Liability in case of specific adventures.

In the case of a joint adventure relating to a specified cargo of goods supplied separately by the several adventurers, where it was agreed that no adventurer was to be answerable for anything ordered and shipped by any co-adventurer, their joint liability was held not to commence until the goods were on board (*u*). But where it was agreed that the goods were to be bought by or for the adventurers jointly, their liability was held to begin at the time of purchase (*v*).

A partner is liable for the debts incurred by his firm from the date fixed for the commencement of his partnership, although the

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circumstances which determine whether the remedy against the estate of the deceased partner is or is not barred, see *Vulliamy* v. *Noble* (1817), 3 Mer. 593, 619; *Way* v. *Basset* (1845), 5 Hare, 55; *Brown* v. *Gordon* (1852), 16 Beav. 302; *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 529, 572; *Wilkinson* v. *Henderson* (1833), 1 My. & K. 582; *Ex parte Kendall* (1811), 17 Ves. 514, 525; *Thorpe* v. *Jackson* (1837), 2 Y. & C. (EX.) 553 (which shows that the surviving partner is a necessary party to the action); *Braithwaite* v. *Britain* (1836), 1 Keen, 206; *Winter* v. *Innes* (1838), 4 My. & Cr. 101; *Cowell* v. *Sikes* (1827), 2 Russ. 191; compare *Mills* v. *Boyd* (1842), 6 Jur. 943; and see title EQUITY, Vol. XIII., p. 39. "As regards the partners where there is in equity no survivorship of property there is no survivorship of the liability" (*Beresford* v. *Browning* (1875), 1 Ch. D. 30, C. A., *per* JAMES, L.J., at p. 34, affirming S. C. (1875), L. R. 20 Eq. 564; compare *Wilmer* v. *Currey* (1848), 2 De G. & Sm. 347).

(*q*) *Clarke* v. *Bickers* (1845), 14 Sim. 639; and see title CONTRACT, Vol. VII., pp. 337, 338.

(*r*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 17 (1); *Shirreff* v. *Wilks* (1800), 1 East, 48; *Newton* v. *Belcher* (1848), 12 Q. B. 921; *Beale* v. *Mouls* (1847), 10 Q. B. 976; *Lucas* v. *Beach* (1840), 1 Man. & G. 417; *Dyke* v. *Brewer* (1849), 2 Car. & Kir. 828; and see *Crauford* v. *Cocks* (1851), 6 Exch. 287. Knowledge by a creditor of the old firm that the new partner had joined the firm is not a necessary ingredient in determining his liability to such creditor (*Scott* v. *Beale* (1860), 6 Jur. (N. S.) 559). Promoters of a bill for a railway are liable from the date of association and not merely from the passing of the bill (*Holmes* v. *Higgins* (1822), 1 B. & C. 74). But *quære* whether *Lucas* v. *Beach, supra*, and *Holmes* v. *Higgins, supra*, were really cases of partnership. As to the effect of novation upon contractual liability, see title CONTRACT, Vol. VII., pp. 505 *et seq.*

(*s*) *Young* v. *Hunter* (1812), 4 Taunt. 582; compare *Mawman* v. *Gillett* (1809), 2 Taunt. 325, n.

(*t*) *Wilsford* v. *Wood* (1794), 1 Esp. 182.

(*u*) *Saville* v. *Robertson* (1792), 4 Term Rep. 720.

(*v*) *Gouthwaite* v. *Duckworth* (1810), 12 East, 421; compare *Barton* v. *Hanson* (1809), 2 Taunt. 49; *Young* v. *Hunter* (1812), 4 Taunt. 582.

partnership deed may be executed at a later date (*w*), notwithstanding an arrangement to the contrary between himself and his partners (*a*).

An agreement for a partnership in certain events does not render the parties liable for the acts or defaults of each other as partners until the events happen, unless there has been "holding out" (*b*); and abortive negotiations for a partnership on the terms of certain draft articles are not sufficient to render the parties liable as partners (*c*).

Agreement for partnership.

Where a person has an option of becoming a partner within twelve months from a specified date, he is not liable for goods supplied to the firm after that date and before his option is exercised (*d*); nor in respect of bills drawn before he becomes a partner (*e*).

Unexercised option.

69. A partner who retires does not thereby cease to be liable for the firm's liabilities incurred before his retirement (*f*): he remains liable until the partnership affairs are wound up, or such liabilities are discharged, unless the creditors accept the liability of the continuing partners by way of novation (*g*), and this is so although he may be only a sleeping partner (*h*). Costs, payable to the firm's solicitor in respect of an action commenced before, and pending at the time of, retirement, constitute a liability incurred when the solicitor was retained (*i*).

Liability of retired partner.

No agreement between partners with regard to the incidence of a partnership liability can *per se* affect the rights of creditors (*j*). Therefore, an agreement by continuing partners to indemnify a retiring partner against the partnership debts does not extinguish the joint liability of the partners to creditors, although, as between the partners, the retiring partner is in the position of a surety (*k*). But a retiring partner may be discharged by an agreement between

Creditors not bound by agreement fixing incidence of liability.

(*w*) *Battley* v. *Lewis* (1840), 1 Man. & G. 155; compare *Vere* v. *Ashby* (1829), 10 B. & C. 288.

(*a*) *Wilson* v. *Lewis* (1840), 2 Man. & G. 197. But in the absence of an express stipulation to the contrary, a partnership commences from the date of the articles of partnership, and evidence of a parol agreement that it was to commence on a future date is inadmissible (*Williams* v. *Jones* (1826), 5 B. & C. 108); see pp. 21, 22, *ante*.

(*b*) *Dickinson* v. *Valpy* (1829), 10 B. & C. 128, *per* PARKE, J., at pp. 141, 142. As to "holding out" as a partner, see p. 13, *ante*.

(*c*) *Re Vanderplank, Ex parte Turquand* (1841), 2 Mont. D. & De G. 339; *Ex parte Peele* (1802), 6 Ves. 602.

(*d*) *Gabriel* v. *Evill* (1842), 9 M. & W. 297.

(*e*) *Ibid.*; *Dickinson* v. *Valpy*, *supra*.

(*f*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 17 (2).

(*g*) *Ibid.*, s. 17 (3); see *Newmarch* v. *Clay* (1811), 14 East, 239. As to novation generally, see title CONTRACT, Vol. VII., pp. 505 *et seq.*

(*h*) *Court* v. *Berlin*, [1897] 2 Q. B. 396, C. A. As regards executors of a deceased partner who are entitled to a share of profits, but do not take any part in conducting the business, see *Holme* v. *Hammond* (1872), L. R. 7 Exch. 218.

(*i*) *Court* v. *Berlin*, *supra*; but *quære* whether the retiring partner might escape liability for the costs incurred, after he retires, by withdrawing his retainer or by giving notice of dissolution to the solicitor (*ibid.*; *per* Lord ESHER, M.R., at p. 399; and see *ibid.*, *per* A. L. SMITH, L.J., at p. 401).

(*j*) *Gough* v. *Davies and Gibbons* (1817), 4 Price, 200.

(*k*) *Rodgers* v. *Maw* (1846), 4 Dow. & L. 66; see *Oakeley* v. *Pasheller* (1836), 4 Cl. & Fin. 207, H. L., distinguished in *Swire* v. *Redman* (1876), 1 Q. B. D. 536, and in *Oakford* v. *European and American Steam Shipping*

SECT. 2. Liability of Partners to Third Parties.

himself, the members of the new firm and the creditors, such agreement being either express or inferred from the course of dealing between the creditors and the new firm (*l*).

Effect of irregular notice of dissolution.

70. A retiring partner may also be liable for subsequent debts if no proper notice of dissolution has been given (*m*), or even if such notice has been given but he has left his name in the firm style (*n*), unless he is a sleeping partner who has not been held out and is not known to the creditors as a partner (*o*). Liability for costs, incurred after the date of retirement, of an action begun before and pending at such date is not for this purpose a subsequent debt (*p*).

Liability contracted without notice of partnership.

71. If a partner acting for his firm makes a contract of a personal character for a term of years in his own name with a person who has no knowledge of the partnership, such person may, on the death of the partner with whom he contracted, elect to put an end to the contract (*q*).

SECT. 3.—*Legal Proceedings.*

SUB-SECT. 1.—*Actions by Partners.*

Firm.

72. A partnership firm is not a legal entity, like a limited company, nor is it, for all purposes, a "person" (*r*).

Co. (1863), 1 Hem. & M. 182, and followed in *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586; and see title GUARANTEE, Vol. XV., p. 443.

(*l*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 17 (3); *Hobson* v. *Cowley* (1858), 27 L. J. (EX.) 205; *Hooper* v. *Keay* (1875), 1 Q. B. D. 178; *Re Head, Head* v. *Head*, [1893] 3 Ch. 426; *Cripps* v. *Tappin & Co.* (1882), Cab. & El. 13; *Bilborough* v. *Holmes* (1876), 5 Ch. D. 255; *Daniel* v. *Cross* (1796), 3 Ves. 277. But mere knowledge by the creditor of the change of firm is not sufficient to discharge the retiring partner (*Blew* v. *Wyatt* (1832), 5 C. & P. 397; and see *Re Family Endowment Society* (1870), 5 Ch. App. 118; *Thompson* v. *Percival* (1834), 5 B. & Ad. 925). As to the circumstances which determine whether a retiring partner is or is not discharged from liability, see *Thompson* v. *Percival, supra*; *Bedford* v. *Deakin* (1818), 2 B. & Ald. 210; *Kirwan* v. *Kirwan* (1834), 2 Cr. & M. 617; *Dickenson* v. *Lockyer* (1798), 4 Ves. 36; *Heath* v. *Percival* (1720), 1 P. Wms. 682; *Benson* v. *Hadfield* (1844), 4 Hare, 32; *Hart* v. *Alexander* (1837), 2 M. & W. 484; *Harris* v. *Farwell* (1851), 15 Beav. 31; *Cummins* v. *Cummins* (1845), 3 Jo. & Lat. 64, 87; *Spenceley* v. *Greenwood* (1858), 1 F. & F. 297; *Brinsmead & Son* v. *Locke & Son* (1889), 5 T. L. R. 542; *Re Robertson, Ex parte Gould* (1834), 4 Deac. & Ch. 547; and compare *Re Worters, Ex parte Oakes* (1841), 2 Mont. D. & De G. 234; *Re Smith, Knight & Co., Ex parte Gibson* (1869), 4 Ch. App. 662. It is perhaps doubtful whether *Lodge* v. *Dicas* (1820), 3 B. & Ald. 611, and *David* v. *Ellice* (1826), 5 B. & C. 196, could now be supported.

(*m*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 36 (1), (2); *Parkin* v. *Carruthers* (1800), 3 Esp. 248; *Slack* v. *Parker* (1886), 54 L. T. 212; *Farrar* v. *Deflinne* (1843), 1 Car. & Kir. 580; *Osborne* v. *Harper* (1804), 5 East, 225; see p. 15, *ante*.

(*n*) *Williams* v. *Keats* (1817), 2 Stark. 290.

(*o*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 36 (3); *Heath* v. *Sansom* (1832), 4 B. & Ad. 172; "a dormant partner may retire from a firm without giving notice to the world" (*ibid.*, *per* PATTESON, J., at p. 177); *Evans* v. *Drummond* (1801), 4 Esp. 89; *Robinson* v. *Wilkinson* (1817), 3 Price, 538; *Crawshay* v. *Maule* (1818), 1 Swan. 495; *Dolman* v. *Orchard* (1825), 2 C. & P. 104; *Western Bank of Scotland* v. *Needell* (1859), 1 F. & F. 461; *Powles* v. *Page* (1846), 3 C. B. 16.

(*p*) *Court* v. *Berlin*, [1897] 2 Q. B. 396, C. A.

(*q*) *Robson* v. *Drummond* (1831), 2 B. & Ad. 303; compare *Stevens* v. *Benning* (1854), 1 K. & J. 168.

(*r*) *Sadler* v. *Whiteman*, [1910] 1 K. B. 868, 889, C. A.; *Re Vagliano*

SECT. 3. Legal Proceedings.

All the members of a firm may sue on a contract made in the firm name, or by one of them as agent for the firm (*s*), and, when there is joint damage, all may sue in an action of tort, subject to exceptions (*t*). An agreement between partners authorising one partner to sue for penalties, payable by defaulting partners to the others, is binding on the parties to the agreement, but it does not bind other persons so as to enable him to sue them on behalf of the firm (*u*).

Right of members to sue.

73. Actions by and against firms are regulated by a special code of procedure (*a*), although this procedure is optional, and partners may, where preferred, still sue and be sued in their individual names. The advantages of the new procedure in many cases are, however, obvious, and it is usually adopted in cases where it is applicable.

Present practice.

74. Two or more partners carrying on business within the jurisdiction (*b*) may sue either a stranger or a member of the

Partners may sue in firm name.

Anthracite Collieries, Ltd. (1910), 79 L. J. (CH.) 769; *R.* v. *Holden*, [1912] 1 K. B. 483, 487, C. C. A.; see note (*q*), p. 5, *ante*. "In English law a firm as such has no existence" (*Sadler* v. *Whiteman*, [1910] 1 K. B. 868, C. A., *per* FARWELL, L.J., at p. 889); compare title COMPANIES, Vol. V., p. 65.

(*s*) *Cothay* v. *Fennell* (1830), 10 B. & C. 671; *Skinner* v. *Stocks* (1821), 4 B. & Ald. 437; *Alexander* v. *Barker* (1831), 2 Cr. & J. 133. Formerly they sued as individuals; and it was necessary for all the partners to be named as plaintiffs, subject to certain exceptions. A continuing partner has been held to be entitled to sue alone on a contract made with him and a retired partner jointly (*Atkinson* v. *Laing* (1822), Dow. & Ry. (N. P.) 16), or made on his behalf, even after dissolution, by a retired partner (*Cox* v. *Hubbard* (1847), 4 C. B. 317); and an active partner might sue without joining his sleeping partner as a plaintiff (*Leveck* v. *Shaftoe* (1796), 2 Esp. 468); and, if the contract is entered into with one partner personally he might sue in his own name without joining his partners (*Agacio* v. *Forbes* (1861), 14 Moo. P. C. C. 160; and see *Jones* v. *Robinson* (1847), 1 Exch. 454; *Driver* v. *Burton* (1852), 17 Q. B. 989; *Hudson* v. *Robinson* (1816), 4 M. & S. 475). Further, the master and part owner of a ship might sue alone on contracts made by him in relation to the ship (*Cawthron* v. *Trickett* (1864), 15 C. B. (N. S.) 754), and two members of a firm who made a contract without disclosing that it was on behalf of the firm could sue alone on it (*Clay* v. *Southern* (1852), 7 Exch. 717; compare *Lucas* v. *De la Cour* (1813), 1 M. & S. 249); but an ostensible partner whose name appeared in the firm was held to be a necessary plaintiff, although he was in fact only in receipt of a salary (*Guidon* v. *Robson* (1809), 2 Camp. 302). With regard to bills of exchange, see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23 (2); and title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 492 *et seq.*

(*t*) *Longman* v. *Pole* (1828), Mood. & M. 223; and see titles LIBEL AND SLANDER, Vol. XVIII., p. 614; TORT.

(*u*) *Radenhurst* v. *Bates* (1826), 3 Bing. 463.

(*a*) Contained in the Rules of the Supreme Court; see R. S. C., Ord. 48A. For procedure in the Supreme Court generally, see title PRACTICE AND PROCEDURE. See also title MAYOR'S COURT, LONDON, Vol. XX., pp. 289, 291, 296.

(*b*) If the firm has an office of its own in this country at which a partner or manager is in control carrying on the business, that is sufficient to bring it within R. S. C., Ord. 48A, r. 1 (*Worcester City and County Banking Co.* v. *Firbank, Pauling & Co.*, [1894] 1 Q. B. 784, C. A.; *Shepherd* v. *Hirsch, Pritchard & Co.* (1890), 45 Ch. D. 231; *Lysaght* v. *Clark & Co.*, [1891] 1 Q. B. 552); see note (*d*), p. 40, *post*. If the firm has only an office in this country where business for the firm is done by an agent, the question whether it is carrying on business within the jurisdiction depends on the powers and authority of the agent. If the agent merely

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firm (*c*) in the name of the firm (*d*) in which they were partners when the cause of action arose (*e*), and a judge may order the names and addresses of such partners to be furnished and verified on oath or otherwise (*f*). In an action by a partner in the firm name his partners may, upon his application, be compelled by attachment to obey an order for discovery obtained by the defendant (*g*).

Names of partners must be disclosed.

If no such order is made, the plaintiffs must, on demand in writing by any defendant, declare the names and addresses of all the partners on whose behalf the action is brought; and if this is not done the action may be stayed on such terms as the court or a judge

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has authority to take orders and transmit them to his firm, or to show samples, that is not "carrying on business" (*Baillie* v. *Goodwin & Co.* (1886), 33 Ch. D. 604; *Grant* v. *Anderson & Co.*, [1892] 1 Q. B. 108, C. A.); but, if he has power to conclude binding contracts on his own initiative on behalf of the firm, it is otherwise (*Compagnie Générale Transatlantique* v. *Law* (*Thomas*) *& Co., La "Bourgogne,"* [1899] A. C. 431; *Dunlop Pneumatic Tyre Co.* v. *Actien Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.*, [1902] 1 K. B. 342, C. A.). The firm must have an office or fixed place of business in this country; the fact that a partner resides in, or that a partner comes regularly to, this country for the purpose of transacting business for the firm is not sufficient (*Heinemann & Co.* v. *Hale & Co.*, [1891] 2 Q. B. 83, C. A.; *Singleton* v. *Roberts, Stocks & Co.* (1894), 70 L. T. 687; *Western National Bank of City of New York* v. *Perez, Triana & Co.*, [1891] 1 Q. B. 304, C. A.; *Indigo Co.* v. *Ogilvy*, [1891] 2 Ch. 31, C. A.). A stand taken for nine days at a show may be a fixed place of business sufficient to bring a firm within the jurisdiction (*Dunlop Pneumatic Tyre Co.* v. *Actien Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co., supra*). See, further, cases cited at pp. 41 *et seq.*, *post*, dealing with proceedings against a firm. A Scottish, Irish, or colonial firm is in the same position as a foreign firm for this purpose, for the question does not depend upon allegiance but on jurisdiction (*Worcester City and County Banking Co.* v. *Firbank, Pauling & Co.*, [1894] 1 Q. B. 784, *per* Lord ESHER, M.R., at p. 787). As to service on unincorporated foreign companies, see title COMPANIES, Vol. V., pp. 20, 21.

(*c*) R. S. C., Ord. 48A, r. 10.

(*d*) *Ibid.*, r. 1. It has been held that this does not authorise a single individual trading under a firm name to sue in such name (*Mason & Son* v. *Mogridge* (1892), 8 T. L. R. 805); but the Court of Appeal has refused to set aside a judgment recovered in such an action (*Hirschfeldt* v. *Elton* (1899), unreported, cited in Yearly Practice of the Supreme Court, 1912, p. 691). In the case of a money-lender trading alone under a registered firm name since the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), it would appear that both his own name and his registered firm name should appear; see Annual Practice, 1912, p. 777; title MONEY AND MONEY-LENDING, Vol. XXI., pp. 48, 51. It has been doubted whether the rule applies to an action *in rem* (*The Assunta*, [1902] P. 150, 154).

(*e*) There may of course have been a change in the personnel of the firm between the date of the cause of action and the issue of the writ. This is of no importance where the action is by the firm, but where the firm is defendant it may have serious consequences; see pp. 43, 45, *post*.

(*f*) The alternative method (see the text, *infra*) of obtaining disclosure, *i.e.*, under R. S. C., Ord. 48A, r. 2, is only a "declaration in writing," and this being considered insufficient, *ibid.*, r. 1, was framed to enable either party to obtain an affidavit or other statement on oath. There can be no cross-examination on such an affidavit (*Abrahams & Co.* v. *Dunlop Pneumatic Tyre Co.*, [1905] 1 K. B. 46, C. A.); nor can disobedience to an order for this disclosure be enforced by attachment (*Pike* v. *Keene* (1876), 24 W. R. 322). As to proceedings in a county court, see title COUNTY COURTS, Vol. VIII., p. 456.

(*g*) *Seal and Edgelow* v. *Kingston*, [1908] 2 K. B. 579, C. A.; and see

directs (*h*). After the demand is complied with the action proceeds in the name of the firm, but all the partners named in the declaration are in the same position as if each was an individual plaintiff (*i*).

Action by a single partner.

75. A partner may sue strangers in the firm name, but if his partners object he may be ordered to give them an indemnity against the costs (*j*). A solvent partner and the trustee in bankruptcy of his insolvent partner may join as plaintiffs in an action to recover from a third person a bill belonging to the partnership and indorsed to such third person by the insolvent partner in fraud of his firm (*k*).

Actions between firms with a common partner.

76. Where two firms have a common partner, either of them may sue the other if both firms carry on business within the jurisdiction (*l*).

Set-off.

77. The separate debt owing by one partner cannot, as a general rule, in the absence of express or implied agreement, be set off against a debt owing to the firm (*m*), unless the indebted partner was the only ostensible partner when the debt to the firm was incurred (*n*), or has become the sole partner under an agreement which operates as a novation of the debt owing to the firm (*o*).

SUB-SECT. 2.—*Actions against Partners.*

Actions against partners.

78. Two or more persons carrying on business within the jurisdiction (*p*) may be sued, in respect of their partnership liabilities,

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title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 44, note (*e*). The court will not commit two partners for contempt in disobeying an order which has been served on one of them only (*Young* v. *Goodson* (1826), 2 Russ. 255).

(*h*) If an order to stay is not made, failure to comply with the demand will not justify the defendant in making default in appearance or prevent the plaintiff from obtaining judgment by default (Yearly Practice of the Supreme Court, 1912, p. 682, note to r. 2).

(*i*) R. S. C., Ord. 48A, r. 2. This rule does not appear to be applicable to an action by a limited partnership. In such a case the names can be ascertained by inspection of the register; see p. 109, *post*.

(*j*) *Whitehead* v. *Hughes* (1834), 2 Cr. & M. 318; *Seal and Edgelow* v. *Kingston*, [1908] 2 K. B. 579, C. A.

(*k*) *Heilbut* v. *Nevill* (1869), L. R. 4 C. P. 354; affirmed (1870), L. R. 5 C. P. 478, Ex. Ch.

(*l*) R. S. C., Ord. 48A, r. 10. Formerly this was not so (*Bosanquet* v. *Wray* (1816), 6 Taunt. 597); but a suit in equity could have been maintained (*Taylor* v. *Midland Rail. Co.* (1860), 28 Beav. 287). Leave to issue execution in such a case must be obtained; see title EXECUTION, Vol. XIV., p. 8.

(*m*) *Gordon* v. *Ellis* (1846), 3 Dow. & L. 803; *Jebsen* v. *East and West India Dock Co.* (1875), L. R. 10 C. P. 300.

(*n*) *Stracey* v. *Deey* (1789), cited 7 Term Rep. 361, n.; *Muggeridge's* v. *Smith & Co.* (1884), 1 T. L. R. 166; compare *Baker* v *Gent* (1892), 9 T. L. R. 159; see also *Spurr* v. *Cass*, *Cass* v. *Spurr* (1870), L. R. 5 Q. B. 656; and see titles EQUITY, Vol. XIII., p. 163; SET-OFF AND COUNTERCLAIM.

(*o*) *Burgess* v. *Morton* (1894), 10 T. L. R. 339, C. A.

(*p*) As to what amounts to carrying on business within the jurisdiction, see note (*b*), p. 39, *ante*. As to proceedings in a county court, see title COUNTY COURTS, Vol. VIII., p. 456. A foreign firm can agree that service on an agent within the jurisdiction shall be valid (*Montgomery* v. *Liebenthal*, [1898] 1 Q. B. 487, C. A.); but it cannot agree that the court shall have power to direct service upon it out of the jurisdiction (*British Wagon Co.*

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in the name of the firm in which they were partners when the cause of action arose (*q*).

Service of writ.

79. A writ against a subsisting firm may be served on any partner or partners (*r*), or at the firm's principal place of business (*s*) within the jurisdiction, on any person there having the control or management of the business (*t*). This operates as good service on every partner, even on those out of the jurisdiction (*a*). Every

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v. *Gray*, [1896] 1 Q. B. 35, C. A.). In the absence of any such agreement, if a firm does not carry on business within the jurisdiction, it is a foreign firm and the partners must be sued individually (*Western National Bank of City of New York* v. *Perez, Triana & Co.*, [1891] 1 Q. B. 304, C. A.); and service of a writ in the firm name has no effect (*ibid.*); see also *Indigo Co.* v. *Ogilvy*, [1891] 2 Ch. 31, C. A.; *Dobson* v. *Festi, Rasini & Co.*, [1891] 2 Q. B. 92, C. A.); and see R. S. C., Ord. 11. If a foreign firm brings an action within the jurisdiction, a counterclaim may be made against it (*Griendtoveen* v. *Hamlyn* (1892), 8 T. L. R. 231).

(*q*) R. S. C., Ord. 48A, r. 1; *Western National Bank of City of New York* v. *Perez, Triana & Co., supra.* The name of a newspaper has been held not to be a firm name (*De Bernales* v. *New York Herald*, [1893] 2 Q. B. 97, n.), but the name of a proprietary club may be (*Firmin & Sons, Ltd.* v. *International Club* (1889), 5 T. L. R. 612, 694, C. A.).

(*r*) Service upon one partner is sufficient to bind the firm, and it is not necessary to effect service on the other or others, except for the purpose of issuing execution against them in case they do not appear or admit liability upon the pleadings, or are not adjudged to be partners. Where more than one service is effected the time for appearance by the firm runs from the last service. In a case where service was effected upon a person having control (see the text, *infra*), and five days later upon a partner, and judgment in default of appearance was signed on the first service before the eight days had elapsed from service on the partner, the judgment was set aside (*Alden* v. *Beckley & Co.* (1890), 25 Q. B. D. 543). Service should not be effected after judgment, but resort had to R. S. C., Ord. 48A, r. 8 (see pp. 43, note (*e*), 44, note (*h*), *post*). Where one of the partners is an infant, service must be effected upon him in the way prescribed by R. S. C., Ord. 9, r. 4; see title INFANTS AND CHILDREN, Vol. XVII., p. 140; and see note (*t*), *infra*. So in the case of a lunatic defendant (*Fore Street Warehouse Co.* v. *Durrant* (1883), 10 Q. B. D. 471).

(*s*) There does not appear to be any reported decision as to what makes a place of business the principal place, but probably it is the place where the administrative part of the business is carried on, and from which the different branches are controlled. As to service on unincorporated foreign companies, see title COMPANIES, Vol. V., pp. 20, 21.

(*t*) This does not include an agent of the firm whose only duty is to show samples and transmit orders (*Baillie* v. *Goodwin & Co.* (1886), 33 Ch. D. 604). Nor is a receiver and manager appointed by the court included in this term, since the person served must be the servant of the firm (*Re Flowers & Co.*, [1897] 1 Q. B. 14, C. A.) (a bankruptcy case). The words of the rule are wide enough to include an infant if in control, and it is conceived that service on him would be good, inasmuch as the special mode of serving an infant provided by R. S. C., Ord. 9, r. 4, applies only where the infant is a party to the action.

(*a*) R. S. C., Ord. 48A, r. 3. This mode of service is good where business is carried on within the jurisdiction, and it is immaterial that the partners are outside the jurisdiction, so far as service on the manager is concerned, or whether they are British subjects or not, so far as service upon them within the jurisdiction or upon the manager at the principal place of business is concerned. Therefore, though all the partners reside and are domiciled out of the jurisdiction, service upon a partner temporarily within the jurisdiction is a sufficient service upon the firm (*Pollexfen* v. *Sibson* (1886), 16 Q. B. D. 792; *Lysaght* v. *Clark & Co.*, [1891] 1 Q. B. 552; *Worcester City and County Banking Co.* v. *Fir-*

Nature of service.

person served must be informed by notice in writing at the time of service whether he is served as partner or person having control or in both characters, and in default of such notice is deemed to be served as a partner (*b*). Substituted service may be ordered where there is no person in apparent control and no partner can be served (*c*).

Dissolved firm.

But if the plaintiff knows that the partnership has been dissolved, he must serve personally every member of the firm within the jurisdiction whom he seeks to make liable (*d*), and must, of course, adopt the usual procedure in the case of any partners out of the jurisdiction (*e*).

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bank, Pauling & Co., [1894] 1 Q. B. 784, C. A.; *Shepherd* v. *Hirsch, Pritchard & Co.* (1890), 45 Ch. D. 231).

(*b*) R. S. C., Ord. 48A, r. 4.

(*c*) *Ibid.*, Ord. 9, r. 2 : *Shillito* v. *Child & Co.*, [1883] W. N. 208. Before an order for substituted service will be made, efforts to serve the person in control of the business and any partner must have been made unsuccessfully. Where there appears to be no one in control, and the address of one of the partners is known, and efforts to serve him have failed, an order will generally be made for service by post addressed to the place of business and to the partner's residence. Possibly, if the names and addresses of the partners cannot be found out, service may be ordered by post addressed to the place of business only. Substituted service cannot be ordered upon a partner who is resident out of the jurisdiction by service upon some one in this country ; see *Worcester City and County Banking Co.* v. *Firbank, Pauling & Co.*, [1894] 1 Q. B. 784, C. A., *per* Lord ESHER, M.R., at p. 788). There cannot be good substituted service where personal service would not be legally possible (*ibid.*). But see *Coles* v. *Gurney* (1815), 1 Madd. 187 ; *Leese* v. *Martin* (1871), L. R. 13 Eq. 77 ; *Figgins* v. *Ward* (1834), 2 Cr. & M. 424.

(*d*) R. S. C., Ord. 48A, r. 3. This refers to liability of the individual partner. Even where the cause of action accrued before the dissolution, the plaintiff cannot make a partner who has since retired liable without serving him personally, unless he has appeared or admitted on the pleadings that he is a partner, or been adjudged to be one; see R. S. C., Ord. 48A, r. 8; *Wigram* v. *Cox, Sons, Buckley & Co.*, [1894] 1 Q. B. 792. But notwithstanding dissolution proceedings can be instituted against the late firm in the firm name, if the dissolution was after the accrual of the cause of action (*Re Wenham, Ex parte Battams*, [1900] 2 Q. B. 698, C. A.), and any service upon the firm would make the partnership property liable to execution. Where there has been an entire change in the persons constituting the firm since the cause of action arose, suing in the firm name may cause difficulty (*Re Sawers, Ex parte Blain* (1879), 12 Ch. D. 522, 533, C. A.). In *Re Young, Ex parte Young* (1881), 19 Ch. D. 124, C. A. (decided under the corresponding repealed Rules of 1875), it was held that a judgment against a firm would not support a debtor's summons against a retired partner who had not been served, nor had appeared nor admitted on the pleadings that he was a partner, nor had been adjudged to be a partner, although the debt had been contracted before the dissolution and the creditor was ignorant of the dissolution; and see *Davis* v. *Morris* (1883), 10 Q. B. D. 436, 444. But where, after dissolution, a charging order was made upon the application of a judgment creditor against the partnership assets in the hands of a receiver, the court refused to discharge the order on the application of partners who had not been served with the writ in the action wherein the creditor had obtained his judgment (*Brand* v. *Sandground* (1901), 18 T. L. R. 96).

(*e*) R. S. C., Ord. 11 ; see Yearly Practice of the Supreme Court, 1912, pp. 61 *et seq.* Where a partner is outside the jurisdiction, leave must be obtained to serve him there, and can only be granted in the cases coming within R. S. C., Ord. 11; see title PRACTICE AND PROCEDURE But he must be made a party or be served within the jurisdiction, if it is sought

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Appearance by partners.

80. Persons served as partners must appear in their own names, but the proceedings continue in the firm's name (*f*). Persons served as in control need not appear unless they are partners (*g*). A person served as a partner may appear under protest denying that he is a partner, but this does not affect the plaintiff's rights against persons properly served (*h*). One partner may appear as "trading

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to make his private property liable to execution. Even if he has appeared or admitted liability, it may be that he cannot be made personally liable, since the proviso in R. S. C., Ord. 48A, r. 8 (see title EXECUTION, Vol. XIV., p. 11), seems to exclude the operation of the rest of that rule.

(*f*) R. S. C., Ord. 48A, r. 5. A managing partner may authorise appearance being entered for all partners (*Tomlinson* v. *Broadsmith*, [1896] 1 Q. B. 386, C. A.). If a married woman appears as sole defendant the writ should be amended by adding her name (*Re Handford (Frances) & Co., Ex parte Handford (Frances)*, [1899] 1 Q. B. 566, C. A.). The appearance must be entered for the individual partners by name, with the description "partners in the firm of," or "trading as," or "practising" or "carrying on business" in the firm name. An appearance by one partner describing himself as such is a sufficient appearance for the firm to prevent judgment from being signed in default against it (*Adam* v. *Townend* (1885), 14 Q. B. D. 103), and upon which to issue a summons for leave to sign judgment under R. S. C., Ord. 14 (*Lysaght* v. *Clark & Co.*, [1891] 1 Q. B. 552), or a summons for directions under R. S. C., Ord. 30. An infant partner must appear by a guardian *ad litem*; see title INFANTS AND CHILDREN, Vol. XVII., p. 140. Where more partners than one appear they need not appear by the same solicitor. Where the firm name is given incorrectly on the writ it may be corrected in the appearance. If there has been a dissolution of partnership since the accrual of the cause of action, the appearance may be entered for the persons who constituted the firm with the description "partners in the said firm of at the time of the accrual of the alleged cause of action." If the dissolution has been caused by death since the accrual of the cause of action, an appearance cannot be entered for the executors of the deceased unless they have been added as parties; but it is otherwise where executors are carrying on the business of their testator and they are sued in the firm name. If an appearance is entered by one partner describing himself as trading in the firm name, the plaintiff is nevertheless entitled to apply under R. S. C., Ord. 48A, r. 1, for an order for disclosure of other partners' names, if any (*Munster* v. *Cox* (1885), 10 App. Cas. 680, 682, 683).

(*g*) R. S. C., Ord. 48A, r. 6.

(*h*) *Ibid.*, r. 7. Where a person has been served as a partner (*i.e.*, simply served with the writ or with an added notice to that effect), he may, without leave, enter an appearance denying that he is a partner, or that he was a partner at the time of the accrual of the cause of action. But such an appearance is not an appearance for the firm, and, in default of any proper appearance for the firm, judgment can be signed against the firm on any service other than that on the person, as a partner, who has appeared denying partnership. Therefore, if he was served as a partner and as the person having the control of the partnership business, judgment may be signed on the service upon him in the latter capacity, or the writ can be re-served on the controller, or manager, or a partner. The plaintiff may either issue a summons to amend the appearance on the ground that the person so appearing is, as a matter of fact, a partner, or wait till he has obtained judgment against the firm and then, if necessary for the purpose of enforcing it, apply to issue execution against him under R. S. C., Ord. 48A, r. 8; see title EXECUTION, Vol. XIV., p. 11. If he resorts to the former course the master may in a very clear case make an order amending the appearance or, if not, may direct an issue to be tried (see *ibid.*). A person who appears under protest is not thereby precluded from applying to set aside the service of the writ upon him (*Mayer* v. *Claretie* (1890), 7 T. L. R. 40). No appearance other than those mentioned above can be entered. The person served as having the control of the business cannot do so (see R. S. C., Ord. 48A,

as A., B. & C.," and the proceedings may then be continued against him alone (*i*).

Notwithstanding the appearance by the partners in their individual names, the plaintiff may apply for discovery of the names and addresses of the persons who were partners when the cause of action arose (*i*). Any defence delivered must be a defence for the firm, not for the partners individually (*k*), though the partners may put in separate defences (*l*).

Discovery of names of partners.

Defence.

81. The above procedure is optional; and a plaintiff may, if he thinks fit, sue all the partners whom he seeks to make liable individually; but in such a case they must all be made defendants. If he sues some only of the partners the defendants can insist on the other partners being made parties if they are within the jurisdiction and can be found (*m*); but an active partner who has ordered goods may be sued alone and cannot plead the joint liability of a sleeping partner as a defence (*n*).

Action against individual partners.

82. In an action to enforce the joint liability of partners, an unsatisfied judgment against one of them is a bar to a future action against the others (*a*); but one or more of several partners who are jointly and severally liable may be sued without making them all defendants (*b*), notwithstanding an unsatisfied judgment against one of them for the same debt (*c*).

Unsatisfied judgment against one partner.

83. If all the partners are dead the legal personal representative of the last survivor may be sued in respect of a liability of

Action against personal representative.

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r. 6, unless he is, as a matter of fact, a partner. In *Robinson* v. *Ward & Son* (1892), 36 Sol. Jo. 415, the court allowed a person, who claimed to be a partner, to enter an appearance and raise the defence that he was not a partner at the time of the accrual of the cause of action, and that the debt, therefore, was not his debt. There were special circumstances in this case, and it is conceived that it would not ordinarily be followed. As to the practice before R. S. C., Ord. 48A, r. 7, see *Davies & Co.* v. *André & Co.* (1890), 24 Q. B. D. 598, 606, 607, C. A.

(*i*) R. S. C., Ord. 48A. r. 1. Where one partner, only, appeared as "trading as R. & Co.," and the proceedings were continued and judgment obtained against him in that form, the plaintiff was not allowed to amend his judgment in order to issue execution against the firm (*Munster* v. *Cox* (1885), 10 App. Cas. 680, affirming S. C., *sub nom. Munster* v. *Railton & Co.* (1883), 11 Q. B. D. 435, C. A.); see note (*f*), p. 44, *ante*, and note (*h*), p. 46, *post*.

(*k*) *Ellis* v. *Wadeson*, [1899] 1 Q. B. 714, 717. Even where one of two partners has died (*ibid.*, at p. 719).

(*l*) *Ibid.*, at p. 717. One partner is entitled to defend (*ibid.*), and such defence is sufficient (*ibid.*; *Taylor* v. *Collier* (1882), 51 L. J. (CH.) 853).

(*m*) *Robinson* v. *Geisel*, [1894] 2 Q. B. 685, 687, C. A. Whether he could sue only one, or whether he need join a sleeping partner as defendant, if his contract had been made with one partner only, and he had no knowledge of the partnership, see *De Mautor* v. *Sanders* (1830), 1 B. & Ad. 398; *Mullett* v. *Hook* (1827), Mood. & M. 88, overruling *Dubois* v. *Ludert* (1814), 5 Taunt. 609.

(*n*) *Ex parte Hodgkinson* (1815), 19 Ves. 291; *Ex parte Norfolk* (1815), 19 Ves. 454; *Re Starkies and Whiteside, Ex parte Chuck* (1832), 8 Bing. 469.

(*a*) *King* v. *Hoare* (1844), 13 M. & W. 494; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; and see title ESTOPPEL, Vol. XIII., p. 335.

(*b*) *Plumer* v. *Gregory* (1874), L. R. 18 Eq. 621; see p. 34, *ante*.

(*c*) *Blyth* v. *Fladgate*, *Morgan* v. *Blyth*, *Smith* v. *Blyth*, [1891] 1 Ch. 337, 353.

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the firm without making the legal personal representatives of the others defendants (*d*).

Discovery.

84. If partnership books contain entries relating only to the private affairs of a partner, he may claim to seal up such entries on producing the books in an action relating to the business of the firm (*e*).

Judgment against a firm.

85. Where a successful action is brought against a firm under the above procedure (*f*) the judgment is in form against the firm, and not against any partner individually (*g*), but it is in effect a judgment against all the partners (*h*). It will not, however, except as against partnership property, affect any partner out of the jurisdiction who has not appeared unless he has been individually served. The means of enforcing such a judgment are dealt with elsewhere (*i*).

(*d*) *Calder* v. *Rutherford* (1822), 3 Brod. & Bing. 302; *Golding* v. *Vaughan* (1782), 2 Chit. 436; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 308.

(*e*) *Re Pickering, Pickering* v. *Pickering* (1883), 25 Ch. D. 247, C. A.; and see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 70, 71: and compare p. 66, *post*.

(*f*) See pp. 42 *et seq.*, *ante*.

(*g*) *Jackson* v. *Litchfield* (1882), 8 Q. B. D. 474, C. A. If one partner is an infant it is against the firm "other than ——" (the infant partner) (*Lovell* v. *Beauchamp*, [1894] A. C. 607).

(*h*) *Western National Bank of City of New York* v. *Perez, Triana & Co.*, [1891] 1 Q. B. 304, C. A.; *Re Handford (Frances) & Co., Ex parte Handford (Frances)*, [1899] 1 Q. B. 566, 570; *Clark* v. *Cullen* (1882), 9 Q. B. D. 355. It has been suggested that where one partner dies before action brought or between service of writ and judgment, judgment can only be obtained against the surviving partners and be enforced against them and the partnership assets, unless the legal personal representatives of the deceased partner are added as parties. Where all the partners die after service but before judgment, judgment cannot be entered at all (*Ellis* v. *Wadeson*, [1899] 1 Q. B 714, C. A., *per* ROMER, L.J., at pp. 718, 719). Whether the action could be continued against the personal representatives depends upon the nature of the claim; see *Kirk* v. *Todd* (1882), 21 Ch. D. 484, C. A.; *Ellis* v. *Wadeson, supra*, at p. 718. Where a firm is sued in its firm name, and an appearance is entered for only one person as though he were sole partner, the action should still go on against the firm in its firm name. In a case where this was not done, and the plaintiff took the subsequent proceedings against that partner individually, and judgment was signed against him, the plaintiff was not allowed to amend his judgment so as to make it a judgment against the firm in order to make another partner, whom he had since discovered, liable for the judgment debt (*Munster* v. *Cox* (1885), 10 App. Cas. 680).

(*i*) See R. S. C., Ord. 48A, r. 8; and see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 29; COUNTY COURTS, Vol. VIII., pp. 556, 557; EXECUTION, Vol. XIV., pp. 8, note (*c*), 10, 11; p. 45, *ante*. As to execution against a married woman partner and an infant partner, see title EXECUTION, Vol. XIV., p. 10, note (*k*), and see respectively, titles HUSBAND AND WIFE, Vol. XVI., pp. 417, 420, 456; INFANTS AND CHILDREN, Vol. XVII., p. 53; INTERPLEADER, Vol. XVII., p. 589, note (*r*). As to bankruptcy proceedings against partners, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 12, 13, 28, 61, 232, 238, 273. A petition in bankruptcy against a person trading individually who was in fact with another in partnership under his own name cannot support a receiving order against the other partner on the ground that service on the first partner is service on the firm (*Re A Debtor (No. 3 of 1912), Ex parte The Debtor* (1912), 1 L. J. County Courts Reporter, 29). Executors carrying on testator's business cannot be adjudicated bankrupt as partners (*Re Fisher & Sons*, [1912] 2 K. B. 491).

SECT. 3. Legal Proceedings.

Effect of judgment against a single partner.

86. When a creditor sues and obtains judgment against some members of a firm, the matter passes into *res judicata*, and he cannot, in respect of the same matter, sue others who were not joined in the action (*k*). But a creditor who proves against the estate of a deceased partner, whom he believes to be the sole owner of a business, is not estopped from proceeding against a person, or the estate of a person, subsequently discovered to be a partner (*l*).

Garnishee order.

87. Debts owing to a firm may be attached although one or more partners may reside out of the jurisdiction, if the firm carries on business (*m*) within the jurisdiction and a partner or person having control or management (*n*) has been served within the jurisdiction with a garnishee order (*o*).

Part V.—Relations of Partners Inter se.

SECT. 1.—*Good Faith Necessary.*

Basis of relationship.

88. Ordinary partnerships are by the law presumed to be based on the mutual trust and confidence of each partner, not only in the skill and knowledge, but also in the integrity, of every other partner. The utmost good faith is requisite in the relations between partners *inter se* (*p*).

General duty to account for profit received.

89. A partner must, accordingly, account to his firm for all benefit derived by him without the consent of his partners from all transactions concerning the partnership, and from the use of the property, name, or business connection of the partnership (*q*), including transactions after dissolution but before the complete winding up of the partnership (*a*). He must also account to his firm for the profits made by him in any business of the same nature as, and competing with, that of his firm, if he carries on any such business without the consent of his partners (*b*).

(*k*) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; see p. 45, *ante*, and title ESTOPPEL, Vol. XIII., pp. 335, 336.

(*l*) *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, C. A.

(*m*) For cases illustrating the meaning of these words, see note (*b*), p. 39, *ante*.

(*n*) For cases illustrating the meaning of these words, see note (*t*), p. 42, *ante*.

(*o*) R. S. C., Ord. 48A, r. 9; Ord. 45, r. 1. As to garnishee proceedings generally, see title EXECUTION, Vol. XIV., pp. 90 *et seq.*

(*p*) This principle is firmly established in equity. It is not expressly enunciated by the Partnership Act, 1890 (53 & 54 Vict. c. 39), but is recognised and embodied in the provisions contained in *ibid.*, ss. 29, 30. The relationship of partners *inter se* is sometimes spoken of as "fiduciary," and in *Cassels* v. *Stewart* (1881), 6 App. Cas. 64, Lord BLACKBURN, at p. 79, said of a partner that it is "because he is an agent that the fiduciary character arises." The word "fiduciary" cannot, however, be applied to the partnership relation in a general or unqualified sense; see title EQUITY, Vol. XIII., p. 156; and see *ibid.*, note (*c*).

(*q*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 29 (1).

(*a*) *Ibid.*, s. 29 (2).

(*b*) *Ibid.*, s. 30. See *Dean* v. *MacDowell* (1878), 8 Ch. D. 345, C. A.; compare *Burton* v. *Wookey* (1822), Madd. & G. 367; *Gardner* v. *M'Cutcheon* (1842), 4 Beav. 534; *Somerville* v. *Mackay* (1810), 16 Ves. 382; *Lock* v.

SECT. 1. **Good Faith Necessary.**

Rule against private profit.

In the conduct of the firm's business a partner must not make any exclusive profit or private advantage for himself (*c*); but a partner may derive private benefit in matters entirely outside the scope of, and not in competition with, the business by the use of information acquired in the partnership business (*d*).

A partner must not place himself in a situation antagonistic to the interests of the firm (*e*). A managing partner should enter in the partnership books all money which he withdraws for his separate use; omission to do so or concealment of any such transaction may amount to fraud (*f*).

A covenant in a partnership agreement restraining competition between the partners will be enforced by the court (*g*).

Dealings between partners privately.

90. One partner is not necessarily precluded by the fiduciary relationship from purchasing the share of another without the knowledge of the rest or from making, on his own account, a purchase, not being within the scope of, or in rivalry with or injurious to, the partnership (*h*).

Renewal of partnership lease.

91. The renewal of a lease by one or more of the partners without the privity of the others enures for the benefit of all (*i*). The rule is the same when the intention to renew is communicated to the others if the latter are prompt to assert their rights (*k*); and

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Lynam (1854), 4 I. Ch. R. 188; *Russell* v. *Austwick* (1826), 1 Sim. 52; *Miller* v. *Mackay* (No. 2) (1865), 34 Beav. 295.

(*c*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 29 (1); compare *Fawcett* v. *Whitehouse* (1829), 1 Russ. & M. 132; *Hichens* v. *Congreve* (1828), 1 Russ. & M. 150.

(*d*) *Aas* v. *Benham*, [1891] 2 Ch. 244, C. A.; and see p. 47, *ante*.

(*e*) *Burton* v. *Wookey* (1822), Madd. & G. 367 (where the defendant obtained goods for the firm by bartering his own shop goods in exchange); *Bentley* v. *Craven* (1853), 18 Beav. 75; *Dunne* v. *English* (1874), L. R. 18 Eq. 524; but mere exposure to a temptation to be dishonest is not sufficient to justify the interference of the court (*Glassington* v. *Thwaites* (1823), 1 Sim. & St. 124).

(*f*) *Re Hay, Ex parte Smith* (1821), Madd. & G. 2.

(*g*) *Morris* v. *Colman* (1812), 18 Ves. 407; *Shackle* v. *Baker* (1808), 14 Ves. 468; see *Cooper* v. *Page* (1876), 34 L. T. 90 (where one partner agreed to advance money to a third person on the terms that he should receive, by way of interest, a share of the profits of the business carried on by such person; held that this was a breach of a covenant "not to directly or indirectly engage in any other business"); and *Cooper* v. *Watlington* (1784), 2 Chit. 451 (where it was held, upon the construction of particular articles, that the right of one partner to retire, under the contract, from the particular trade carried on by the partnership, could not be exercised with a view to setting up a similar separate trade elsewhere). As to retirement, see p. 85, *post*. As to the method of enforcing such covenants, see titles INJUNCTION, Vol. XVII., pp. 242 *et seq.*; SPECIFIC PERFORMANCE. As to covenants in restraint of trade, see titles MASTER AND SERVANT, Vol. XX., pp. 88 *et seq.*; TRADE AND TRADE UNIONS.

(*h*) *Cassels* v. *Stewart* (1881), 6 App. Cas. 64; *Trimble* v. *Goldberg*, [1906] A. C. 494, P. C.

(*i*) *Clegg* v. *Fishwick* (1849), 1 Mac. & G. 294, *per* Lord COTTENHAM, L.C., at p. 298: "the old lease was the foundation of the new lease; . . . . the tenant-right of renewal arising out of the old lease giving the partners the benefit of this new lease."

(*k*) *Clegg* v. *Edmondson* (1857), 8 De G. M. & G. 787, C. A.; *Re Biss, Biss* v. *Biss*, [1903] 2 Ch. 40, 61; and see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 513, 514, where the considerations specially affecting mining property are referred to.

SECT. 1. Good Faith Necessary.

it is immaterial whether the term of the partnership is definite or indefinite, or whether the lessors would have refused to renew to the partners who are not privy to the renewal (*l*). The representatives of a deceased partner may have a right to share in the benefit of a renewed lease (*m*). If one partner declines to concur in taking a renewed lease of property where a branch of the firm's business is carried on, and the articles provide that the business shall be carried on at such place as the partners agree, no other partner can take a renewed lease in his own name and insist upon continuing such branch on account of the firm (*n*).

SECT. 2.—*Management of Partnership Affairs.*

All partners entitled to act.

92. The management of a partnership business is in the hands of all the partners, each being entitled to act, in the absence of any provision to the contrary (*o*).

Power of majority.

93. With respect to matters connected with the ordinary carrying on of the partnership business, disputes among the partners may, in the absence of any express provision for their settlement, be decided by a majority of the partners (*p*); but the majority must act in good faith and every partner must have the opportunity of being heard (*q*).

Limitation of power of majority.

A majority of partners, however, cannot change the nature of the partnership business; for this purpose the assent of all is required (*r*). Nor can a majority, when selling their own shares in the partnership, sell the shares of the dissentient partners (*a*).

Diligence required.

94. The diligence required of a partner may be limited by the articles to that part of the business which is conducted by him (*b*).

(*l*) *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298.

(*m*) *Clements* v. *Hall* (1858) 2 De G. & J. 173, C. A.

(*n*) *Clements* v. *Norris* (1878), 8 Ch. D. 129, C. A.

(*o*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (5). The powers of management are co-extensive unless it is otherwise agreed (*Donaldson* v. *Williams* (1833), 1 Cr. & M. 345). The exclusion of a partner may be restrained by injunction: see p. 80, *post*.

(*p*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (8). The admission of a pupil or apprentice with a view to train him in the knowledge of the business falls within "ordinary matters connected with the partnership business" (*Highley* v. *Walker* (1910), 26 T. L. R. 685); and see p. 52, *post*.

(*q*) "I call that the act of all, which is the act of the majority, provided all are consulted and the majority are acting *bonâ fide*, meeting, not for the purpose of negativing what anyone may have to offer, but for the purpose of negativing what, when they are met together, they may, after due consideration, think proper to negative" (*Const* v. *Harris* (1824), Turn. & R. 496, *per* Lord ELDON, L.C., at p. 525). If there is any agreement by the majority, before hearing the minority, to override in any event the views of the latter, such conduct is not consistent with good faith (*Great Western Rail. Co.* v. *Rushout* (1852), 5 De G. & Sm. 290, 310). On the other hand, the minority must not be merely obstructive, and may, after reasonable discussion, be closured; see *Wall* v. *London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.

(*r*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (8); *Natusch* v. *Irving* (1824), 2 Coop. *temp.* Cott. 358; *A.-G.* v. *Great Northern Rail. Co.* (1860), 1 Drew. & Sm. 154; and see pp. 25 26, *ante*. What are the limits of deviation that will justify the interference of the court on behalf of a dissentient minority depends on the circumstances of each case; and the right to relief may be lost through laches or acquiescence (*Gregory* v. *Patchett* (1864), 33 Beav. 595).

(*a*) *Chapple* v. *Cadell* (1822), Jac. 537.

(*b*) *Smith* v. *Mules* (1852), 9 Hare, 556.

SECT. 2. Management of Partnership Affairs.

Right of access to books.

95. In the absence of contrary agreement each partner is entitled to access to the partnership books, which must be kept at the place of business of the firm (*c*). On dissolution partnership books may, by agreement, become the exclusive property of one partner (*d*); but when one partner is bankrupt the court will not take the books from solvent partners (*e*).

Remuneration for management.

96. A managing partner, like any other partner, is not entitled to remuneration unless there is a special agreement to that effect (*f*). Agreement and acquiescence under pressure have been held not to debar the reopening of an account in which remuneration has been sanctioned by partners to a person who stood in the position of trustee for them (*g*). Such an agreement may be inferred where all the partners agree to give their whole time and attention to the business and then permit one of their number to act exclusively (*h*).

Allowance to surviving partner for management.

Winding up.

A surviving partner who carries on the business profitably, retaining the capital of his deceased partner, is entitled to just allowances for management (*i*), unless he is himself the executor of the deceased partner (*k*); but allowance for management during the conduct of a business is not payable for *interim* management between dissolution and the sale and distribution of assets (*l*).

SECT. 3.—*Admission of Other Partners.*

New partner admitted only by consent of all.

97. Subject to any agreement a new partner may not be introduced without the consent of all the existing partners (*m*). The terms on which he is admitted are therefore usually determined by express agreement (*n*). An attempt by one partner to introduce a

(*c*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (9).

(*d*) *Lingen* v. *Simpson* (1824), 1 Sim. & St. 600.

(*e*) *Re Coverdale, Ex parte Finch* (1832), 1 Deac. & Ch. 274. Nor will the court take the partnership books and accounts out of the possession of the former managing partner to enable a receiver to make out the bills, if such partner offers free access to them for all purposes (*Darie* v. *John* (1824), 13 Price, 446).

(*f*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (6); *Hutcheson* v. *Smith* (1842), 5 I. Eq. R. 117; *Thornton* v. *Proctor* (1792), 1 Anst. 94; *Robinson* v. *Anderson* (1855), 20 Beav. 98; *Holmes* v. *Higgins* (1822), 1 B. & C. 74 (where a partner did work as a surveyor); compare *Whittle* v. *M'Farlane* (1830), 1 Knapp, 311, P. C. (where remuneration for collection of book debts due to a preceding partnership was not allowed).

(*g*) *Barrett* v. *Hartley* (1866), 14 W. R. 684.

(*h*) *Airey* v. *Borham* (1861), 29 Beav. 620; compare *Webster* v. *Bray* (1849), 7 Hare, 159, where inequality of labour was contemplated from the beginning.

(*i*) *Brown* v. *De Tastet* (1821), Jac. 284; *Re Aldridge, Aldridge* v. *Aldridge*, [1894] 2 Ch. 97.

(*k*) *Burden* v. *Burden* (1813), 1 Ves. & B. 170; *Stocken* v. *Dawson* (1843), 6 Beav. 371.

(*l*) *Tibbits* v. *Phillips* (1853), 10 Hare, 355; see *Harris* v. *Sleep*, [1897] 2 Ch. 80, C. A., where a partner, who was appointed receiver and manager on dissolution, was, in his accounts, allowed premiums paid to a guarantee society as his surety, as well as remuneration for services which were outside the scope of his duties as receiver and manager, although he undertook to act without salary.

(*m*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (7). This is a fundamental principle of the law of partnership; see note to *Crawshay* v. *Maule* (1818), 1 Swan. 495, at pp. 509 *et seq.*; compare *Lovegrove* v. *Nelson* (1834), 3 My. & K. 1, 20.

(*n*) For a form, see Encyclopædia of Forms and Precedents, Vol. IX., p. 586.

new partner without consent amounts only to an assignment of a share in the partnership (*o*). It may create a sub-partnership between the newcomer and his introducer, but does not confer upon the newcomer the rights of a partner as against the original firm (*a*).

Power to nominate a partner.

98. Frequently it is provided that a partner may nominate one or more persons to succeed to his share of the business at his death or retirement. Upon the exercise of such power the firm comes under an obligation to admit the nominee as a partner (*b*), but cannot compel him to become a partner (*c*). Even if one partner has covenanted with another that his nominee shall become a partner with the latter, the court will not specifically enforce the covenant against the nominee, and, if no provision has been made for the event of his refusal to become a partner, the partnership will be declared dissolved, but without prejudice to any right of action which the covenantee may have against the covenantor or his estate for breach of the covenant (*d*).

Conditions of entry must be complied with.

A person who has an option to enter a partnership must comply *modo et formâ* with the conditions of it (*e*). He must make his election within the time fixed (*f*): if no time is fixed the option is lost unless it is exercised within a reasonable time (*g*). Before making his election he is entitled to have a reasonable time for inspecting the affairs of the partnership, but not to have the accounts formally taken (*h*). A nominee, who has an option to enter a partnership contingent upon his attaining twenty-one, cannot prevent the dissolution of the partnership before that time by the mutual consent of the partners (*i*). Though the effect of the agreement between the partners may be to create a trust of the share in favour of the nominee (*k*), it is not an immediate trust, but one to arise at a future time, at any rate when the nominee's right is contingent, and will attach only upon the then existing assets (*l*).

(*o*) *Bray* v. *Fromont* (1821), Madd. & G. 5.

(*a*) The rights of an assignee are dealt with elsewhere; see p. 57, *post*; see also p. 111, *post*. As to the term of a sub-partnership, see p. 23, *ante*.

(*b*) *Byrne* v. *Reid*, *supra*. With regard to the remedies of a rejected nominee, see *M'Neill* v. *Reid* (1832), 9 Bing. 68; *Byrne* v. *Reid*, [1902] 2 Ch. 735, C. A. For forms of nomination of new partners, compare Encyclopædia of Forms and Precedents, Vol. IX., pp. 586, 606.

(*c*) *Madgwick* v. *Wimble* (1843), 6 Beav. 495.

(*d*) *Downs* v. *Collins* (1848), 6 Hare, 418; *Lancaster* v. *Allsup* (1887), 57 L. T. 53; see also *Kershaw* v. *Matthews* (1826), 2 Russ. 62.

(*e*) See *Brooke* v. *Garrod* (1857), 3 K. & J. 608; *Watney* v. *Trist* (1876), 45 L. J. (CH.) 412.

(*f*) *Holland* v. *King* (1848), 6 C. B. 727; and, during that period, surviving partners must not do any act prejudicial to the value of the business, which, in the event of the option being declined, is directed to be sold (*Evans* v. *Hughes* (1854), 18 Jur. 691 (changing the firm-style)).

(*g*) *Vansittart* v. *Osborne* (1871), 20 W. R. 195.

(*h*) *Pigott* v. *Bagley* (1825), M'Cle. & Yo. 569.

(*i*) *Ehrmann* v. *Ehrmann* (1894), 72 L. T. 17. But when a person assigns his business to three persons as partners, on the terms that there shall be reserved a share of the profits for his nominee, who is to have the option of being admitted a partner on attaining twenty-one, the partnership cannot be prematurely dissolved without the consent of such person (*Allhusen* v. *Borries* (1867), 15 W. R. 739).

(*k*) *Page* v. *Cox* (1852), 10 Hare, 163.

(*l*) *Ehrmann* v. *Ehrmann* (1894), 72 L. T. 17 (where the observations in

SECT. 3. Admission of Other Partners.

A power to introduce two sons as pupils or clerks, with the option of becoming partners, does not extend to the introduction of a third son as pupil or clerk to succeed a son who has died without becoming a partner (*m*). Executors having a duty to nominate certain persons as partners, with power to exclude one of them, have the right to exclude him if they, without fraud, unite in doing so (*n*).

Entry subject to terms of partnership.

An incoming partner is subject to the terms of the partnership, except as varied by express agreement (*o*), though he may not be bound by a special term of which he had no notice (*o*).

SECT. 4.—*Partnership Property and Property of Separate Partners.*

General rule as to user.

99. Partnership property may only be used for partnership purposes, and in accordance with the partnership agreement (*p*).

What partnership property includes.

100. Partnership property includes all property, rights and interests originally brought into the partnership stock, or subsequently acquired, by purchase or otherwise (*q*), for, and substantially involved in, the purposes of the business (*r*).

Presumption as to property purchased with partnership funds.

The mere fact that the business is conducted on property belonging to one partner does not necessarily make the property involved in the partnership dealings so as to become partnership property (*s*). On the other hand, if the property has been purchased out of partnership assets and held as part of the partnership stock, it is immaterial that it has not been actually used for carrying on the partnership business upon it or by means of it (*a*). Thus, where the transaction is in substance the purchase of a mixed property, for example, a farm and the stock as a going concern (*b*), or a nursery-ground and the business carried on upon it (*c*), the property so acquired is partnership property.

Re Flavell, Murray v. *Flavell* (1883), 25 Ch. D. 89, C. A., of COTTON, L.J., at p. 102, are questioned).

(*m*) *Watney* v. *Trist* (1876), 45 L. J. (CH.) 412 (where there was a provision restricting the employment of clerks and servants); and see note (*p*), p. 49, *ante*.

(*n*) *Wainwright* v. *Waterman* (1791), 1 Ves. 311.

(*o*) *Austen* v. *Boys* (1857), 24 Beav. 598, 606.

(*p*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 20 (1). As to the devolution of partnership property, see p. 55, *post*.

(*q*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 20 (1); and see *Waterer* v. *Waterer* (1873), L. R. 15 Eq. 402. Property given to some only of the partners to replace lost partnership property is not included (*Campbell* v. *Mullett* (1819), 2 Swan. 551).

(*r*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 20 (1).

(*s*) *Davis* v. *Davis*, [1894] 1 Ch. 393, 401. Where the property upon which the business is carried on is, and is declared by the partnership agreement to be, the property of one partner, and the agreement contains no provision as to the tenancy of the partnership, but only a general direction that "all rent" is to be paid out of yearly profits, the court infers that the partnership was intended to hold the property on a tenancy during the continuance of the partnership, and not on a tenancy from year to year or at will (*Pocock* v. *Carter*, [1912] 1 Ch. 663); and see note (*l*), p. 85, *post*.

(*a*) *Murtagh* v. *Costello* (1881), 7 L. R. Ir. 428. "If the property purchased is substantially involved in the partnership business, it is to be held as purchased for partnership purposes" (*ibid.*, at p. 436).

(*b*) *Davies* v. *Games* (1879), 12 Ch. D. 813.

(*c*) *Waterer* v. *Waterer, supra*.

SECT. 4. Partnership Property and Property of Separate Partners.

Property bought with money belonging to the partnership is partnership property unless a contrary intention appears (*d*). Such intention may appear from the circumstances in which property is purchased (*e*).

Contrary intention.

101. Persons may be partners in profits made by the use of land of which they are co-owners, though the land itself or their interest therein is not partnership property (*f*). Other land purchased out of such profits, to be used in like manner, does not become partnership property in the absence of agreement, but is held by the partners as co-owners for the same estate or interest as the original land (*g*).

Land as partnership property.

102. Partners are not precluded from effectually transferring partnership property to one or more of themselves, and such transfer is valid not only as between the partners themselves, but as against the partnership creditors (*h*). But good faith is essential to the transfer (*i*), and it must have been completed: if the agreement remains executory the property remains joint (*k*).

Assignments by partners to one of themselves.

(*d*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 21; *Tibbits* v. *Phillips* (1853), 10 Hare, 355; *Helmore* v. *Smith* (1) (1887), 35 Ch. D. 436, C. A.; *Wray* v. *Wray*, [1905] 2 Ch. 349. It is immaterial that the purchase is made in the name of one partner only, if it is clear that he is not to hold it for himself alone (*Morris* v. *Barrett* (1829), 3 Y. & J. 384).

(*e*) It cannot be laid down as a universal rule that when lands are bought by partners in trade, and are paid for out of the partnership assets, they, of necessity, become part of the joint estate of the partners (*Re Laurence, Ex parte M'Kenna, Bank of England Case* (1861), 3 De G. F. & J. 645, C. A., *per* TURNER, L.J., at p. 659). But when the property is not only paid for with partnership money, but also bought for partnership purposes, the presumption that it is partnership property becomes practically conclusive (*ibid.*; and see *Smith* v. *Smith* (1800), 5 Ves. 189).

(*f*) See *dicta* in *Crawshay* v. *Maule* (1818), 1 Swan. 495, *per* Lord ELDON, L.C., at pp. 518, 523; see also p 6, *ante*.

(*g*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 20 (3); *Steward* v. *Blakeway* (1869), 4 Ch. App. 603, affirming S. C. (1868) L. R. 6 Eq. 479; *Davies* v. *Games* (1879), 12 Ch. D. 813. "It is not the law that partners in business who are owners of the property by means of which the business is carried on are necessarily partners as regards that property" (*Davis* v. *Davis*, [1894] 1 Ch 393, *per* NORTH, J., at p. 401). But in *Morris* v. *Barrett* (1829), 3 Y. & J. 384, though the original land was not partnership property, land afterwards bought and paid for out of profits was, in the circumstances, held to be partnership property. If co-owners of business property agree that such property shall be partnership assets, and the trade is carried on there, the mortgagee of the interest of one of the partners is put upon inquiry with regard to the agreement between them when he is aware that the property is used for partnership purposes (*Cavander* v. *Bulteel* (1873), 9 Ch. App. 79, where the mortgagee was postponed to the lien of the other partner for the excess share of debts discharged by the latter, though incurred after the date of the mortgage).

(*h*) *Bolton* v. *Puller* (1796), 1 Bos. & P. 539; *Ex parte Ruffin* (1801), 6 Ves. 119; and see, further, title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 220; *Re Henderson and Morley, Ex parte Freeman* (1819), Buck, 471. As to the effect of the assignment of a lease, see title LANDLORD AND TENANT, Vol. XVIII., p. 577.

(*i*) See *Re Lightoller, Ex parte Peake* (1816), 1 Madd. 346; *Re Walker, Ex parte Walker* (1862), 4 De G. F. & J. 509, C. A.; compare *Re Edwards-Wood, Ex parte Mayou* (1865), 4 De G. J. & Sm. 664; title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 220. See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 635.

(*k*) *E.g.*, if payment is to be guaranteed by a surety and he refuses to

SECT. 4. **Partnership Property and Property of Separate Partners.**

Similarly, if the personal representatives of a partner sell his share to the surviving partner or partners, relying simply on a covenant of indemnity against the partnership debts; or if, on the true construction of the partnership articles, they lose their right against the surviving partner or partners to have the partnership assets applied to the payment of the partnership liabilities, the joint property becomes the separate property of the surviving partner or partners (*l*).

On death of a partner.

Conversely, the separate property of one partner may be converted into the joint property of the firm (*m*); but the mere fact that the profits of the partnership are made by means of the separate property of one partner does not convert that property into joint property (*n*). If the owner of a business holds out to the world, as a partner, a person who has in fact no interest in such business, and

Transfer of separate property to firm.

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join in the transfer (*Re Mallam, Ex parte Wheeler* (1817), Buck, 25); in such circumstances notice of the retirement in the *Gazette* and in circulars to customers do not suffice to complete the transfer (*ibid.*); see also *Re Johnston and Danston, Ex parte Cooper* (1840), 1 Mont. D. & De G. 358; *Re Kemptner* (1869), L. R. 8 Eq. 286; *Re Head, Ex parte Kemp* (1893), 10 Morr. 76; *Re Wright, Ex parte Wood* (1879), 10 Ch. D. 554, C. A.

(*l*) *Re Simpson* (1874), 9 Ch. App. 572. On the other hand, if the articles are merely intended to vest the partnership assets in the surviving partner subject to payment of the partnership debts, the assets which were joint assets at the death remain joint assets, available to the joint creditors (*Re White, Ex parte Morley* (1873), 8 Ch. App. 1026; followed in *Re White, Ex parte Dear* (1876), 1 Ch. D. 514, C. A.; and *Re Mellor, Ex parte Manchester Bank* (1879), 12 Ch. D. 917; affirmed *sub nom. Re Mellor, Ex parte Butcher* (1880) 13 Ch. D. 465, C. A.), and the executors having paid, or become liable for, the partnership debts are entitled to be indemnified out of such assets (*Re Daniel, Ex parte Powell* (1896), 75 L. T. 143); compare *Re Head, Ex parte Kemp, supra.* In these cases there is no question of "order and disposition," they depend on the nature of the agreement between the parties; see *Re Mellor, Ex parte Butcher, supra.*

(*m*) *Re Bowers, Ex parte Owen* (1851), 4 De G. & Sm. 351 (where one partner "B" was separate owner of stock-in-trade and furniture, and it was inferred and held by the court that the stock-in-trade had become joint property, subject to an account in which the firm would be debited in favour of "B" with the value of articles which belonged to him or for which he had paid. A different inference was drawn as to the furniture which was held to have remained the separate property of "B"); distinguish *Re Fear, Ex parte Hare* (1835), 2 Mont. & A. 478 (where the furniture had been treated by the partners as joint property). For the principle of these cases, see *Re Ashley, Ex parte Murton* (1840), 1 Mont. D. & De G. 252, *per* Sir GEORGE ROSE, at p. 261. Where the owner of a mill and its machinery admitted two partners, and the value of the property was entered in the partnership books as the amount of his capital, and all additions and improvements during the partnership were made at the expense of the firm, the property was held to have become joint property (*Robinson* v. *Ashton, Ashton* v. *Robinson* (1875), L. R. 20 Eq. 25; compare *Pilling* v. *Pilling* (1865), 3 De G. J. & Sm. 162; and *Hills* v. *Parker* (1861), 7 Jur. (N S.) 833). So, if a patent belonging solely to one partner is "dedicated to the purposes of the partnership," it becomes joint property (*Kenny's Patent Button-Holeing Co.* v. *Somervell and Lutwyche* (1878), 38 L. T. 878).

(*n*) *Burdon* v. *Barkus* (1862), 4 De G. F. & J. 42, C. A., distinguishing *Jackson* v. *Jackson* (1804), 9 Ves. 591; *Fromont* v. *Coupland* (1824), 2 Bing. 170; *Smith* v *Watson* (1824), 2 B. & C. 401; and see *Pocock* v. *Carter*, [1912] 1 Ch. 663. With regard to a sleeping partner, see *Re Starkey, Ex parte Chuck* (1831), Mont. 364, 373; *Re Starkey, Ex parte Jennings* (1830), Mont. 45.

permits him to act as such, and the two are jointly adjudicated bankrupts, the owner is estopped from saying that the assets of the business are not joint property (*o*); but where the holding out is only to a very few creditors, and there is no holding out to the world, it may be that there is no partnership and consequently no joint property (*p*).

Execution.

103. Partnership property cannot be taken in execution for a separate judgment against one partner (*q*).

SECT. 5.—*Shares in Partnerships.*

SUB-SECT. 1.—*Nature of Shares.*

Partner's share is in net assets only.

104. The share of a partner is his proportion of the joint assets after their realisation and conversion into money and after payment and discharge of the joint debts and liabilities (*a*). Such share includes sums advanced by either partner beyond his due proportion (*b*), and, therefore, separate creditors of a partner cannot be paid out of partnership assets until the claims of the other partners upon the partnership are satisfied (*c*). A share of partnership assets bequeathed to a surviving partner is not thereby relieved from its liability for the joint debts (*d*), and, as a surviving partner must pay the firm's debts out of the assets, he may consequently give security for such a debt upon partnership property (*e*).

Partners are tenants in common as regards assets.

105. Equity recognises no right of survivorship as regards partnership property: at law the same doctrine applies, but is subject to exceptions (*f*). So far as the right of survivorship in

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(*o*) *Re Rowland and Crankshaw* (1866), 1 Ch. App. 421; *Re Pulsford, Ex parte Hayman* (1878), 8 Ch. D. 11, C. A.

(*p*) *Re Wright, Ex parte Sheen* (1877), 6 Ch. D. 235, C. A.; compare *Re Reay, Ex parte Arbouin, Ex parte Gonne* (1846), De G. 359. As to "holding out," see p. 13, *ante*.

(*q*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (1). But a charging order may be made on the interest of a partner, subject to the right of the other partners to redeem the interest charged (*ibid.*, s. 23 (2), (3); see p. 59, *post*). With regard to a charging order to give effect to such a judgment, see p. 59, *post*, and title EXECUTION, Vol. XIV., p. 11.

(*a*) *Garbett* v. *Veale* (1843), 5 Q. B. 408; and see *Marshall* v. *Maclure* (1885), 10 App. Cas. 325, 334, P. C. Joint debts are payable primarily out of joint assets if sufficient, even though secured by a charge on the separate property of one partner (*Re Ritson, Ritson* v. *Ritson*, [1898] 1 Ch. 667; affirmed [1899] 1 Ch. 128, C. A.), although one of the persons entitled to share in the assets—*e.g.*, an infant partner—may not be personally liable for the joint debts (*Lovell and Christmas* v. *Beauchamp*, [1894] A. C. 607); and see titles EXECUTION, Vol. XIV., p. 10, note (*k*); EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 289; INFANTS AND CHILDREN, Vol. XVII., p. 53.

(*b*) *West* v. *Skip* (1749), 1 Ves. Sen. 239; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 39. On this point see p. 103, *post*; and as to a partner's right to an indemnity and lien, see pp. 60, 61, *post*.

(*c*) *Croft* v. *Pike* (1733), 3 P. Wms. 180; *Holderness* v. *Shackels* (1828), 8 B. & C. 612; *West* v. *Skip*, *supra*.

(*d*) *Farquhar* v. *Hadden* (1871), 7 Ch. App. 1.

(*e*) *Re Clough, Bradford Commercial Banking Co.* v. *Cure* (1885), 31 Ch. D. 324; *Re Bourne, Bourne* v. *Bourne*, [1906] 2 Ch. 427, 434, C. A.; and see p. 98, *post*.

(*f*) *Jus accrescendi inter mercatores locum non habet.* But see *Reilly* v. *Walsh* (1848), 11 I. Eq. R. 22. In *Buckley* v. *Barber* (1851), 6 Exch. 164, it was held that the interest of a deceased partner in the firm's

SECT. 5. **Shares in Partnerships.**

partnership property exists, it applies only to the legal title and not to the beneficial interest (*g*). The estate of a deceased partner is entitled—not specifically, but in value—to a share of the articles used for the purposes of the business (*h*), and, on his death, the value of his share is regarded as the price to be paid by the continuing firm (*i*).

Conversion as regards partnership land.

106. Land which is partnership property is deemed to be converted into personal estate as between the partners (including the representatives of a deceased partner) and also as between the heirs of a deceased partner and his personal representatives (*k*), unless a contrary intention is expressed (*l*). It may be deemed to be reconverted in some circumstances, for example, after termination of the partnership (*m*).

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chattels did not devolve upon the surviving partners; but this case has been disapproved of and is of doubtful authority; and see, further, titles DESCENT AND DISTRIBUTION, Vol. XI., pp. 6, 7; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 221, 222.

(*g*) So the undivided property of a deceased or retiring partner must not be continued in the business without an express or implied agreement (*Crawshay* v. *Collins* (1808), 15 Ves. 218). A surviving partner is a trustee only as regards the shares of his deceased partners, notwithstanding a conveyance to the partners "and their heirs for ever."

(*h*) *Stuart* v. *Bute* (*Marquis*) (1813), 11 Ves. 657, 665; *Bligh* v. *Brent* (1837), 2 Y. & C. (EX.) 268; *Ashworth* v. *Munn* (1880), 15 Ch. D. 363, 369.

(*i*) *Ewing* v. *Ewing* (1882), 8 App. Cas. 822.

(*k*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 22; see *Re Wilson*, *Wilson* v. *Holloway*, [1893] 2 Ch. 340. The rule is based on the following cases:—*Lake* v. *Gibson* (1729), 1 Eq. Cas. Abr. 290; *Murtagh* v. *Costello* (1881), 7 L. R. Ir. 428; *Gordon* v. *Scott* (1858), 12 Moo. P. C. C. 1; *Morris* v. *Kearsley* (1837), 2 Y. & C. (EX.) 139; *Re Cooper*, *Cooper* v. *Cooper* (1878), 26 W. R. 785; *Crawshay* v. *Maule* (1818), 1 Swan. 495; *Phillips* v. *Phillips* (1832), 1 My. & K. 649; *Holroyd* v. *Holroyd* (1859), 28 L. J. (CH.) 902; *Jeffereys* v. *Small* (1684), 1 Vern. 217; *Lake* v. *Craddock* (1732), 3 P. Wms. 158; *Elliot* v. *Brown* (1791), 3 Swan. 489, n.; *Houghton* v. *Houghton* (1841), 11 Sim. 491; *Essex* v. *Essex* (1855), 20 Beav. 442 (where the partnership was continued beyond the agreed term); *Ripley* v. *Waterworth* (1802), 7 Ves. 425; *Baxter* v. *Brown* (1845), 7 Man. & G. 198; *Darby* v. *Darby* (1856), 3 Drew. 495: and see titles DESCENT AND DISTRIBUTION, Vol. XI., p. 7; EQUITY, Vol. XIII., p. 39. This rule was well settled notwithstanding some decisions which appear either to conflict with the current of authority or to have been based on special circumstances (*Randall* v. *Randall* (1835), 7 Sim. 271; *Thornton* v. *Dixon* (1791), 3 Bro. C. C. 199; *Bell* v. *Phyn* (1802), 7 Ves. 453; *Cookson* v. *Cookson* (1837), 8 Sim. 529). Where land belonging to an incorporated voluntary society was taken for public purposes the proceeds were held to belong to the persons who were members of the society at the time of sale (*Brown* v. *Dale* (1878), 9 Ch. D. 78). It was formerly held that real estate, although partnership property, if not purchased out of partnership funds for partnership purposes, was not to be deemed converted unless required for the purposes of paying debts after the expiration of the partnership; see *Cookson* v. *Cookson*, *supra*. It may be doubted whether this decision would have been the same after the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 22. The proceeds of sale of such land were held to be real estate within stat. (1736) 9 Geo. 2, c. 36, repealed by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42). As to the liability of partnership land to death duty, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 308; *Ashworth* v. *Munn*, *supra*.

(*l*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 22; *Balmain* v. *Shore* (1804), 9 Ves. 500.

(*m*) *Myers* v. *Myers* (1889), 61 L. T. 757; *Rowley* v. *Adams* (1844), 7 Beav. 548.

SECT. 5. Shares in Partnerships.

107. Partners may convert their joint property into the separate property of one or more of their number (*n*). A partner may have the right to work a patent, although he may not be entitled to a share in the patent itself (*o*).

Conversion into separate property.

SUB-SECT. 2.—*Amount of Shares.*

108. Subject to any agreement, express or implied, the rule is that partners share equally in capital and profits and contribute equally towards losses, whether of capital or otherwise (*p*). The rule of equality may be negatived by the terms of the contract (*q*) or by the course of dealing (*a*).

Primâ facie, shares of partners are equal.

SUB-SECT. 3.—*Dealings by a Partner with his Share.*

109. A partner may assign his share to a third person, absolutely or by way of security, but cannot make the assignee a partner (*b*). Recognition by the other partners may, however, confer the rights of a partner on an assignee (*c*), and a partnership may be so constituted that the assignment of a share places the assignee in the position of the transferor (*d*). A partner who has an unconditional right to transfer his share is relieved from liability by an actual assignment, of which notice is given to the other partners, although the assignee may be insolvent (*e*).

Effect of assignment of a partner's share.

Liability of assignor.

The assignee or mortgagee of a share takes subject to the rights of the other partners, and is affected by equities arising between the assignor and his partners after the date of the assignment (*f*). An assignee of a share is entitled to the share of profits found

Rights and liabilities of assignee.

(*n*) *Bolton* v. *Puller* (1796), 1 Bos. & P. 539; see p. 53, *ante*.

(*o*) *Kenny's Patent Button-Holeing Co.* v. *Somervell and Lutwyche* (1878), 38 L. T. 878.

(*p*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (1); *Peacock* v. *Peacock* (1809), 16 Ves. 49; *Robinson* v. *Anderson* (1855), 7 De G. M. & G. 239, C. A., affirming S. C., 20 Beav. 98 (where separate solicitors acted for the same clients, and were jointly interested in the profits). *Robinson* v. *Anderson*, *supra*, shows that the rule is the same both in general partnerships and in partnerships limited to a particular business or adventure; see *Farrar* v. *Beswick* (1836), 1 Mood. & R. 527.

(*q*) *Robley* v. *Brooke* (1833), 7 Bli. (N. S.) 90, H. L.; *Warner* v. *Smith* (1863), 1 De G. J. & Sm. 337, C. A.

(*a*) *Stewart* v. *Forbes* (1849), 1 Mac. & G. 137.

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31 (1); *Bray* v. *Fromont* (1821), Madd. & G. 5.

(*c*) *Jefferys* v. *Smith* (1826), 3 Russ. 158.

(*d*) *Mayhew's Case* (1854), 5 De G. M. & G. 837, C. A.; *Fox* v. *Clifton* (1832), 9 Bing. 115; *Pinkett* v. *Wright* (1842), 2 Hare, 120. As to the case of a limited partnership, see p. 111, *post*.

(*e*) *Jefferys* v. *Smith*, *supra*.

(*f*) *Cavander* v. *Bulteel* (1873), 9 Ch. App. 79; *Smith* v. *Parkes* (1852), 16 Beav. 115; *Kelly* v. *Hutton* (1868), 3 Ch. App. 703; *Dodson* v. *Downey*, [1901] 2 Ch. 620. The right of an equitable mortgagee of partnership property is not varied by a subsequent dissolution of partnership between the mortgagors and the bankruptcy of the continuing partner, although there has been a substitution of a separate collateral security for a joint collateral security given before the dissolution (*Re Draper, Ex parte Booth* (1832), 1 L. J. (BCY.) 81); see also title MORTGAGE, Vol. XXI., p. 96.

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due to his assignor (*g*), and must accept the accounts agreed by the partners (*h*). A purchaser of a share must indemnify his vendor against the partnership liabilities (*h*), and he cannot call for accounts nor inspect books while the business is a going concern (*i*); nor interfere in the management or administration of the business (*k*). But an assignee or mortgagee is entitled, on dissolution, to call for an account from the dissolution (*l*), and is not affected by any agreement or dealing between the partners with regard to the assigned share, subsequent to and with notice of the assignment (*m*); and a mortgagee of shares in a mining partnership is entitled to foreclosure (*n*).

Right of pre-emption.

110. A continuing partner's right of pre-emption, under the partnership contract, is recognised by the court as a right of great value and importance, and is enforceable, in proper cases, by injunction or specific performance (*o*). Such a right may lapse if not exercised with due diligence on notice (*p*).

Assignment of share to a partner.

111. An assignment of his interest by one partner to another, where there are only two partners, operates as a dissolution (*q*), but where there are more than two the point is doubtful (*r*). Known insolvency of the concern does not vitiate the sale of his share by one partner to the other if no fraud is intended (*s*).

One of several partners may purchase the share of another for his own benefit, and not for the benefit of the firm (*a*). A purchase,

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(*g*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31 (1); *Glyn* v. *Hood* (1859), 1 Giff. 328; *Cavander* v. *Bulteel* (1873), 9 Ch. App. 79.

(*h*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31 (1); *Bergmann* v. *Macmillan* (1881), 17 Ch. D. 423.

(*i*) *Dodson* v. *Downey*, [1901] 2 Ch. 620; see *Mills* v. *United Counties Bank, Ltd.*, [1912] 1 Ch. 231, C. A.

(*k*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31 (1). A *bonâ fide* agreement for payment of salaries to partners has been held to be binding on assignees, as part of "management and administration" (*Re Garwood's Trusts, Garwood* v. *Paynter*, [1903] 1 Ch. 236).

(*l*) *Watts* v. *Driscoll*, [1901] 1 Ch. 294, C. A.; but if there has been no dissolution the account will be taken from the date of issue of the writ in an action by the mortgagee to realise his security; see *Whetham* v. *Davey* (1885), 30 Ch. D. 574.

(*m*) *Watts* v. *Driscoll, supra*; see *Re Garwood's Trusts, Garwood* v. *Paynter, supra.*

(*n*) *Redmayne* v. *Forster* (1866), L. R. 2 Eq. 467.

(*o*) *Homfray* v. *Fothergill* (1866), L. R. 1 Eq. 567; and see *Stewart* v. *Stuart* (1823), 1 L. J. (O. S.) (CH.) 61.

(*p*) *Rowlands* v. *Evans, Williams* v. *Rowlands* (1861), 30 Beav. 302; so also if the offer cannot be made as provided by the articles (*Chapple* v. *Cadell* (1822), Jac. 537).

(*q*) *Heath* v. *Samson* (1832), 4 B. & Ad. 172.

(*r*) Having regard to the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31; see *Emanuel* v. *Symon*, [1907] 1 K. B. 235; *Sturgeon Brothers* v. *Salmon* (1906), 22 T. L. R. 584. If it be the correct view that such an assignment does not operate as, or give an absolute right to, dissolution, it is at all events a circumstance which the court may consider in determining the question.

(*s*) *Re Lightoller, Ex parte Peake* (1816), 1 Madd. 346.

(*a*) *Cassels* v. *Stewart* (1881), 6 App. Cas. 64.

by solvent partners, of a share of a partner under an execution will be set aside if there is any unfairness in their conduct in respect of the sale (*b*).

SUB-SECT. 4.—*Charging Orders.*

Enforcement of judgment for separate debts.

112. Execution cannot be levied against partnership property for the separate debt of a partner (*c*), but the court may make an order charging the share of a partner who is a judgment debtor (*d*).

Effect of charging order.

The effect of a charging order is the same as if the partner had executed or signed a document charging his share with the debt (*e*). Such an order is valid although the indebted partner may be a lunatic (*f*), but if he is a bankrupt it does not take priority over the title of his trustee (*g*).

Receiver and other relief in aid of charging order.

113. When a charging order is made, the court may appoint, by the same or a subsequent order, a receiver (*h*) of the partner's share of profits and of any other money coming to him from the partnership (*i*). It may also direct such accounts and inquiries and give such orders and directions as it might have done if the partner had given a charge, or as the case may require (*k*); but this will only be done in special circumstances (*l*).

Rights of other partners.

114. The partners of a member of a firm whose interest has been charged may redeem it (*m*), or, if the court directs the sale

(*b*) *Perens* v. *Johnson*, *Johnson* v. *Perens* (1857), 3 Sm. & G. 419.

(*c*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (1). As to the practice before this Act, see *Eddie* v. *Davidson* (1781), 2 Doug. (K. B.) 650; *Helmore* v. *Smith* (1) (1887), 35 Ch. D. 436, C. A.; *Brown, Janson & Co.* v. *Hutchinson & Co.*, [1895] 1 Q. B. 737, C. A.; [1895] 2 Q. B. 126, C. A.; and see title EXECUTION, Vol. XIV., p. 11.

(*d*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (2); see R. S. C., Ord. 46, rr. 1, 1A, 1B; Irish R. S. C., Ord. 46, r. 23; and County Court Rules, 1903, Ord. 25, rr. 12, 13; and see titles COUNTY COURTS, Vol. VIII., p. 556; EXECUTION, Vol. XIV., p. 11. This provision extended the operation of the law relating to charging orders contained in the Judgments Acts, 1838 (1 & 2 Vict. c. 110) and 1840 (3 & 4 Vict. c. 82); see *Sutton* v. *English and Colonial Produce Co.*, [1902] 2 Ch. 502 (shares held "in own right" for purposes of qualification or for charging order); *Howard* v. *Sadler*, [1893] 1 Q. B. 1; *Gill* v. *Continental Gas Co.* (1872), L. R. 7 Exch. 332; *Cooper* v. *Griffin*, [1892] 1 Q. B. 740, C. A.; *Re Owen*, [1894] 3 Ch. 220.

(*e*) *Brown, Janson & Co.* v. *Hutchinson & Co.*, [1895] 2 Q. B. 126, 131, C. A.; see Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 23 (2), 31 (1); and see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 273; EXECUTION, Vol. XIV., pp. 107, 108.

(*f*) *Re Seager Hunt*, [1900] 2 Ch. 54, n., C. A.

(*g*) *Wild* v. *Southwood*, [1897] 1 Q. B. 317.

(*h*) See titles EXECUTION, Vol. XIV., pp. 11, 118 *et seq.*; RECEIVERS.

(*i*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (2). As to the effect of the appointment of a receiver, see *Brown, Janson & Co.* v. *Hutchinson & Co.*, [1895] 1 Q. B. 737, 740, C. A.

(*k*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (2). As to the rights of a chargee, see *ibid.*, s. 31; p. 58, *ante*.

(*l*) *Brown, Janson & Co.* v. *Hutchinson & Co.*, [1895] 2 Q. B. 126, C. A. An account will not as a rule be ordered during the continuance of the partnership (*ibid.*).

(*m*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (3).

SECT. 5. **Shares in Partnerships.**

of a share, they may purchase it (*n*), or they may dissolve the partnership (*o*).

SECT. 6.—*Right to Indemnity.*

To what payments or liabilities the right extends.

115. Subject to any express or implied agreement, each partner is entitled to be indemnified by his firm out of its assets, or by way of contribution by his partners, in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the partnership business, or in or about anything necessarily done for the preservation of the firm's business or property (*p*). The right extends to expenditure for partnership purposes made with the express or implied consent of the other partners (*q*); and it is immaterial that the expenditure proves to be useless or unprofitable if it has been approved of or ratified by the firm (*r*).

Interest on advances.

Payments or advances made by a partner for partnership purposes beyond the capital he has agreed to subscribe carry interest at 5 per cent. per annum from the date of payment or advance (*s*).

To what payments the right does not extend.

116. This right of indemnity does not extend to joint transactions where no partnership subsists (*t*). Nor does it extend to sums

(*n*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (3); see *Perens* v. *Johnson*, *Johnson* v. *Perens* (1857), 3 Sm. & G. 419.

(*o*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 33 (2).

(*p*) *Ibid.*, s 24 (2); *Wright* v. *Hunter* (1801), 5 Ves. 792; *Robinson's Executor's Case* (1856), 6 De G. M. & G. 572, C. A.; *McOwen* v. *Hunter* (1838), 1 Dr. & Wal. 347; *Evans* v. *Yeatherd* (1824), 2 Bing. 133; *Browne* v. *Gibbins* (1726), 5 Bro. Parl. Cas. 491; *Prole* v. *Masterman* (1855), 21 Beav. 61; *Denton* v. *Rodie* (1813), 3 Camp. 493; *Re Norwich Yarn Co., Ex parte Bignold* (1856), 22 Beav. 143.

(*q*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (2); *Hamilton* v. *Smith* (1859), 7 W. R. 173; *Gleadow* v. *Hull Glass Co.* (1849), 13 Jur. 1020; *Matthews* v. *Ruggles-Brise*, [1911] 1 Ch. 194 (where the estate of a deceased partner, who had taken an onerous lease as trustee for his firm, was held entitled to be indemnified by his partners against money paid under the covenants in the lease, although such lease (with the other partnership assets) had been assigned to a limited company which covenanted to indemnify the partners, including the trustee of the deceased, against the partnership liabilities).

(*r*) *Cragg* v. *Ford* (1842), 1 Y. & C. Ch. Cas. 280 (where loss occurred through delay by one partner in selling); *Re Court Grange Silver-lead Mining Co., Ex parte Sedgwick* (1856), 2 Jur. (N. S.) 949 (where there was acquiescence in liabilities incurred by a managing director); *Burden* v. *Burden* (1813), 1 Ves. & B. 170 (where an allowance was made to a surviving partner for expenses of carrying on the business for himself and the children of the deceased partner, but not for his management or time and labour); *Burdon* v. *Barkus* (1861), 3 Giff. 412 (a case of outlay by the firm on property belonging exclusively to one partner); *Pawsey* v. *Armstrong* (1881), 18 Ch. D. 698, 707; *Re Oundle Union Brewery Co., Croxton's Case* (1852), 5 De G. & Sm. 432; *Re Protestant Assurance Association, Ex parte Letts and Steer* (1857), 26 L. J. (CH.) 455.

(*s*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (3); *Spartali* v. *Constantinidi* (1872), 20 W. R. 823 (where interest was allowed to two partners on sums advanced by them in excess of their due proportion of capital, such sums being treated as a debt wrongfully withheld); see also S. C. (1872), 21 W. R. 116; title MONEY AND MONEY-LENDING, Vol. XXI., pp. 38, 42.

(*t*) *Sedgwick* v. *Daniell* (1857), 2 H. & N. 319; see title CONTRACT, Vol. VII., p. 472.

SECT. 6. Right to Indemnity.

paid by a partner for which the partnership is not liable (*a*), nor to losses due to his own fraud or culpable negligence in the conduct of the partnership affairs (*b*). On the contrary, he must compensate or indemnify the partnership against such losses (*c*).

Partners are not entitled to be credited, as against the trustee of a bankrupt partner, with sums which he had paid as agent for the partnership, before he became a partner (*d*). The principle, moreover, does not extend to private loans from one partner to another, but is confined to partnership transactions (*e*).

Contrary agreement—express or implied.

117. The liability of a partner to contribute for this purpose may be expressly limited (*f*), and a person, though liable as a partner to persons dealing with the firm, may be relieved from liability to contribute to partnership debts as between himself and his partners by the method of dealing adopted by the firm (*g*).

Where partnership illegal.

The right of contribution does not exist if the partnership is itself illegal (*h*); but if the partnership is not illegal, the fact that the act for which the firm is liable is unlawful does not prevent an innocent partner from obtaining contribution from the guilty partners (*i*).

Loss of right.

118. The right to indemnity may be lost by laches (*k*) or by agreement between the partners whereby the partnership effects are converted into the separate property of each (*l*).

SECT. 7.—*Partner's Lien.*

Nature of right.

119. On dissolution of partnership, each partner can insist that the partnership property shall be applied in payment of the partnership debts and liabilities, and that the surplus assets shall be applied in payment of what may be due to the partners after deducting any sums in which they may be indebted to the firm (*m*).

(*a*) *Re Webb* (1818), 2 Moore (C. P.), 500; *M'Ilreath* v. *Margetson* (1785), 4 Doug. (K. B.) 278. Whether this rule is applicable to a debt barred by a Statute of Limitation does not appear to have been decided.

(*b*) *Thomas* v. *Atherton* (1878), 10 Ch. D. 185, C. A.

(*c*) *Bury* v. *Allen* (1845), 1 Coll. 589; *Robertson* v. *Southgate* (1848), 6 Hare, 536.

(*d*) *Smith* v. *De Silva* (1776), 2 Cowp. 469; as explained in *Holderness* v. *Shackels* (1828), 8 B. & C. 612, *per* Lord TENTERDEN, C.J., at p. 618.

(*e*) *Ryall* v. *Rolle* (1749), 1 Atk. 165. "The partnership stock is no further subject to debts from one partner to another than is the money which has been applied to the partnership" (*ibid.*, *per* LEE, C.J., at p. 181).

(*f*) *Gillan* v. *Morrison* (1847), 1 De G. & Sm. 421; *Re Worcester Corn Exchange Co.* (1853), 3 De G. M. & G. 180. As to the principles of contribution generally, see titles CONTRACT, Vol. VII., pp. 471, 472; GUARANTEE, Vol. XV., pp. 526 *et seq.*

(*g*) *Geddes* v. *Wallace* (1820), 2 Bli. 270, H. L.; and see *Dale* v. *Powell* (1911), 105 L. T. 291.

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

(*i*) *Campbell* v. *Campbell* (1840), 7 Cl. & Fin. 166, H. L.; see also cases cited at p. 18, *ante*. There is no lien for contributed money between co-owners who are not partners (*Kay* v. *Johnston* (1856), 21 Beav. 536); *Re Coulson's Trusts, Prichard* v. *Coulson* (1907), 97 L. T. 754; compare *Leigh* v. *Dickeson* (1884), 15 Q. B. D. 60, C. A.; see *Re Leslie, Leslie* v. *French* (1883), 23 Ch. D. 552, 564.

(*k*) *West* v. *Skip* (1749), 1 Ves. Sen. 239.

(*l*) *Holroyd* v. *Griffiths* (1856), 3 Drew. 428; *Lingen* v. *Simpson* (1824), 1 Sim. & St. 600; see also *Re Langmead's Trusts* (1855), 20 Beav. 20.

(*m*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 39: *West* v. *Skip*

SECT. 7. **Partner's Lien.**

Against whom right is available.

120. This right is available, and may be enforced not only against the partnership assets and the other partners, but also against all persons claiming through them in respect of their interests as partners, for example, assignees, personal representatives, trustees in bankruptcy, or judgment creditors (*n*), except purchasers or pledgees of specific assets of the partnership who might reasonably suppose that all the partnership debts had been paid or barred by lapse of time, or who otherwise deal with the surviving or continuing partner in good faith (*o*). During the continuance of the partnership the right to indemnity constitutes a lien which attaches to all the property of the partnership for the time being, whatever may be its variations and changes (*p*), but after dissolution it is limited to the partnership property existing as such at the date of the dissolution, and does not extend to property added to or substituted for the old stock by those who continue the business after that date (*q*).

SECT. 8.—*Division of Profits and Incidence of Losses.*

Equal shares unless otherwise agreed.

121. In the absence of express or implied agreement to the contrary, partners share equally in the capital and profits (*r*) of the business (*s*). This presumption may be negatived either by express agreement or by implication (*t*), and such an implication may arise from the course of dealing by the partners (*u*), but the burden of

(1749), 1 Ves. Sen. 239; and see, further, title LIEN, Vol. XIX., pp. 18, 19. For the suggested analogous rule in the case of a company, see title COMPANIES, Vol. V., p. 168, note (*s*).

(*n*) *West* v. *Skip* (1749), 1 Ves. Sen. 239; *Cavander* v. *Bulteel* (1873), 9 Ch. App. 79 (mortgagee); *Stocken* v. *Dawson* (1845), 9 Beav. 239 (executors); *Holderness* v. *Shackels* (1828), 8 B. & C. 612, 618; *Re Butterworth, Ex parte Plant* (1835), 4 Deac. & Ch. 160 (trustee in bankruptcy); *Skipp* v. *Harwood* (1747), 2 Swan. 586 (execution creditors).

(*o*) *Re Langmead's Trusts* (1855), 20 Beav. 20; 7 De G. M. & G. 353. "It is really what one may call a general lien upon the surplus assets and does not affect each particular property so as to interfere with the right of the surviving partner to deal with the separate properties belonging to the partnership for the purpose of realisation and to give a good title to persons dealing in good faith with him in respect of those properties," and for this purpose "no real distinction can be drawn between real estate held for partnership purposes and personal estate" (*Re Bourne, Bourne* v. *Bourne*, [1906] 2 Ch. 427, C. A., *per* ROMER, L.J., at pp. 432, 433).

(*p*) *West* v. *Skip, supra*; *Skipp* v. *Harwood, supra*.

(*q*) *Payne* v. *Hornby* (1858), 25 Beav. 280; compare title LIEN, Vol. XIX., pp. 19, note (*i*), 32.

(*r*) "There is no single definition of the word 'profits' which will fit all cases" (*Bond* v. *Barrow Hæmatite Steel Co.*, [1902] 1 Ch. 353, *per* FARWELL, J., at p. 366). The rise in value of fixed plant or real estate belonging to a partnership is profit (*Robinson* v. *Ashton, Ashton* v. *Robinson* (1875), L. R. 20 Eq. 25, *per* JESSEL, M.R., at p. 28). Upon the construction of particular articles profits have been held to mean profits actually realised (*Croker* v. *Kreeft, Kreeft* v. *Croker* (1865), 13 L. T. 136; see also *Badham* v. *Williams* (1902), 86 L. T. 191).

(*s*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (1); see *Farrar* v. *Beswick* (1836), 1 Mood. & R. 527; *Peacock* v. *Peacock* (1809), 16 Ves. 49; *Robinson* v. *Anderson* (1855), 7 De G. M. & G. 239, C. A.; compare *Sharpe* v. *Cummings* (1844), 2 Dow. & L. 504.

(*t*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (1); *Bell* v. *Barnett* (1872), 21 W. R. 119.

(*u*) *Stewart* v. *Forbes* (1849), 1 Mac. & G. 137.

SECT. 8. Division of Profits and Incidence of Losses.

proof is on the partner who alleges inequality (*v*). Even where one partner does much more work than another the rule of equality applies, subject to a claim for allowances for his extra work (*w*).

All the partners are entitled to share in the profits made by any one or more of them from transactions arising out of the business (*x*); but the salary received by a partner in respect of an official position held by him is not *primâ facie* to be treated as profits so as to be shared by the others (*a*).

Profits of all partnership transactions divisible.

122. The right to claim a share of profits may be lost, for example, by laches (*b*), where the interest is executory (*c*); but mere laches does not divest a partner of an interest which is executed, unless it amounts to an agreement or licence (*d*) or abandonment of his rights (*e*).

Effect of laches.

123. A partner continuing the business with partnership assets after dissolution must account for profits (*f*) up to the winding up of the concern (*g*); and surviving partners who carry on the business must account for the profits of the share of a deceased partner up to the time of the liquidation of the assets (*h*).

Profits made after dissolution.

In the absence of a contrary agreement the outgoing partner, or his representative if he is dead, has a statutory right to elect to charge the continuing partner either with the share of profits which the court may find to be attributable to his share of the assets, or at his option, to interest at 5 per cent. per annum from the date of

(*v*) *Robinson* v. *Anderson* (1855), 7 De G. M. & G. 239, C. A.

(*w*) *Webster* v. *Bray* (1849), 7 Hare, 159; *Robinson* v. *Anderson*, *supra*.

(*x*) *Hancock* v. *Heaton* (1874), 30 L. T. 592; and see *Bentley* v. *Craven* (1853), 18 Beav. 75; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 29; and see pp. 8, 55, *ante*.

(*a*) *Alston* v. *Sims* (1855), 1 Jur. (N. S.) 438; but it is otherwise when so treated by the partners themselves (*Collins* v. *Jackson*, *Jackson* v. *Collins* (1862), 31 Beav. 645).

(*b*) *Prendergast* v. *Turton* (1841), 1 Y. & C. Ch. Cas. 98; *Jones* v. *North Vancouver Land and Improvement Co.*, [1910] A. C. 317, 328, P. C.; and where there has been laches the mere assertion of rights, unaccompanied by any act to give effect to it, is not sufficient to preserve them (*Clegg* v. *Edmondson* (1857), 8 De G. M. & G. 787, C. A.). Recognition may, however, counterbalance laches (*Penny* v. *Pickwick* (1852), 16 Beav. 246; *Clements* v. *Hall* (1858), 2 De G. & J. 173, C. A.).

(*c*) Especially where expenditure has taken place in a speculative undertaking (*Norway* v. *Rowe* (1812), 19 Ves. 144; *M'Lure* v. *Ripley* (1850), 2 Mac. & G. 274).

(*d*) *Clarke and Chapman* v. *Hart* (1858), 6 H. L. Cas. 633; *Rule* v. *Jewell* (1881), 18 Ch. D. 660, distinguishing *Clarke and Chapman* v. *Hart*, *supra*, and *Prendergast* v. *Turton*, *supra*.

(*e*) *Palmer* v. *Moore*, [1900] A. C. 293, P. C.; see *Lake* v. *Craddock* (1732), 3 P. Wms. 158.

(*f*) *Crawshay* v. *Collins* (1826), 2 Russ. 325; but he may have a claim for "just allowances" (*ibid.*, at p. 347); see p. 100, *post*.

(*g*) But not necessarily in the same proportions as those in which the shares were held (*Willett* v. *Blanford* (1842), 1 Hare, 253; *Yates* v. *Finn* (1880), 13 Ch. D. 839).

(*h*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 29 (2), 42; *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318; *Hordern* v. *Hordern*, [1910] A. C. 465, P. C.; compare *Croft* v. *Pyke* (1733), 3 P. Wms. 180 (a case of a bankrupt partner).

SECT. 8. Division of Profits and Incidence of Losses.

dissolution on the value of such share (*i*). This right exists even where the continuing partner has, under the partnership contract, an option to buy the share of the other partner, unless the terms of such option have been complied with in all material respects. But where this has been done the outgoing partner or his representative is not entitled to any further share of profits: his rights are governed by the partnership contract (*k*). Profits left in the business are not necessarily regarded as capital, for example, for the purpose of bearing interest, unless there is an agreement to this effect, or unless they are treated as capital in the partnership books (*l*).

How losses are borne.

124. The incidence of losses is, in the absence of express or implied agreement, borne equally (*m*). When the profits are not shared equally, the losses are, in the absence of agreement, to be borne in the same proportions as the profits are shared (*n*), although additional capital may be contributed by one partner (*o*). The liability of a partner to contribute to losses may be limited or excluded by express or implied agreement (*p*), and will not necessarily be extended by the fact that the loss is mainly attributable to his acts (*q*).

Rights of deceased partner's legal personal representative.

125. The methods adopted during a partnership with regard to what is capital and what is income have been held, upon the construction of a deceased partner's will, to govern the interest of a deceased partner during the continuance of the business by his trustees or executors (*r*). Partners for a specific undertaking cannot compel the executor of a deceased partner to accept a valuation; he is entitled to a share of the profits found due on completion of the undertaking (*s*).

When interest payable.

126. Except as provided by statute (*t*), interest between partners is not allowed, unless there is an express stipulation, or a particular course of dealing between the partners as shown by the partnership books, or a trade custom to the contrary (*u*); but the

(*i*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 42 (1).

(*k*) *Ibid.*, s. 42 (2).

(*l*) *Dinham* v. *Bradford* (1869), 5 Ch. App. 519, 524; compare *Wood* v. *Scoles* (1866), 1 Ch. App. 369; *Binney* v. *Mutrie* (1886), 12 App. Cas. 160, P. C.; *Straker* v. *Wilson* (1871), 6 Ch. App. 503, 510; *Ibbotson* v. *Elam* (1865), L. R. 1 Eq. 188; *Pilsworth* v. *Mosse* (1862), 14 I. Ch. R. 163; *Garwood* v. *Garwood* (1911), 105 L. T. 231.

(*m*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (1).

(*n*) *Re Albion Life Assurance Society* (1880), 15 Ch. D. 79; affirmed, 16 Ch. D. 83, C. A.

(*o*) *Nowell* v. *Nowell* (1869), L. R. 7 Eq. 538.

(*p*) *Geddes* v. *Wallace* (1820), 2 Bli. 270, H. L.; see pp. 9, 22, *ante*.

(*q*) *Cragg* v. *Ford* (1842), 1 Y. & C. Ch. Cas. 280; and see the cases cited with regard to the right of a partner to indemnity, p. 60, *ante*.

(*r*) *Gow* v. *Forster* (1884), 26 Ch. D. 672. For instance, the conventional periods of accounting should, in the absence of agreement, be observed (*Browne* v. *Collins* (1871), L. R. 12 Eq. 586).

(*s*) *McClean* v. *Kennard* (1874), 9 Ch. App. 336.

(*t*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (3); see p. 60, *ante*.

(*u*) *Rishton* v. *Grissell* (1868), L. R. 5 Eq. 326; *Hill* v. *King* (1863), 3 De G. J. & Sm. 418; *Rhodes* v. *Rhodes* (1860), 6 Jur. (N. S.) 600; *Stevens* v. *Cook* (1859), 5 Jur. (N. S.) 1415; *Millar* v. *Craig* (1843), 6 Beav. 433; *Cooke* v. *Benbow* (1865), 3 De G. J. & Sm. 1, C. A.; *Boddam* v. *Ryley* (1783), 1 Bro. C. C. 239; (1785), 2 Bro. C. C. 2; (1787) 4 Bro. Parl. Cas. 561. In this last case no interest was allowed to the estate of a surviving partner who had kept

court allows interest on the restitution of money of the firm which has been expended or withheld by a partner, and of secret profits made by a partner in breach of good faith towards his partners (*r*).

SECT. 8. Division of Profits and Incidence of Losses.

SECT. 9.—*Accounts.*

127. Each partner, or his legal personal representative, is entitled to full information in relation to the partnership affairs and to accounts of the partnership dealings and funds from his partners (*a*). If a partner on retiring has left his capital in the business, reserving a right of access to the books, and liberty to call in his capital upon breach of provisions which are intended to satisfy him as to the continued solvency of the firm, his legal personal representative is, it seems, entitled to accounts at his discretion (*b*).

Right of partners: (1) to accounts;

128. Each partner is entitled to have access to and inspection of and to take copies of the firm's books personally (*c*) or, subject to reasonable limitations, by his agent (*d*). Such partner or agent is

(2) to inspection of books and documents.

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the accounts so badly that a considerable interval elapsed before the balances could be ascertained. Even if the articles provide for the payment of interest on capital, such interest will not be payable after the date of the dissolution unless so agreed (*Watney* v. *Wells* (1867), 2 Ch. App. 250; *Barfield* v. *Loughborough* (1872), 8 Ch. App. 1). Nor is a partner under such articles entitled to be credited with the amount of undivided profits as additional capital, and accordingly to receive interest thereon, unless they have been so treated in the partnership books or otherwise left in the business as capital by agreement (*Dinham* v. *Bradford* (1869), 5 Ch. App. 519). Under articles which provide for payment of interest on capital and also for payment of interest (instead of profits) on the value of the share of a deceased or retiring partner as it stands on the last account, the estate of a deceased partner has been held to be entitled to interest on his capital, and also interest on the value of his share instead of profits (*Browning* v. *Browning* (1862), 31 Beav. 316).

(*v*) *Evans* v. *Coventry* (1857), 8 De G. M. & G. 835, C. A.; *Hart* v. *Clarke* (1854), 6 De G. M. & G. 232, 254, C. A.; *Fawcett* v. *Whitehouse* (1829), 1 Russ. & M. 132; *York and North Midland Rail. Co.* v. *Hudson* (1853), 16 Beav. 485, 505; see also *Slainton* v. *Carron Co.* (1857), 24 Beav. 346, 362. But where accounts have not been asked for, or only demanded at irregular intervals, the accounting party will not be charged with interest on balances retained in his hands in the absence of any wilful withholding, or falsification of the accounts, or other fraudulent dealing with the money (*Turner* v. *Burkinshaw* (1867), 2 Ch. App. 488).

(*a*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 28; see *Habershon* v. *Blurton* (1847), 1 De G. & Sm. 121 (where the plaintiff's share and interest in the partnership were seized under a *fi. fa.*, and sold by the sheriff to a person, who sold to plaintiff's partner; held that plaintiff was entitled to an account, as there might be something coming to him which was not seizable by the sheriff).

(*b*) *Re Bennett, Jones* v. *Bennett*, [1896] 1 Ch. 778, C. A.

(*c*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 24 (9), 28; *Walmsley* v. *Walmsley* (1846), 3 Jo. & Lat. 556 (where the books were withheld, and the court allowed 10 per cent. as profits); *Taylor* v. *Rundell* (1841), 1 Y. & C. Ch. Cas. 128; *Re Martindale, Ex parte Trueman* (1832), 1 Deac. & Ch. 464 (where the assignees of a bankrupt partner obtained inspection of books which remained the property of both partners after dissolution, though a release had been executed); and see *Re Burnand, Ex parte Baker, Sutton & Co.*, [1904] 2 K. B. 68, C. A.

(*d*) *Bevan* v. *Webb*, [1901] 2 Ch. 59, C. A.

SECT. 9. Accounts.

bound to abstain from making improper use of information so obtained (*e*), and items not connected with the partnership business may be sealed up (*f*).

Books as evidence.

The partnership books are evidence for and against any of the partners in the absence of proof of any fraudulent or erroneous omission or insertion of items (*g*).

Order for production.

129. Where a partnership action is pending, books in daily use are usually ordered to be produced at the place of business, but production may be ordered in court where a party cannot be trusted with the custody of the books (*h*). A defendant partner may obtain production and inspection of the partnership books and documents before delivery of defence if they are in the plaintiff's hands and he cannot prepare his defence without such inspection (*i*); but, on an interlocutory application by a party whose status as a partner is disputed, production of books may be refused (*k*).

SECT. 10.—*Enforcement of Rights of Partners Inter se.*

SUB-SECT. 1.—*Parties to Partnership Actions.*

All partners must generally be parties or represented.

130. In an action for dissolution of partnership it is a general rule that all the partners who are within the jurisdiction must be before the court (*l*), especially where questions affecting the rights of the partners *inter se* (*m*), or the construction of the articles

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(*e*) *Trego* v. *Hunt*, [1896] A. C. 7, 26; compare *Mutter* v. *Eastern and Midlands Rail. Co.* (1888), 38 Ch. D. 92, C. A. As to production by partners who have allowed an executor to place his accounts in the general books, see *Freeman* v. *Fairlie* (1817), 3 Mer. 24, 43. The best account possible, without undue labour and expense, must be furnished. As to the sufficiency of answers to interrogatories with reference to books of account, see *Drake* v. *Symes* (1859), John. 647; and as to sufficiency of description of numerous documents for the purpose of production in an action of account, see *Christian* v. *Taylor* (1841), 11 Sim. 401, 405; and title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 60, note (*z*).

(*f*) *Re Pickering, Pickering* v. *Pickering* (1883), 25 Ch. D. 247, C. A.; see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 70, 71; and compare p. 46, *ante*.

(*g*) *Lodge* v. *Prichard* (1853), 3 De G. M. & G. 906, C. A.; and, for the general principle on which partnership books are evidence for and against all the partners, see *Hill* v. *Manchester and Salford Waterworks Co.* (1833), 2 Nev. & M. (K. B.) 573, *per* DENMAN, C.J., at p. 582; and see, generally, title EVIDENCE, Vol. XIII., p. 561.

(*h*) *Mertens* v. *Haigh* (1860), John. 735.

(*i*) *Pickering* v. *Rigby* (1812), 18 Ves. 484. The application is now by summons; see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 69.

(*k*) *Turney* v. *Bayley* (1864), 4 De G. J. & Sm. 332, C. A.; see *Turner* v. *Bayley* (1864), 34 Beav. 105. As to accounts and their production in an action, see pp. 70 *et seq.*, *post*.

(*l*) *Hills* v. *Nash* (1844), 1 Ph. 594; *Ireton* v. *Lewes* (1674), Cas. *temp.* Finch, 96; *Simpson* v. *Chapman* (1853), 4 De G. M. & G. 154, 167.

(*m*) *Long* v. *Yonge* (1830), 2 Sim. 369. Injunctions against breaches of the agreement between the partners, *e.g.*, against competitive trading, are dealt with elsewhere; see pp. 81, 83, *post*; see also title TRADE AND TRADE UNIONS.

of partnership (*n*), are raised. The legal personal representative of a deceased partner should be a party although the deceased partner's estate may be reputed to be insolvent (*o*); and generally, where there is a diversity of interest, all the partners should be parties to (*p*) or represented in the action (*q*).

Where parties may be represented by others.

Where, however, all the partners, or a section of them, have the same interest and are numerous, one or more may sue or be sued as representing the others similarly interested (*r*); and, generally, where an action is for the benefit of all the partners, that is, where there is a community of interest, all those having similar interests may be represented, either as plaintiffs or defendants, by one or more of their number (*s*), and, if the common interest seems open to doubt, the court may, it seems, give liberty to amend (*t*).

Persons who are not necessary parties.

Where two persons engage in the purchase of a joint cargo, but keep separate accounts with respect to each moiety, one of them is not a necessary party to an action for an account concerning

(*n*) *Baldwin* v. *Lawrence* (1824), 2 Sim. & St. 18; *Seddon* v. *Connell* (1840), 10 Sim. 58; *Cockburn* v. *Thompson* (1809), 16 Ves. 321.

(*o*) *Cox* v. *Stephens* (1863), 11 W. R. 929; compare *Seddon* v. *Connell, supra*; *Madox* v. *Jackson* (1747), 3 Atk. 405.

(*p*) *Evans* v. *Stokes* (1836), 1 Keen, 24; *Harvey* v. *Bignold* (1845), 8 Beav. 343; *Van Sandau* v. *Moore* (1826), 1 Russ. 441.

(*q*) *Attwood* v. *Small* (1838), 6 Cl. & Fin. 232; *Cramer* v. *Bird* (1868), L. R. 6 Eq. 143.

(*r*) R. S. C., Ord. 16, r. 9. This rule has been acted upon in an action for dissolution and winding up of the affairs of an unregistered (but not illegal) friendly society consisting of 439 members; see *Re Lead Co.'s Workmen's Fund Society, Lowes* v. *Governor & Co. for Smelting down Lead with Pit and Sea Coal*, [1904] 2 Ch. 196; title FRIENDLY SOCIETIES, Vol. XV., p. 190; see also *Wood* v. *McCarthy*, [1893] 1 Q. B. 775 (where the president and secretary of a labour protection league consisting of about 4,000 members were sued, and authorised, against their will, to defend on behalf of all the members); *Andrews* v. *Salmon*, [1888] W. N. 102; and see title COMPANIES, Vol. V., p. 319.

(*s*) *Cockburn* v. *Thompson, supra*; *Hichens* v. *Congreve* (1828), 4 Russ. 562; *Small* v. *Attwood* (1832), 1 You. 407; compare *Bedford (Duke)* v. *Ellis*, [1901] A. C. 1.

(*t*) *Bainbridge* v. *Burton* (1840), 2 Beav. 539. The cases under the old practice are not altogether uniform. A distinction was drawn between an action for an account after the partnership had come to an end (*Richardson* v. *Hastings* (1844), 7 Beav. 301; see *Duxbury* v. *Isherwood* (1864), 10 L. T. 712), and an action for dissolution (*Deeks* v. *Stanhope* (1844), 14 Sim. 57), or such an action for an account as was, in effect, an action for dissolution (*Abraham* v. *Hannay* (1843), 13 Sim. 581; compare *Seddon* v. *Connell, supra*; *Sibley* v. *Minton* (1857), 27 L. J. (CH.) 53). In the former case it was held that an action might be maintained by some partners on behalf of themselves and others: in the latter, it was held that all the partners, however numerous, were necessary parties. In *Beaumont* v. *Meredith* (1814), 3 Ves. & B. 180, it was held that all the members of a benevolent society must be parties to an action by some members against the trustees for an account, and in *Leigh* v. *Thomas* (1751), 2 Ves. Sen. 312, a demurrer was allowed to a bill by representatives of sixty-four out of eighty seamen (see also *Moffat* v. *Farquharson* (1788), 2 Bro. C. C. 338), while in *Good* v. *Blewitt* (1807), 13 Ves. 397, a bill by the captain of a ship on behalf of himself and the crew for an account of prize money was sustained; see also *Anon.* (1722), Prec. Ch. 592; *Taylor* v. *Salmon* (1838), 4 My. & Cr. 134; *Wallworth* v. *Holt* (1841), 4 My. & Cr. 619.

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the moiety of the other (*a*); and persons who have merely a contingent right to become partners should not be joined in an action for dissolution and accounts (*b*).

Effect of assignment of share.

131. The assignee of a share in a partnership is not, during the continuance of the partnership, a necessary party to an action against the other partners for an account, but after the dissolution of the partnership he may become so (*c*). The legal personal representative of a deceased partner may sue for accounts though he has assigned all the intestate's beneficial interest (*d*).

Purchase of deceased partner's share.

Where the share of a deceased partner is purchased by the surviving partners under a provision in the articles and the purchase money is allowed to remain in the business, contrary to the trusts of his will, all the partners who have notice of the trusts must be made defendants to an action by the beneficiaries claiming profits made by the employment of that money in trade, and not merely such of them as are trustees (*e*).

Mortgage of deceased's property to firm.

Where a partner creates an equitable mortgage upon the real estate of himself and a third party in favour of his firm and dies intestate, the firm cannot enforce the security without making his legal personal representative a party to the action (*f*).

Enforcement of debts after dissolution.

An action for a debt due to the partnership may, as a general rule, be brought by a surviving partner (*g*); and a surviving partner must be brought before the court in an action to enforce a partnership debt against the estate of his deceased partner (*h*).

Illegal adventure.

132. The subscribers to an illegal adventure which has not been carried out may recover their subscriptions, but they have no right to an account of dealings and profits (*i*).

Loss of rights by conduct.

133. A partner may by his conduct lose the right to have all the other partners before the court (*k*).

(*a*) *Weymouth* v. *Boyer* (1792), 1 Ves. 416; see also *Brown* v. *De Tastet* (1821), Jac. 284 (where an account was ordered between a partner and a sub-partner without making the other two principal partners parties to the action, one of them being ignorant of the sub-partnership, and the other out of the jurisdiction).

(*b*) *Ehrmann* v. *Ehrmann* (1894), 72 L. T. 17.

(*c*) See Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31. In *Williams* v. *Poole* (1873), 21 W. R. 252, an assignee, after dissolution, was held not to be a necessary party, being merely a "dry trustee" for a satisfied mortgagee. A sub-partner has no right to an account from the principal partnership, but only from the partner with whom he is a sub-partner; therefore the other partners are not necessary parties to an action against that partner; see *Re Slyth, Ex parte Barrow* (1815), 2 Rose, 252, 255; and note (*a*), *supra*.

(*d*) *Clegg* v. *Fishwick* (1849), 1 Mac. & G. 294 (where it was held that the effect of an assignment by an administratrix was to constitute her a trustee for the assignee).

(*e*) *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318, 335; compare *Pointon* v. *Pointon* (1871), L. R. 12 Eq. 547.

(*f*) *Scholefield* v. *Heafield* (1837), 7 Sim. 667.

(*g*) *Haig* v. *Gray* (1850), 3 De G. & Sm. 741.

(*h*) *Hills* v. *M'Rae* (1851), 9 Hare, 297 (where the surviving partner was ordered to attend before the master); see *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, 192, C. A.

(*i*) *Harvey* v. *Collett* (1846), 15 Sim. 332; see p. 18, *ante*.

(*k*) *Bodin* v. *Farquhar* (1822), 1 L. J. (O. S.) (CH.) 21.

SUB-SECT. 2.—*Actions for Fraud or Misrepresentation.*

(i.) *Inducing Partnership.*

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134. Fraud in the inception of a partnership agreement is a ground for the rescission of the agreement (*l*), and the fact that the plaintiff could have discovered the truth, for example, by examination of the partnership books, is not necessarily a bar to relief (*m*). Nor is the fact that there cannot be *restitutio in integrum* after the firm, in which the interest has been acquired, has become insolvent, an objection to the grant of relief (*n*). In a question of rescission of his contract by a partner, on the ground of fraud or misrepresentation, there is no analogy, in the case of such insolvency, between the case of an ordinary partnership and that of an incorporated company (*n*). The action by a defrauded partner against his fraudulent partner may be framed alternatively for rescission or dissolution (*o*).

Fraud invalidates an agreement though capable of discovery.

Misrepresentation without fraud is a sufficient ground for rescission, and the repayment of capital advanced (*p*) and premium paid (*a*).

Misrepresentation.

135. On the rescission of a partnership agreement on the ground of fraud or misrepresentation the innocent partner has the following rights:—(1) a lien on, or right of retention of, the surplus assets, after discharge of the partnership liabilities, for the money paid by him for his share and for any capital contributed by him; (2) a right of subrogation to the rights of the partnership creditors in respect of payments made by him to them; (3) a right to be indemnified by the guilty partner against the partnership debts and liabilities (*b*).

Rights of defrauded partner on rescission.

(*l*) *Beck* v. *Kantorowicz*, *Kantorowicz* v. *Carter*, *Kalb* v. *Kantorowicz* (1857), 3 K. & J. 230 (where one partner made a secret profit on the purchase of property for the partnership). But it is no defence to an action for damages for breach of an agreement to become a partner that the plaintiff has been guilty of fraud in another partnership (*Andrewes* v. *Garstin* (1861), 10 C. B. (N. S.) 444). For such an action generally, see *Figes* v. *Cutler* (1822), 3 Stark. 139; *Walker* v. *Harris* (1793), 1 Anst. 245. As to setting up a Statute of Limitation by way of defence to a claim for rescission, see title LIMITATION OF ACTIONS, Vol. XIX., p. 50.

(*m*) *Rawlins* v. *Wickham*, *Wickham* v. *Rawlins* (1858), 1 Giff. 355; compare *Riddell* v. *Smith* (1864), 12 W. R. 899 (where the plaintiff continued the partnership after discovery of misrepresentation), and *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, C. A. (where the contract of sale was rescinded and the deposit returned, but no damages were given); and see cases cited in title MISREPRESENTATION AND FRAUD, Vol. XX., p. 743, note (*d*). As to the nature of relief generally, see *ibid.*, pp. 742 *et seq.*

(*n*) *Adam* v. *Newbigging* (1888), 13 App. Cas. 308, *per* Lord WATSON, at p. 322; see title COMPANIES, Vol. V., p. 131; and compare title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 736, 737.

(*o*) *Bagot* v. *Easton* (1877), 7 Ch. D. 1, C. A.

(*p*) *Adam* v. *Newbigging*, *supra*.

(*a*) *Jauncey* v. *Knowles* (1859), 29 L. J. (CH.) 95.

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 41. These rights are "without prejudice to any other right of the innocent partner" (*ibid.*). This provision merely declares the previous law; see *Mycock* v. *Beatson* (1879), 13 Ch. D. 384; *Adam* v. *Newbigging*, *supra*, affirming S. C. (1886), 34 Ch. D. 582, C. A. On the question whether an indictment for obtaining money by false pretences will lie against a person who induces another by

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A person who is induced by fraud or misrepresentation to become a partner is liable to the partnership creditors in respect of all dealings taking place while he remains a partner and, in the event of bankruptcy of the partner by whom he was defrauded, will be allowed to prove for a premium paid on entering the partnership in competition with the separate creditors of the bankrupt partner, but not in competition with the joint creditors of the firm (*c*).

Liability of defrauded partner to firm's creditors.

(ii.) *On Sale of Shares.*

Instances of fraud or misrepresentation entitling to rescission.

136. The sale of the share of one partner to another, on the footing of a balance sheet prepared by the vendor's accountant and believed by both parties to be substantially correct, may be set aside on proof that the balance sheet was grossly inaccurate and placed too high a value on the assets (*d*). So a purchase of a partner's share, at an undervalue, by a partner who kept the books and knew and concealed from his partner the inadequacy of consideration, may be declared void and set aside (*e*). But this relief will not be given when there has been no fraud or oppression, especially after long delay (*f*).

A sale by the executors of a deceased partner to the surviving partners will be closely scrutinised by the court, but will be supported if no unfair advantage has been taken of the executors (*g*). If, however, the sale is at a gross undervalue, it will be set aside (*h*). A sale by the executors of a deceased partner to a surviving partner for the purpose of resale to one of the executors has been set aside (*i*).

SUB-SECT. 3.—*Accounts.*

Order for accounts, when made.

137. In an action by a partner, or a person claiming through him, for dissolution and winding up of the affairs of the partnership, the accounts (*k*) are usually directed at the trial; but an order for accounts may be made at any stage of the action (*l*).

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fraudulent representation to enter into partnership with him and advance money as capital, see *R.* v. *Watson* (1857), Dears. & B. 348, C. C. R.; and, as to this offence, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 698, note (*a*).

(*c*) *Re Hooper, Ex parte Broome* (1811), 1 Rose, 69, as explained in *Bury* v. *Allen* (1845), 1 Coll. 589, 598, n., 607. Although as against the guilty partner he may have "an equity to say that he never was a partner, it will be difficult to say so as against third parties" (*Re Hooper, Ex parte Broome, supra, per* Lord ELDON, L.C., at p. 71).

(*d*) *Charlesworth* v. *Jennings* (1864), 34 Beav. 96.

(*e*) *Maddeford* v. *Austwick, Austwick* v. *Maddeford* (1826), 1 Sim. 89; affirmed (1833), 2 My. & K. 279.

(*f*) *Knight* v. *Marjoribanks* (1848), 11 Beav. 322; approved in *Melbourne Banking Corporation* v. *Brougham* (1882), 7 App. Cas. 307, P. C.; *Re Lightoller, Ex parte Peake* (1816), 1 Madd. 346.

(*g*) *Chambers* v. *Howell* (1847), 11 Beav. 6; *Hordern* v. *Hordern*, [1910] A. C. 465, P. C.; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 297, 298.

(*h*) *Rice* v. *Gordon* (1848), 11 Beav. 265.

(*i*) *Cook* v. *Collingridge* (1823), Jac. 607.

(*k*) As to the right to an account, see pp. 65 *et seq.*, *ante*, and p. 74, *post*.

(*l*) *Turquand* v. *Wilson* (1875), 1 Ch. D. 85; see now R. S. C., Ord. 33, rr. 2—5; and, generally, see *ibid.*, Ord. 15. As to the time limit in an action for an account, see title LIMITATION OF ACTIONS, Vol. XIX., p. 171.

138. The court will not, as a general rule, order an account of partnership dealings unless the plaintiff also claims dissolution or alleges that the partnership is dissolved (*m*). But an account may be ordered without a claim for dissolution in a proper case, where a sufficient reason is shown for departing from the usual rule, for example, where a partner is trying to exclude his partner from some secret benefit or from the partnership, or to force him to a dissolution, or where there is a refusal to account, or where a limited account will meet the necessity or justice of the case (*a*).

When accounts ordered even where dissolution not specifically claimed.

In an action for administration of the estate of a deceased partner the ordinary direction for an account of debts includes equitable debts, and therefore includes a debt due by the estate of the deceased partner on his separate account with the partnership, and a surviving partner can claim such a debt as a creditor of the deceased and have it ascertained by the taking of a partnership account (*b*).

139. It is no objection to a claim for an account that the defendant partner has stolen or embezzled the partnership assets and has not been first prosecuted for the felony (*c*), or that taking the accounts involves the settlement of claims in the nature of unliquidated damages (*d*).

Circumstances insufficient to bar relief.

The court will direct an account in England of the transactions of a partnership business carried on abroad, as to which settled accounts have been established in the foreign court to the jurisdiction of which it is subject, if it be shown that the English partner has not been a party to the foreign proceedings, so that they are, as to him, *res inter alios acta* (*e*).

Concurrent remedy where business carried on abroad.

Although the court will not, as a rule, give its assistance to persons who carry on an illegal business, an account may be ordered against a defendant who asserts the illegality of the partnership (*f*). Thus, accounts of a bookmaking business have been ordered at the

Accounts of illegal business.

(*m*) *Forman* v. *Homfray* (1813), 2 Ves. & B. 329; *Knebell* v. *White* (1836), 2 Y. & C. (EX.) 15, 21; *Loscombe* v. *Russell* (1830), 4 Sim. 8; *Leyborne-Popham* v. *Spencer-Brown* (1893), 9 T. L. R. 309; *Richards* v. *Davies* (1831), 2 Russ. & M. 347; compare *Waters* v. *Taylor* (1808), 15 Ves. 10. With regard to actions for dissolution generally, and the circumstances in which such actions will be stayed, see pp. 90 *et seq.*, *post*.

(*a*) *Harrison* v. *Armitage* (1819), 4 Madd. 143 (where *Forman* v. *Homfray*, *supra*, was distinguished); *Richardson* v. *Hastings* (1844), 7 Beav. 301 (where the suit was brought to recover moneys and assets of the partnership, of which two members had possessed themselves); *Bentley* v. *Bates* (1840), 4 Y. & C. (EX.) 182 (where it was said by Lord ABINGER, C.B., that joint owners of a colliery are in the position of mercantile partners for some purposes only, and that the rule requiring a dissolution to be claimed was meant to apply only to mercantile partnerships); *Fairthorne* v. *Weston* (1844), 3 Hare, 387; *Chapple* v. *Cadell* (1822), Jac. 536; *Wallworth* v. *Holt* (1841), 4 My. & Cr. 619.

(*b*) *Paynter* v. *Houston* (1817), 3 Mer. 297; *Woolley* v. *Gordon* (1829), Taml. 11.

(*c*) *Roope* v. *D'Avigdor* (1883), 10 Q. B. D. 412.

(*d*) *Bury* v. *Allen* (1845), 1 Coll. 589.

(*e*) *Maunder* v. *Lloyd* (1862), 2 John. & H. 718 (in which case it appeared that all the assets of the English partner were in England, so that no payment out of them could have been enforced except by proceedings upon the foreign judgment); see also note (*h*), p. 74, *post*.

(*f*) *Sheppard* v. *Oxenford* (1855), 1 K. & J. 491.

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instance of an innocent partner who had not intended that the business should be carried on in an illegal manner by his partners (*g*).

Defences to action for an account.

140. The following may be good defences to a partner's action for an account: denial of partnership (*h*); illegality, fraud, or forfeiture under a power contained in the articles (*i*); laches (*k*); a Statute of Limitation (*l*); account stated (*m*); award, release by deed, or payment and acceptance of money under an agreement amounting to an accord and satisfaction (*n*).

Reopening settled accounts.

141. Though a settled account between the partners is a good ground of defence to an action for an account (*o*), the court may, in special circumstances, reopen the accounts or give liberty to surcharge and falsify (*p*). Settled accounts are not usually reopened *in toto*, except upon the ground of fraud, or numerous and important

(*g*) *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496; *Harvey* v. *Hart*, [1894] W. N. 72 (where betting was merely collateral to the partnership); but see *Thomas* v. *Dey* (1908), 24 T. L. R. 272, and the "highwaymen" case, *Everet* v. *Williams* (1725), L. R. 20 Eq. 230, n.

(*h*) As to discovery where the partnership is denied, see R. S. C., Ord. 31, rr. 6, 20; Irish R. S. C., Ord. 31, rr. 6, 19; and see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 52.

(*i*) *Hart* v. *Clarke* (1854), 6 De G. M. & G. 232, C. A.; affirmed *sub nom. Clarke and Chapman* v. *Hart* (1858), 6 H. L. Cas. 633.

(*k*) As to the effect of laches generally, see title EQUITY, Vol. XIII., pp. 168 *et seq.*; and see title LIMITATION OF ACTIONS, Vol. XIX., pp. 170, 172, 174.

(*l*) *Bridges* v. *Mitchell* (1726), Gilb. (CH.) 224; *Noyes* v. *Crawley* (1878), 10 Ch. D. 31; *Tatam* v. *Williams* (1844), 3 Hare, 347. An executor of a deceased partner may be barred by lapse of time (*Knox* v. *Gye* (1872), L. R. 5 H. L. 656; *Taylor* v. *Taylor* (1873), 28 L. T. 189; *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474, C. A.). But where the surviving partners, being the executors of their deceased partner, kept his share in the business and did not supply full information and accounts to the persons beneficially interested under his will, an account was directed against them at the suit of the beneficiaries after the lapse of thirty years (*Wedderburn* v. *Wedderburn* (1836), 2 Keen, 722; (1838) 4 My. & Cr. 41), and time will not run against the executors of a deceased partner so long as there are outstanding assets to be got in and the parties have dealt with one another upon the footing of the account being still open (*Millington* v. *Holland* (1869), 18 W. R. 184). Time does not run as between partners while the partnership continues (*Barton* v. *North Staffordshire Rail. Co.* (1888), 38 Ch. D. 458, *per* KAY, J., at p. 463; see title LIMITATION OF ACTIONS, Vol. XIX., p. 171).

(*m*) As to "account stated," see title CONTRACT, Vol. VII., pp. 489 *et seq.*

(*n*) *Brown* v. *Perkins* (1842), 1 Hare, 564. As to accord and satisfaction generally, see title CONTRACT, Vol. VII., pp. 441 *et seq.*

(*o*) As to pleading a settled account, see *Davies* v. *Davies* (1837), 2 Keen, 534.

(*p*) A single important error is sufficient, if fraudulent, to justify an order to open the whole account. If it is not fraudulent, the proper order is to give liberty to surcharge and falsify (*Gething* v. *Keighley* (1878), 9 Ch. D. 507, 510). Accounts will be reopened on the ground of fraud in spite of the existence of a stringent agreement against reopening (*Oldaker* v. *Lavender* (1833), 6 Sim. 239; *Sim* v. *Sim* (1861), 11 I. Ch. R. 310, 321). In *Barrow* v. *Barrow* (1872), 27 L. T. 431, goodwill had not been accounted for, and the account was in that respect and otherwise not in accordance with the terms of the articles. The mere fact that the claimant has already had an account rendered to him will not preclude him, in the absence of acquiescence, from having an account taken by the

errors, or mistakes affecting the whole account (*q*); otherwise the court will not usually do more than give liberty to surcharge and falsify (*r*). In the absence of fraud, accounts are not reopened in favour of a party who has stood by and acquiesced in them (*s*); but acquiescence in the principle of keeping an account does not amount to acquiescence in the accuracy of the items (*t*).

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Acquiescence.

142. Accounts must be taken according to the uniform practice of the firm (*a*), even if contrary to the method prescribed by the partnership deed (*b*); and, in the absence of agreement, the burden of establishing a system different from the ordinary method lies on the party who would gain by the varied system (*c*). The executors of a deceased partner are entitled to have his share ascertained on the basis of a balance sheet as prescribed by the articles although such balance sheet has not in fact been made out at the time of his death (*d*).

Basis on which accounts framed.

A partner is bound by the debit items of an account furnished by him, although the court may not accept his items on the credit side (*e*).

The whole partnership assets must be included in the accounts (*f*).

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court (*Irvine* v. *Young* (1823), 1 Sim. & St. 333; *Clements* v. *Bowes* (1853), 1 Drew. 684; *Hunter* v. *Belcher* (1863), 2 De G. J. & Sm. 194, C. A.; and compare titles AGENCY, Vol. I., p. 188; MISTAKE, Vol. XXI., p. 32; MORTGAGE, Vol. XXI., p. 216).

(*q*) *M'Kellar* v. *Wallace* (1853), 8 Moo. P. C. C. 378; *Pritt* v. *Clay* (1843), 6 Beav. 503; *Williamson* v. *Barber* (1877), 9 Ch. D. 529; *Gething* v. *Keighley* (1878), 9 Ch. D. 547, 550; see *Re Webb, Lambert* v. *Still*, [1894] 1 Ch. 73, 84, C. A.; compare *Maund* v. *Allies* (1840), 5 Jur. 860; *Laing* v. *Campbell* (1865), 36 Beav. 3.

(*r*) *Gething* v. *Keighley*, *supra*. Where a valuation was held to be merely incidental to the carrying out of the purchase of a deceased partner's share by a surviving partner, as provided for in the articles, the court allowed the account to stand, subject to correction on proof of error of a clear and convincing character (*Hordern* v. *Hordern*, [1910] A. C. 465, P. C.).

(*s*) *Scott* v. *Milne* (1841), 5 Beav. 215; (1843), 7 Jur. 709; *Cuthbert* v. *Edinborough* (1872), 21 W. R. 98; *Millar* v. *Craig* (1843), 6 Beav. 433.

(*t*) *Mosse* v. *Salt* (1863), 32 Beav. 269.

(*a*) *Binney* v. *Mutrie* (1886), 12 App. Cas. 160, P. C.; *Coventry* v. *Barclay* (1863), 33 Beav. 1; affirmed (1864), 3 De G. J. & Sm. 320; *Pettyt* v. *Janeson* (1819), Madd. & G. 146. The court will gather the intention of the parties from the combined effect of the articles and the usual practice of the firm (*Simmons* v. *Leonard* (1844), 3 Hare, 581; see also *Crosskill* v. *Bower*, *Bower* v. *Turner* (1863), 32 Beav. 86; *Re Barber*, *Ex parte Barber* (1870), 5 Ch. App. 687; *Garwood* v. *Garwood* (1911), 105 L. T. 231, C. A.).

(*b*) *Jackson* v. *Sedgwick* (1818), 1 Swan. 460; but see *Lawes* v. *Lawes* (1878), 9 Ch. D. 98 (where a parol agreement to vary the time fixed by the articles for settling accounts was held not to have been intended to affect the money interests of the partners). In the absence of special agreement, the practice of making annual rests, so as to allow interest on the balances credited to the partners, will not be continued after dissolution (*Barfield* v. *Loughborough* (1872), 8 Ch. App. 1, 7; and see title MORTGAGE, Vol. XXI., p. 228).

(*c*) This principle was recognised where a surviving partner, who carried on the business, claimed compound interest (*Bate* v. *Robins* (1863), 32 Beav. 73).

(*d*) *Hunter* v. *Dowling*, [1893] 3 Ch. 212, C. A., affirming S. C., [1893] 1 Ch. 391.

(*e*) *Morehouse* v. *Newton* (1849), 3 De G. & Sm. 307.

(*f*) An unsaleable asset should be valued. For instance, in accounts taken upon dissolution an unassignable contract held by one partner on

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Parties entitled to an account.

143. Not only a partner himself, but his legal personal representative or trustee in bankruptcy, may have an account against the other partner or his legal personal representative; but an assignee or mortgagee of a partner's share has no right to an account from the other partners during the continuance of the partnership, although on dissolution he becomes entitled to an account from the date of the dissolution (*g*). In special circumstances strangers to the partnership are entitled to an account (*h*); and the persons beneficially interested in the estate of a deceased partner, whose executor, being also a partner, uses the testator's assets in the business, are entitled to accounts from the executor, but not from the other partners unless they have notice of a breach of trust by the executor (*i*). But, where surviving partners deal with the property of their deceased partner, knowing it to belong to his estate, they are fixed with notice of the trust on which it is held (*k*).

When action for payment lies.

144. In a series of monthly accounts, in which the balances are not carried forward from one account to another, payment of the balance on the last account does not, it seems, bar an action for the payment of balances on preceding accounts (*l*); and when the partners, on dissolution, agree to divide the partnership property *in specie*, and one partner takes the whole according to a valuation, an

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behalf of the firm must be retained by him and valued as an asset (*Ambler* v. *Bolton* (1872), L. R. 14 Eq. 427); and see p. 63, *ante*, and p. 103, *post*.

(*g*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31.

(*h*) The following are instances in which this right has been recognised :— *Law* v. *Law* (1845), 2 Coll. 41 (where residuary legatees obtained an account, the executors of a deceased partner having agreed to purchase the shares of the other partners); *Pointon* v. *Pointon* (1871), L. R. 12 Eq. 547; *Newland* v. *Champion* (1748), 2 Coll. 46, n. (where a separate creditor of a deceased partner was plaintiff); *Millar* v. *Craig* (1843), 6 Beav. 433; *Cropper* v. *Knapman* (1836), 2 Y. & C. (EX.) 338; *Maunder* v. *Lloyd* (1862), 2 John. & H. 718; compare *Taylor* v. *Taylor* (1873), 28 L. T. 189.

(*i*) In order to ascertain what profits were made from a breach of trust of this kind Lord ELDON, L.C., ordered the executor to produce attested copies of books in the custody of the executor's partners or agents, who were not parties to the suit (*Freeman* v. *Fairlie* (1817), 3 Mer. 24, as explained in *MacDonald* v. *Richardson*, *Richardson* v. *Marten* (1858), 1 Giff. 81, 87; and see *Hue* v. *Richards* (1839), 2 Beav. 305; *Vyse* v. *Foster* (1872), L. R. 13 Eq. 602).

(*k*) *Travis* v. *Milne*, *Milne* v. *Milne* (1851), 9 Hare, 141. In *Hue* v. *Richards*, *supra*, *the* widow of a deceased partner who was beneficially interested under his will was held entitled to production of accounts from the testator's executors, one of whom was the surviving partner; and, generally, such an action may be maintained, whether the executor is a partner or not, "in all cases where the relation between the executors and the surviving partner is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners" (*Travis* v. *Milne*, *Milne* v. *Milne*, *supra*, *per* TURNER, V.-C., at p. 151; compare *Beningfield* v. *Baxter* (1886), 12 App. Cas. 167, P. C.; *Yeatman* v. *Yeatman*, (1877), 7 Ch. D. 210, commenting on *Bowsher* v. *Watkins* (1830), 1 Russ. & M. 277; and see *Davies* v. *Davies* (1837), 2 Keen, 534, 539).

(*l*) *Brierly* v. *Cripps* (1836), 7 C. & P. 709. One account is in the circumstances as final as any other; *secus*, if they have been intended to form part of one general account; see *Fromont* v. *Coupland* (1824), 2 Bing. 170.

action by the other partner for the amount payable to him may be maintained notwithstanding that the partnership accounts remain otherwise unadjusted (*m*).

Right of retainer.

145. A surviving partner who is also executor of his deceased partner has a right of retainer in respect of an unascertained balance owing by his testator to the partnership (*n*).

Indebtedness between partners only.

146. Partners are not, as regards partnership dealings, considered as debtor and creditor *inter se* until the concern is wound up or until there is a binding settlement of the accounts (*o*). It follows that one partner has no right of action against another for the balance owing to him until after final settlement of the accounts (*p*); but a partner may have a right of action against another for a debt which is independent of the partnership accounts (*q*).

Effect of dissolution and settlement of accounts.

147. Dissolution and mutual settlement of accounts are sufficient consideration for an implied promise to pay the balance, and no express promise is necessary to support an action for the same (*r*).

Payment into court.

148. When it can be shown by admissions or by a binding report, or at all events after judgment by a case of probability amounting to reasonable certainty, that a certain sum will be found due upon the taking of a partnership account, such sum may be ordered on motion to be paid into court (*s*); and money shown to have been

(*m*) *Jackson* v. *Stopherd* (1834), 2 Cr. & M. 361. "There may be special bargains by which particular transactions are insulated and separated from the winding up of the concern and are taken out of the general law of partnership" (*ibid.*, *per* BAYLEY, B., at p. 366; compare *Coffee* v. *Brian* (1825), 3 Bing. 54; *Lomas* v. *Bradshaw* (1850), 9 C. B. 620).

(*n*) *Re Morris's Estate, Morris* v. *Morris* (1874), 10 Ch. App. 68; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 258.

(*o*) *Richardson* v. *Bank of England* (1838), 4 My. & Cr. 165; *Bovill* v. *Hammond* (1827), 6 B. & C. 149; *Carr* v. *Smith* (1843), 5 Q. B. 128; *Clark* v. *Glennie* (1820), 3 Stark. 10; and as to the authority of a partner, who is appointed to wind up the partnership affairs, to settle the necessary accounts, see *Luckie* v. *Forsyth* (1846), 3 Jo. & Lat. 388.

(*p*) *Smith* v. *Barrow* (1788), 2 Term Rep. 476; *Fromont* v. *Coupland* (1824), 2 Bing. 170; *Prole* v. *Masterman* (1855), 21 Beav. 61; *Weston* v. *Abrahams* (1869), 20 L. T. 586. As to the *situs* of such cause of action when the business has been carried on by partners resident in different jurisdictions, see *Luchmeechund* v. *Mull* (1860), 3 L. T. 603, P. C.

(*q*) *Simpson* v. *Rackham* (1831), 5 Moo. & P. 612; *Worrall* v. *Grayson* (1836), 1 M. & W. 166.

(*r*) *Rackstraw* v. *Imber* (1861), Holt (N. P.). 368 (where the continuing partner sought unsuccessfully to attach conditions to his payment); *Moravia* v. *Levy* (1786), 2 Term Rep. 483, n. (where, however, there was an express promise to pay); *Foster* v. *Allanson* (1788), 2 Term Rep. 479, 483; compare *Wray* v. *Milestone* (1839), 5 M. & W. 21; and see, generally, title CONTRACT, Vol. VII., pp. 489 *et seq.*

(*s*) *London Syndicate* v. *Lord* (1878), 8 Ch. D. 84, C. A., *per* JESSEL, M.R., at p. 87; *Wanklyn* v. *Wilson* (1887), 35 Ch. D. 180; *Nutter* v. *Holland*, [1894] 3 Ch. 408, C. A.; *Freeman* v. *Cox* (1878), 8 Ch. D. 148 (where the defendant admitted that he had had the money of the firm in his hands); *Neville* v. *Matthewman*, [1894] 3 Ch. 345, C. A.; *Richardson* v. *Bank of England*, *supra* (where the motion was refused on the ground that the defendant not only did not admit the accuracy of the accounts, but disputed

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received by a partner improperly, or in breach of agreement or good faith, will be ordered to be paid into court (*t*).

Costs.

In case of misconduct.

149. The costs of taking accounts are, as a general rule, payable out of the partnership assets (*u*). But negligence or other misconduct by a partner renders him liable for the costs of an action as far as it has been occasioned thereby (*a*). If the partnership assets are not sufficient to pay the costs the partners must contribute in proportion to their shares after adjusting their rights in other respects (*b*); thus, partnership debts and liabilities, including debts and balances due to partners by the firm in respect of advances, take priority over the costs (*c*).

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numerous items in it); *Re Beeney, Ffrench* v. *Sproston*, [1894] 1 Ch. 499 (which shows that the admission may be oral only); *Hollis* v. *Burton*, [1892] 3 Ch. 226, C. A. (where an admission made in error was allowed to be withdrawn, but upon the terms of bringing money into court); *Gaskell* v. *Chambers* (No. 3) (1858), 26 Beav. 360; *Creak* v. *Capell* (1821), Madd. & G. 114 (motion on master's report after confirmation, but pending objections to it refused); compare *Toulmin* v. *Copland* (1837), 3 Y. & C. (EX.) 625, 643; and, generally, *Richardson* v. *Bank of England* (1838), 4 My. & Cr. 165.

(*t*) *Foster* v. *Donald* (1820), 1 Jac. & W. 252, followed in *Birley* v. *Kennedy* (1865), 6 New Rep. 395; *Re Benson, Elletson* v. *Pillers*, [1899] 1 Ch. 39; *Costeker* v. *Horrox* (1839), 3 Y. & C. (EX.) 530; *Jervis* v. *White* (1802), 6 Ves. 738. Money received by a partner on account of the partnership is not money received in a fiduciary capacity, and a partner is not liable to attachment under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4 (3), for disobeying an order to pay into court money in his hands belonging to the partnership (*Piddocke* v. *Burt*, [1894] 1 Ch. 343); see titles CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 301; EQUITY, Vol. XIII., p. 156.

(*u*) *Butcher* v. *Pooler* (1883), 24 Ch. D. 273, C. A. "An order for payment of costs out of the assets is a discretionary order within R. S. C., Ord. 55, and is not appealable" (*ibid.*, *per* BOWEN, L.J., at p. 280); *Jones* v. *Welch* (1855), 1 K. & J. 765; *Bonville* v. *Bonville* (1865), 35 Beav. 129; *Hamer* v. *Giles*, *Giles* v. *Hamer* (1879), 11 Ch. D. 942; *Austin* v. *Jackson* (1879), 11 Ch. D. 942, n.; *Newton* v. *Taylor* (1874), L. R. 19 Eq. 14 (where the accounts were settled under an award, in pursuance of an arbitration clause contained in the articles, and the costs were made payable out of the assets and in the same proportions as if the accounts had been taken by the court).

(*a*) *Hamer* v. *Giles*, *Giles* v. *Hamer*, *supra*; *Norton* v. *Russell* (1875), L. R. 19 Eq. 343 (where a defendant was ordered to pay costs up to hearing; he had admitted default in rendering accounts, but there was no allegation or denial that anything was due from him). In *Dean* v. *MacDowell* (1878), 8 Ch. D. 345, C. A., the plaintiffs obtained an account of alleged secret profits by a partner in another business; and by a supplemental bill claimed not only those profits, but the partner's whole interest in the business. The first claim was dismissed without costs as the defendant's conduct had been blameworthy, but the second claim was dismissed with costs as wholly unfounded.

(*b*) *Ross* v. *White*, [1894] 3 Ch. 326, C. A.

(*c*) *Rosher* v. *Crannis* (1890), 63 L. T. 272 (where funds had been voluntarily brought in after dissolution by a partner); *Potter* v. *Jackson* (1880), 13 Ch. D. 845 (where a balance was owing to a partner for rent of property occupied by the firm and for capital advanced by him); compare *Davy* v. *Scarth*, [1906] 1 Ch. 55 (where a partner, who had been appointed receiver, was held to be entitled to payment of his remuneration and costs in that capacity, although he was unable to pay a sum which he owed to his firm); and see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 44 (b) (2).

Jurisdiction to appoint receiver.

150. The court has jurisdiction to appoint a receiver (*d*) whenever it is just and convenient (*e*), on the application of any partner, whether plaintiff or defendant (*f*), or of other persons interested in the preservation of the partnership assets, such as the legal personal representatives of a deceased partner (*g*), especially where the surviving partner fails to get in the assets (*h*). The jurisdiction may be exercised although an agreement for reference to arbitration exists (*i*).

Appointment where dissolution inevitable or special grounds shown.

151. The court will not usually appoint a receiver on interlocutory motion before the trial of an action in which substantial issues are raised; but it will do so if the property is in danger (*k*), or if the partnership has been or is about to be dissolved, or if satisfied that special grounds, for example, misconduct, for such appointment exist (*l*).

Circumstances which justify appointment:—

(1) misconduct;

Danger to the property is always a ground for the appointment (*m*). Thus the court will appoint a receiver, although the partnership is not dissolved, where a partner is guilty of such breaches of his duty as a partner as would, if proved at the hearing, entitle his partner to a dissolution (*n*), or of embezzling the assets (*o*),

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(*d*) As to receivers and the appointment of receivers generally, see title RECEIVERS; compare titles COMPANIES, Vol. V., pp. 376 *et seq.*; MORTGAGE, Vol. XXI., pp. 261 *et seq.*

(*e*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); see Lindley, Law of Partnership, 8th ed., pp. 610—623.

(*f*) *Katsch* v. *Schenck* (1849), 13 Jur. 668.

(*g*) *Davis* v. *Amer* (1854), 3 Drew. 64.

(*h*) *Estwick* v. *Coningsby* (1683), 1 Vern. 118.

(*i*) *Machin* v. *Bennett*, [1900] W. N. 146; see also *Pini* v. *Roncoroni*, [1892] 1 Ch. 633; *Law* v. *Garrett* (1878), 8 Ch. D. 26, C. A.; *Plews* v. *Baker* (1872), L. R. 16 Eq. 564; and see title ARBITRATION, Vol. I., p. 454.

(*k*) *Bowker* v. *Henry* (1862), 6 L. T. 43; *Fairburn* v. *Pearson* (1850), 2 Mac. & G. 144 (where an issue was directed whether the partnership had been dissolved or not); *Chapman* v. *Beach* (1820), 1 Jac. & W. 594 (where the existence of a partnership was denied).

(*l*) *Smith* v. *Jeyes* (1841), 4 Beav. 503; *Waters* v. *Taylor* (1808), 15 Ves. 10, 28; *Roberts* v. *Eberhardt* (1853), Kay, 148; *Goodman* v. *Whitcomb* (1820), 1 Jac. & W. 589; *Baxter* v. *West* (1858), 28 L. J. (CH.) 169 (where a receiver was refused as it was not clear that the partnership might not still subsist); *Carlen* v. *Drury* (1812), 1 Ves. & B. 154. Dissolution *per se* was not formerly considered sufficient ground for the appointment of a receiver without some breach of duty (*Harding* v. *Glover* (1810), 18 Ves. 281), but this view is scarcely consistent with recent cases, which seem to show that, in the case of a dissolved partnership, the appointment of a receiver is almost of course. In *Const* v. *Harris* (1824), Turn. & R. 496, a receiver was appointed, with limited duties, to carry out a previous arrangement between the partners; and in *Hall* v. *Hall* (1850), 3 Mac. & G. 79, Lord TRURO, L.C., at p. 90, said, of *Const* v. *Harris*, *supra*, that it was a peculiar case. The receiver there had a simple duty to perform, which might be considered purely ministerial. He was to receive the entrance moneys of a theatre and apply them according to the previous arrangement between the parties till the hearing of the cause.

(*m*) *Evans* v. *Coventry* (1854), 5 De G. M. & G. 911, C. A., reversing S. C., 3 Drew. 75; compare *Sheppard* v. *Oxenford* (1855), 1 K. & J. 491.

(*n*) *Smith* v. *Jeyes*, *supra*.

(*o*) *Oliver* v. *Hamilton* (1794), 2 Anst. 453.

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or of excluding his partner (*p*), or where a surviving partner insists on continuing the business with the assets of the deceased partner (*q*), or fails to get in the outstanding debts, or otherwise acts to the prejudice of the assets (*a*), or where an acting partner claims the whole property for himself (*b*), or where a new firm, being interested in giving long credit to the debtors of the old firm, forbears to press them (*c*). On the other hand, in the absence of misconduct or danger to the assets, a receiver will not be appointed unless dissolution is inevitable (*d*).

(2) danger to asset;

(3) where all partners dead.

The court will readily appoint a receiver where all the partners are dead, as there is not the same mutual confidence between the personal representatives of partners as between the partners themselves (*e*).

Limits of jurisdiction.

152. The court will not appoint a receiver for a purpose, neither authorised nor assented to by the partners, which it could not authorise one partner to carry out against the will of the others (*f*).

A partner may be appointed.

153. The order frequently gives liberty to each partner to propose himself as receiver (*g*). A solvent partner will ordinarily be appointed receiver for the purpose of winding up the affairs of the firm where the others are bankrupt and there is no reason for distrusting him (*h*). But the court will direct him to give security, furnish accounts, and allow access to and inspection of the partnership books by the trustee in bankruptcy, and may order him to pay balances in excess of a stated amount into court or into a joint banking account of himself and the trustee. This right of the solvent partner to wind up the affairs of the partnership is a personal

Nature of right of partner to be appointed.

(*p*) *Wilson* v. *Greenwood* (1818), 1 Swan. 471; *Blakeney* v. *Dufaur* (1851), 15 Beav. 40.

(*q*) *Madgwick* v. *Wimble* (1843), 6 Beav. 495.

(*a*) *Estwick* v. *Conningsby* (1682), 1 Vern. 118; and see *Young* v. *Bucket* (1882), 30 W. R. 511.

(*b*) *Hale* v. *Hale* (1841), 4 Beav. 369. In an action for an injunction to restrain the defendant from drawing out of partnership funds more than the stipulated amount, and for a receiver, a receiver was appointed, pending a reference to arbitration, although there was no claim for dissolution of partnership (*Medwin* v. *Ditcham* (1882), 47 L. T. 250).

(*c*) *Collinridge* v. *Cook* (1837), 1 Jur. 771.

(*d*) *Lawson* v. *Morgan* (1815), 1 Price, 303; a manager may, however, be appointed (*Tippetts* v. *Phillips* (1853), 1 W. R. 163). In a mining partnership a receiver has been refused against a tenant in common, where the plaintiff had stood by and the mine proved profitable, and the defendant had incurred expenditure (*Norway* v. *Rowe* (1812), 19 Ves. 144; and see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 513, 5 4); and against a partner who was also an unsatisfied mortgagee (*Rowe* v. *Wood* (1822), 2 Jac. & W. 553). Mere disagreement and want of co-operation between the partners is not sufficient ground for the appointment of a receiver (*Roberts* v. *Eberhardt* (1853), Kay, 148); compare *Jefferys* v. *Smith* (1820), 1 Jac. & W. 298; and see, generally, title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 511 *et seq.*

(*e*) *Philips* v. *Atkinson* (1787), 2 Bro. C. C. 272.

(*f*) *Niemann* v. *Niemann* (1889), 43 Ch. D. 198, 202, C. A.

(*g*) *Blakeney* v. *Dufaur* (1851), 15 Beav. 40; compare *Pini* v. *Roncoroni*, [1892] 1 Ch. 633, 637; *Sargant* v. *Read* (1876), 1 Ch. D. 600; 1 Seton, Judgments and Orders, 6th ed., p. 760.

(*h*) *Re Upperton, Ex parte Stoveld* (1823), 1 Gl. & J. 303; *Collins* v. *Barker*, [1893] 1 Ch. 578.

right, belonging to him in his character of partner, and cannot be transferred to a stranger; therefore the court will appoint a receiver on the application of the trustee of the bankrupt partner as against the purchaser of a solvent partner's share (*i*). A retired partner who is liable for the debts of the firm may be appointed receiver (*k*).

154. A receiver and manager, carrying on the business pending sale, may enter into such new contracts as are necessary for carrying on the business in the mode usual in the particular trade (*l*). A receiver is not the agent of the partnership, but acts on his own responsibility, and incurs personal liability for orders given and contracts made by him, subject to a right of indemnity out of the assets in respect of all proper transactions (*m*). Against the partners personally, however, a receiver appointed by the court has no right of indemnity (*n*).

Powers of receiver and manager.

Liability of receiver.

Interference with a receiver is a contempt of court (*o*), and may be restrained by injunction (*p*) or punished by committal (*q*).

Interference with receiver

There is no fixed rule with regard to the amount of remuneration of a receiver and manager; each case depends on its own circumstances (*r*). A partner appointed receiver with remuneration is entitled to be paid although he may be indebted to the firm (*s*).

Remuneration of receiver.

In the absence of an express covenant, a receiver and manager who is *functus officio* will not be restrained from carrying on a similar business on his own account (*t*).

Receiver not restrained from subsequent competition.

(*i*) *Fraser* v. *Kershaw* (1856), 2 K. & J. 496.

(*k*) *Hoffman* v. *Duncan* (1853), 18 Jur. 69.

(*l*) *Taylor* v. *Neate* (1888), 39 Ch. D. 538, 543 (where, however, a limit for the amount of such contracts was fixed which the receiver might not exceed without the consent of the partners or the court). It is not unusual to limit a period during which a receiver and manager may act as manager, with liberty to apply to the court on the expiration of that period; see 1 Seton, Judgments and Orders, 6th ed., pp. 756, 757.

(*m*) *Burt, Boulton and Hayward* v. *Bull*, [1895] 1 Q. B. 276, C. A.; *Boehm* v. *Goodall*, [1911] 1 Ch. 155; compare title COMPANIES, Vol. V., p. 379.

(*n*) *Boehm* v. *Goodall*, *supra*. As to the effect of payments by a receiver so far as Statutes of Limitation are concerned, see title LIMITATION OF ACTIONS, Vol. XIX., p. 79.

(*o*) *Freeland* v. *Stansfeld* (1854), 2 Sm. & G. 479; *Helmore* v. *Smith* (2) (1886), 35 Ch. D. 449, C. A. (where a former clerk sent a circular soliciting business to customers of the firm); *King* v. *Dopson* (1911), 56 Sol. Jo. 51 (where circulars were issued to the effect that the original undertaking was no longer carried on; and see title INJUNCTION, Vol. XVII., p. 250). Judgment creditors should not levy execution against property of which a receiver has been appointed without the leave of the court (*Lane* v. *Sterne* (1862), 3 Giff. 629; *Defries* v. *Creed* (1865), 13 W. R. 632). In a proper case the court will give liberty to the receiver to pay the judgment debt (*Mitchell* v. *Weise, Ex parte Friedheim*, [1892] W. N. 139) or give the applicants a charging order on the assets (*Armstrong* v. *Paris* (1888), 4 T. L. R. 247; and see title EXECUTION, Vol. XIV., p. 11).

(*p*) *Dixon* v. *Dixon*, [1904] 1 Ch. 161; compare *Kitcat* v. *Sharp* (1882), 31 W. R. 227.

(*q*) *King* v. *Dopson*, *supra*. For procedure for committal, see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 309 *et seq.*

(*r*) *Prior* v. *Bagster* (1887), 57 L. T. 760; *Day* v. *Croft* (1840), 2 Beav. 488; *Harris* v. *Sleep*, [1897] 2 Ch. 80; see title RECEIVERS.

(*s*) *Davy* v. *Scarth*, [1906] 1 Ch. 55.

(*t*) *Re Irish, Irish* v. *Irish* (1889), 40 Ch. D. 49.

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SUB SECT. 5.—*Injunctions.*

(i.) *In a Going Concern.*

Jurisdiction to grant injunction.

155. The court may grant an injunction whenever it appears just or convenient (*a*); and will do so, at the instance of a partner, to restrain any other partner from acting contrary to the obligations imposed upon him by the partnership relationship, whether such acts are an actual breach of express stipulations or a breach of that good faith which is the implied duty of every partner.

Position of partner claiming injunction.

156. The plaintiff who claims an injunction against excluding him from the partnership must be a partner and not a servant of the firm (*b*), and must be in a position to perform his own part of the partnership contract (*c*).

Claim for dissolution, when necessary.

Exclusion of partner.

157. In the case of a partnership for a fixed term (*d*) it is not necessary that a partner who claims an injunction should also claim a dissolution (*e*); but, as a general rule, an interlocutory injunction is not granted unless the plaintiff can show facts which, if proved at the trial, would entitle him to a dissolution (*f*). The exclusion of one partner by the others from the management of the business will be restrained, though dissolution is not claimed (*g*).

Grounds for relief.

158. A partner may be restrained by injunction from entering into a new partnership with others for carrying on a business of the same nature and character as the old partnership before the expiration of the term of the old partnership, from publishing notices of dissolution, and from using the firm name of the old partnership in his new business (*h*); and generally, from carrying

(*a*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); R. S. C., Ord. 50, r. 6. It must be just as well as convenient (*Beddow* v. *Beddow* (1878), 9 Ch. D. 89. *per* JESSEL, M.R., at p. 93; *Day* v. *Brownrigg* (1878), 10 Ch D. 294, 307, C. A.); and see title INJUNCTION, Vol. XVII., pp. 202 *et seq.*, 249, 250; and see Lindley, Law of Partnership, 8th ed., pp. 603—610.

(*b*) *Walker* v. *Hirsch* (1884), 27 Ch. D. 460.

(*c*) *Smith* v. *Fromont* (1818), 2 Swan. 330; *Const* v. *Harris* (1824), Turn. & R. 496, 524. As to the effect of active misconduct, or acquiescence in the misconduct of another, on the part of the applicant for relief, see title INJUNCTION, Vol. XVII., p. 250; and as to the general principle involved, see *ibid.*, pp. 219 *et seq.*; and see title EQUITY, Vol. XIII., pp. 70, 71.

(*d*) As to whether it is necessary to claim dissolution in the case of a partnership at will, see title INJUNCTION, Vol. XVII., pp. 249, 250.

(*e*) *Fairthorne* v. *Weston* (1844), 3 Hare, 387; *Watney* v. *Trist* (1876), 45 L. J. (CH.) 412; *Richardson* v. *Hastings* (1844), 7 Beav. 301.

(*f*) *Smith* v. *Jeyes* (1841), 4 Beav. 503. Differences of opinion, even though they may develop into actual quarrels, are not enough to induce the court to interfere between partners in a going concern. There must be some definite act amounting to breach of faith, breach of the partnership contract, illegality or insolvency, or such gross misconduct as to imperil the business or to prevent it from being properly conducted; and in such cases the conduct complained of would usually be enough to enable the plaintiff to obtain judgment for dissolution if he desired, and framed his action with a view to, that relief; see cases cited in title INJUNCTION, Vol. XVII., p. 250, note (*g*); *Lemann* v. *Berger* (1876), 34 L. T. 235.

(*g*) *Hall* v. *Hall* (1850), 12 Beav. 414. In *Anon.* (1856), 2 K. & J. 441, a dissolution was claimed.

(*h*) *England* v. *Curling* (1844), 8 Beav. 129.

on a business on his own account in the firm name (*i*), or with partnership assets (*k*); from using the assets of the firm in a separate business carried on for his own benefit (*l*); from altering the partnership property without the consent of his partner (*m*); or from drawing, accepting, or negotiating bills of exchange for his own purposes in the name of the firm (*n*).

So a partner may be restrained from writing plays for a rival theatre, contrary to a stipulation in the partnership deed (*o*); from using partnership assets for the renewal of a lease against the will of his partner (*p*); from using or granting licences to use a patent belonging to the partnership without the consent of the other partners (*q*); or, generally, from such conduct in the management of the business as would render it impossible for the business to be carried on in a proper manner, or would cause irreparable injury to it (*r*).

Matters outside partnership relationship.

159. But an injunction will not be granted in respect of matters not falling within the express or implied obligations of the partnership agreement (*s*); nor in respect of a possible breach of the articles which may never happen at all and cannot happen till a future period (*t*).

Injunction against third party.

160. Partners may obtain an injunction to restrain a trader from carrying on business so as to suggest, contrary to the fact, that he is their partner or agent and so expose them to a risk of litigation or responsibility (*a*).

(ii.) *In Relation to Dissolution.*

Injunctions ancillary to dissolution.

161. After dissolution, or during an action for dissolution, of partnership, the court will interfere by injunction, if necessary or

(*i*) *Aas* v. *Benham*, [1891] 2 Ch. 244, C. A.

(*k*) *Turner* v. *Major* (1862), 3 Giff. 442.

(*l*) *Gardner* v. *M'Cutcheon* (1842), 4 Beav. 534; see *Glassington* v. *Thwaites* (1823), 1 Sim. & St. 124 (where all the partners of a firm were proprietors of a morning newspaper and had agreed not to be concerned in any other morning paper, and some of them afterwards became proprietors of an evening newspaper, a general injunction to restrain competition, applied for by a partner interested in the morning paper only, was refused, the mere temptation of his partners to betray their duty to the morning paper not being sufficient ground for interference to such extent by the court; but a limited injunction was granted to restrain his partners from publishing news obtained at the expense of the firm in the evening paper before such news had appeared in the morning paper); see also *Turner* v. *Major* (1862), 3 Giff. 442.

(*m*) *Elmslie* v. *Beresford*, [1873] W. N. 152.

(*n*) Holders with notice may also be restrained from negotiating such bills (*Hood* v. *Aston* (1826), 1 Russ. 412; see also *Jervis* v. *White* (1802), 7 Ves. 413).

(*o*) *Morris* v. *Colman* (1812), 18 Ves. 437.

(*p*) *Clements* v. *Norris* (1878), 8 Ch. D. 129, C. A.

(*q*) *Blachford* v. *Hawkins* (1823), 1 L. J. (O. S.) (CH.) 141.

(*r*) *Anderson* v. *Wallace* (1826), 2 Mol. 540; *Francis* v. *Spittle* (1840), 9 L. J. (CH.) 230.

(*s*) *Glassington* v. *Thwaites*, *supra*.

(*t*) *Coates* v. *Coates* (1821), Madd. & G. 287.

(*a*) *Walter* v. *Ashton*, [1902] 2 Ch. 282.

SECT. 10. **Enforcement of Rights of Partners Inter se.**

desirable, to preserve the assets, or to restrain any act by a partner which would interfere with the rights of the other partners, or with the systematic and equitable winding up of the business, by causing loss or depreciation of the assets or otherwise: thus a lunatic partner will be restrained from interfering to the prejudice of the business (*b*), but a partner who has been temporarily insane will not be restrained from interfering, pending an inquiry into his state of mind at the time when his partners ask for dissolution (*c*).

Interference with business.

Improper carrying on of business.

A partner will be restrained from carrying on the business except for the purpose of winding it up (*d*); from carrying on a branch of the partnership business with partnership assets for his own benefit (*e*); from getting in debts owing to the firm (*f*), or other assets, especially if he has dealt, or is likely to deal, improperly with them (*g*); or from selling his share to a stranger if his partners are entitled, by contract, to an option to buy it (*h*).

Wrongful dealing with assets.

A partner will be restrained from taking undue advantage of his legal title to eject a partner, or the legal personal representatives of a deceased partner, from property held by him in trust for the firm (*i*), or from applying the firm's assets for his own purposes, for example, from dealing with a partnership lease as his own property (*k*). So the executors of a deceased partner may be restrained from dealing with a renewed lease otherwise than as partnership property (*l*).

Removal of books.

An injunction will be granted to restrain a partner from removing the partnership books from the place of business and keeping them elsewhere, though it amounts to an order to bring them back (*m*).

Trade secret.

The court will restrain the publication of a trade secret where the information has been obtained through a partner's breach of contract or duty (*n*).

(*b*) *J.* v. *S*, [1894] 3 Ch. 72; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 443.

(*c*) *Anon.* (1856), 2 K. & J. 441; see *Jones* v. *Lloyd* (1874), L. R. 18 Eq. 265.

(*d*) *De Tastet* v. *Bordenave* (1822), Jac. 516.

(*e*) *Turner* v. *Major* (1862), 3 Giff. 442: see *Re David and Matthews*, [1899] 1 Ch. 378, 382.

(*f*) *Read* v. *Bowers* (1793), 4 Bro. C. C. 441.

(*g*) *O'Brien* v. *Cooke* (1871), 5 I. R. Eq. 51; *Hartz* v. *Schrader* (1803), 8 Ves. 317.

(*h*) *Homfray* v. *Fothergill* (1866), L. R. 1 Eq. 567.

(*i*) *Hawkins* v. *Hawkins* (1858), 4 Jur. (N. S.) 1044.

(*k*) *Elliot* v. *Brown* (1791), 3 Swan. 489, n.

(*l*) *Alder* v. *Fouracre* (1818), 3 Swan. 489; see *Re Biss, Biss* v. *Biss*, [1903] 2 Ch. 40, 57, 61, C. A. But the lessor will not be restrained from granting the renewed lease.

(*m*) *Greatrex* v. *Greatrex* (1847), 1 De G. & Sm. 692; see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (9).

(*n*) *Morison* v. *Moat* (1852), 21 L. J. (CH.) 248, C. A., affirming S. C. (1851), 9 Hare, 241; followed and applied in the following cases of master and servant or principal and agent:—*Tuck & Son* v. *Priester* (1887), 19 Q. B. D. 629, C. A.; *Lamb* v. *Evans*, [1893] 1 Ch. 218, C. A.; *Robb* v. *Green*, [1895] 2 Q. B. 315, C. A. In *Morison* v. *Moat*, *supra*, the defendant was a volunteer. Different considerations would arise if the defendant were a purchaser for value of the secret without notice of any obligations

162. After dissolution, if the assets are divided between the partners, each of them is entitled, in the absence of contrary agreement, to use the name of the old firm, unless the other partners would thereby be exposed to a risk of litigation or responsibility; and an injunction will not be granted to restrain such use (*o*), unless it exposes the other partners to risk of liability (*p*). Whether this danger exists depends on the circumstances of the case (*q*).

Injunctions after dissolution.

Although the court has refused to restrain a surviving partner, who was also executor and trustee of a deceased partner, from carrying on a similar business, a surviving partner must not carry on a rival business so as to lead to the belief that it is the partnership business, and so appropriate the goodwill of the business (*r*).

Use of firm name.

Competing business.

Where, on dissolution, the goodwill of the business becomes the property of one of the partners, another partner will not be restrained from stating that he was formerly a partner in the old firm, but he will be restrained from using the name of the firm so as to suggest that he is carrying on the old business (*a*); and a continuing partner, who has purchased the assets, but not the goodwill, *nominatim*, may be restrained from using, in the style of the firm, the name of his former partner (*b*).

Trade name.

If two partners have agreed that, on dissolution of the partnership, the goodwill shall belong solely to one of them, the other will be restrained from doing anything calculated to depreciate its value. Accordingly, although he may, in the absence of contrary agreement, do business with the customers of the old firm, he will be restrained from canvassing them and from soliciting them either to deal with him or not to deal with the purchasing partner (*c*).

Conduct tending to depreciate goodwill.

Solicitation of old customers.

affecting it (*Morison* v. *Moat* (1851), 9 Hare, 241, 263); and see titles INJUNCTION, Vol. XVII., pp. 254, 255; MASTER AND SERVANT, Vol. XX., p. 126. But an injunction to restrain publication, by a partner, of a book explanatory of a patent which belonged to the partnership was refused, as publication was not likely to injure or endanger the patent (*Blachford* v. *Hawkins* (1823), 1 L. J. (o. s.) (CH.) 141).

(*o*) *Banks* v. *Gibson* (1865), 34 Beav. 566. As to trade names, see title TRADE MARKS, TRADE NAMES, AND DESIGNS.

(*p*) *Webster* v. *Webster* (1791), 3 Swan. 490, n.

(*q*) *Burchell* v. *Wilde*, [1900] 1 Ch. 551, 564, C. A. (where the court held that the risk was "not substantial in any business sense"); *Townsend* v. *Jarman*, [1900] 2 Ch. 698; see *Gray* v. *Smith* (1889), 43 Ch. D. 208, C. A.; *Chappell* v. *Griffith* (1885), 53 L. T. 459; compare *Lewis* v. *Langdon* (1835), 7 Sim. 421 (where an injunction was granted against the executor of a deceased partner), and *Hill* v. *Fearis*, [1905] 1 Ch. 466; and see *Levy* v. *Walker* (1879), 10 Ch. D. 436, C. A.

(*r*) *Davies* v. *Hodgson* (1857), 25 Beav. 177, 182, 183; *Re David and Matthews*, [1899] 1 Ch. 378, 383. Where a surviving partner bought his deceased partner's share of the trade property from his executors, a legatee of a share of the deceased partner's goodwill was held not entitled to enforce a sale of the goodwill (*Roberston* v. *Quiddington* (1860), 28 Beav. 529).

(*a*) *Hookham* v. *Pottage* (1872), 8 Ch. App. 91, compare *Matthews* v. *Hodgson* (1886), 2 T. L. R. 899, C. A.

(*b*) *Scott* v. *Rowland* (1872), 20 W. R. 508.

(*c*) *Trego* v. *Hunt*, [1896] A. C. 7, approving *Labouchere* v. *Dawson* (1872), L. R. 13 Eq. 322, and *Leggott* v. *Barrett* (1880), 15 Ch. D. 306, C. A.; applied in *Jennings* v. *Jennings*, [1898] 1 Ch. 378; *Gillingham* v. *Beddow*, [1900] 2 Ch. 242. By the exercise of this jurisdiction, a partner who has become entitled by contract to the goodwill is placed in the same position as any other purchaser of the goodwill of a business; compare *Churton*

SECT. 10. **Enforcement of Rights of Partners Inter se.**

But the restriction from canvassing does not apply to a partner expelled under a power in the articles (who, however, must not carry on the business as the business of the old firm), nor to a purchaser from the trustee in bankruptcy of a bankrupt partner (*d*).

If a partner, who has sold his share of the business to his partners, has undertaken not to compete with them, he will be restrained by injunction from acting contrary to such undertaking (*e*). But where a vendor has aided his wife in subsequently commencing a similar business with her separate property, the court may refuse to restrain the vendor from breach of an agreement not to carry on or be interested in any similar business (*f*).

Breach of agreement against competition.

Injunctions against partners who are purchasers of shares.

163. Where a partner has agreed to buy his partner's share of the business, the court may refuse, pending an action for specific performance of the agreement, to restrain him from publishing the accounts of the business with a view to its resale to a company (*g*). If a partner who has agreed to buy his partner's share carries on the business with the whole assets, without paying the purchase-money, the vendor's remedy is not by an injunction but by an action for an account, unless the purchaser commits acts of waste (*h*).

Publication of discontinuance of connection.

164. On dissolution a partner may be restrained from advertising that a publication belonging to the partnership, which ought to be sold as an asset, will be discontinued, but not from advertising the discontinuance of his connection with it (*i*).

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v. *Douglas* (1859), John. 174; *Cruttwell* v. *Lye* (1810), 17 Ves. 335 (where Lord ELDON, L.C., gave a definition of "goodwill" which is now regarded as too narrow; see *Trego* v. *Hunt*, [1896] A. C. 7, 17, 23, 27); *Curl Brothers, Ltd.* v. *Webster*, [1904] 1 Ch. 685; see also titles INJUNCTION, Vol. XVII., p. 249; TRADE AND TRADE UNIONS.

(*d*) *Dawson* v. *Beeson* (1882), 22 Ch. D. 504, 507, C. A.; *Walker* v. *Mottram* (1881), 19 Ch. D. 355, C. A.; see *Mogford* v. *Courtenay* (1881), 45 L. T. 303.

(*e*) *Turner* v. *Evans* (1852), 2 De G. M. & G. 740, C. A.; *Williams* v. *Williams* (1818), 2 Swan. 253; compare *Clifford* v. *Phillips* (1907), 51 Sol. Jo. 748. So, too, a breach of a mere undertaking not to compete, upon which an arbitrator has acted in fixing the price of the goodwill, has been restrained upon the ground of fraud and bad faith, although the award was silent with regard to the restriction (*Harrison* v. *Gardner* (1817), 2 Madd. 198). See *Dean* v. *MacDowell* (1878), 8 Ch. D. 345, C. A. (where it was held that the remedy for breach of covenant not to engage in business except for the benefit of the partnership is by action for an injunction or dissolution; and that an action for an account of profits made in the business which is not a competing business cannot be maintained, nor can the business itself be claimed as part of the partnership assets); see also note (*a*), p. 76, *ante*.

(*f*) *Smith* v. *Hancock*, [1894] 2 Ch. 377, C. A. (where the Court of Appeal dismissed plaintiff's appeal, but without costs).

(*g*) *Marshall* v. *Watson* (1858), 25 Beav. 501.

(*h*) *Cofton* v. *Horner* (1818), 5 Price, 537.

(*i*) *Bradbury* v. *Dickens* (1859), 27 Beav. 53.

Part VI.—Dissolution.

SECT. 1.—*Otherwise than by the Court.*

SUB-SECT. 1.—*On Notice.*

SECT. 1. Otherwise than by the Court.

Partnership at will.

165. Subject to any agreement between the partners (*k*), a partnership for an indefinite period may be dissolved by any partner at any moment by notice to the others (*l*). The dissolution takes effect from the date specified in the notice, or, if none is specified, from the date of the communication of the notice (*m*).

Essentials of notice.

166. The notice must amount to an unambiguous intimation of a final intention to dissolve the partnership (*n*), and must be served on all the partners unless the articles otherwise provide (*o*). A notice duly given cannot be withdrawn without the consent of the partner or partners served (*p*), and is valid although the partner receiving it is a lunatic (*q*). Even if the partnership has been originally constituted by deed, a written notice signed by the partner

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(*k*) See *Moss* v. *Elphick*, [1910] 1 K. B. 846, C. A., affirming S. C., [1910] 1 K. B. 465 (where an agreement that the partnership was to be terminated "by mutual arrangement only" was held to be an agreement within the meaning of the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 32). For forms of deeds of dissolution, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 591, 594.

(*l*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 26 (1), 32 (c); *Crawshay* v. *Maule* (1818), 1 Swan. 495, 508; *Peacock* v. *Peacock* (1809), 16 Ves. 49; *Heath* v. *Sansom* (1832), 4 B. & Ad. 172, 175; *Miles* v. *Thomas* (1839), 9 Sim. 606, 609. If the business has been carried on upon property belonging to one partner and there has been no lease thereof to the firm, any right of occupation which the other partner had ceases upon the dissolution (*Benham* v. *Gray* (1847), 5 C. B. 138); see p. 23, *ante*; and see note (*s*), p. 52, *ante*.

(*m*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 32. A partnership at will is dissolved, in the absence of previous notice, from the date of service, not from the date of issue, of the writ in an action for dissolution (*Unsworth* v. *Jordan*, [1896] W. N. 2). As a dissolution is subject to the taking of the accounts, no partner can reap an unfair advantage by giving unseasonable notice (*Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298, 309; compare *Chavany* v. *Van Sommer* (1770), 1 Swan. 512, n.). As to the effect of death, see p. 86, *post*.

(*n*) Compare *Parsons* v. *Hayward* (1862), 4 De G. F. & J. 474; *Steuart* v. *Gladstone* (1879), 10 Ch. D. 626, 650, C. A.

(*o*) *Wheeler* v. *Van Wart* (1838), 9 Sim. 193; *Van Sandau* v. *Moore* (1826), 1 Russ. 441.

(*p*) *Jones* v. *Lloyd* (1874), L. R. 18 Eq. 265. *A fortiori* if there accrues to the recipient of the notice an option to purchase the share of the retiring partner (*Warder* v. *Stilwell* (1856), 3 Jur. (N. S.) 9). Nor will a valid notice become inoperative owing to an irregularity in the mode of taking the accounts consequent upon it (*Steuart* v. *Gladstone*, *supra*, at p. 654). The parties may, however, waive a valid notice by subsequent negotiations (*Laycock* v. *Bulmer* (1844), 13 L. J. (EX.) 156).

(*q*) *Robertson* v. *Lockie* (1846), 15 Sim. 285; *Mellersh* v. *Keen* (1859), 27 Beav. 236; but see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (a), (b); Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 119; and title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 443.

SECT. 1. Otherwise than by the Court.

giving it is sufficient (*r*), and in some cases formal notice is not necessary (*s*).

SUB-SECT. 2.—*On Effluxion of Time or Completion of Adventure.*

When partnership *ipso facto* determines.

167. Subject to any agreement between the partners, a partnership for a fixed term, or for a single adventure, is dissolved by the expiration of the term or by the completion of the adventure, as the case may be (*t*), except so far as it is deemed to continue for the purpose of winding up its affairs (*a*).

SUB-SECT. 3.—*On Death of Partner.*

Effect of death.

168. Subject to any agreement between the partners, a partnership is dissolved as regards all the partners by the death of any partner (*b*). If a partner gives a valid notice of a dissolution but dies before the expiration of the notice, the partnership is dissolved by the death and not by the notice (*c*).

Relation of personal representatives to surviving partners.

Unless the articles otherwise provide, neither the surviving partners nor the personal representatives of a deceased partner are entitled or bound to continue a partnership, though the term thereof may be unexpired at the time of the death (*d*).

Termination of liability for partnership debts.

169. No notice of the death is necessary in order to terminate the liability of the deceased partner for partnership debts contracted after his death (*e*). Where goods are ordered before, but delivered

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(*r*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 26 (2); see *Doe* d. *Waithman* v. *Miles* (1816), 4 Camp. 373. If the partnership deed requires dissolution by deed only, a submission under seal of all matters in dispute, followed by an award under seal vesting the partnership assets in one partner as trustee for the purpose of winding up the business, is a sufficient compliance with the deed (*Hutchinson* v. *Whitfield* (1830), Hayes, 78).

(*s*) *Pearce* v. *Lindsay* (1860), 3 De G. J. & Sm. 139 (where, after disputes and attempted settlement of accounts, a long correspondence as to items of account ensued, without any reference to new business or continuing connection); *Bagshaw* v. *Parker* (1847), 10 Beav. 532 (where the partnership was determinable on a specified event which happened).

(*t*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 32 (a), (b); and see p. 24, *ante*.

(*a*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 38; and see p. 97, *post*. As to the continuation of a partnership beyond the fixed term without any express new agreement, see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 27; and p. 23, *ante*.

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 33 (1); *Crawshay* v. *Collins* (1808), 15 Ves. 218, 227; *Vulliamy* v. *Noble* (1817), 3 Mer. 593, 614; *Crawshay* v. *Maule* (1818), 1 Swan. 495, 508; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 221.

(*c*) *Bell* v. *Nevin* (1866), 15 W. R. 85.

(*d*) *Pearce* v. *Chamberlain* (1750), 2 Ves. Sen. 33; *Gillespie* v. *Hamilton* (1818), 3 Madd. 251; see *Lancaster* v. *Allsup* (1887), 57 L. T. 53; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 221.

(*e*) *Vulliamy* v. *Noble*, *supra*, at p. 614; *Crawshay* v. *Maule*, *supra*, at p. 508; *Devaynes* v. *Noble*, *Houlton's Case* (1816), 1 Mer. 528, 616; and see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 36 (3). As to the effect of dissolution, by death or otherwise, on contracts with persons employed by the firm, see title CONTRACT, Vol. VII., p. 431; *Phillips* v. *Alhambra Palace Co.*, [1901] 1 Q. B. 59; *Tasker* v. *Shepherd* (1861), 6 H. & N. 575; *Friend* v. *Young*, [1897] 2 Ch. 421, 429; see also title MASTER AND SERVANT, Vol. XX., p. 94.

after, the death of a partner, the debt accrues on the delivery of the goods, and the vendor therefore, although he had no notice of the death, cannot make the deceased partner's estate liable for the price (*f*).

SECT. 1. Otherwise than by the Court.

SUB-SECT. 4.—*On Bankruptcy of Partner.*

170. Subject to any agreement between the partners, a partnership is dissolved as regards all the partners by the bankruptcy of any partner (*g*), and the estate of the bankrupt thereupon ceases to be liable for the partnership debts incurred after the bankruptcy, though the party dealing with the firm is ignorant of it (*h*).

Bankruptcy dissolves a partnership.

SUB-SECT. 5.—*On Making of Charging Order on Partner's Share.*

171. If a charging order is made (*i*) upon a partner's share in respect of his separate debt, the other partners may dissolve (*k*).

Charging order.

SUB-SECT. 6.—*On Partnership becoming Illegal.*

172. Whenever on the happening of any event the partnership business itself, or the carrying on thereof by the members of the firm in partnership, becomes illegal, the partnership is *ipso facto* dissolved (*l*).

Illegality.

(*f*) *Friend* v. *Young*, [1897] 2 Ch. 421 (where a contract of agency was held to be determined by the death of a partner in the agent's firm); *Bagel* v. *Miller*, [1903] 2 K. B. 212; and see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 9; title AGENCY, Vol. I., pp. 233, 234.

(*g*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 33 (1); see *Fox* v. *Hanbury* (1776), Cowp. 445, 448; *Hague* v. *Rolleston* (1768), 4 Burr. 2174; *Thomason and Hipgip* v. *Frere* (1808), 10 East, 418, 426; from which cases it would appear that the dissolution takes effect from the act of bankruptcy, subject to the doctrine of relation back; and see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 43; title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 161, 181 *et seq.*; *Re Houghton and Watts, Ex parte Robinson* (1833), 3 Deac. & Ch. 376. It is the adjudication and not the presentation of the petition which dissolves the partnership (*Ex parte Smith* (1800), 5 Ves. 295). The rule that, on the bankruptcy of one partner, the firm is dissolved was, before the Partnership Act, 1890 (53 & 54 Vict. c. 39), held not to apply to mining partnerships (*Re Borron, Ex parte Broadbent* (1834), 1 Mont. & A. 635, 638; *Bentley* v. *Bates* (1840), 4 Y. & C. (EX.) 182; but see the criticism of these cases in *Dodds* v. *Preston* (1888), 59 L. T. 718, C. A.). Such cases seem to be now governed by the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 33 (1).

(*h*) *Ibid.*, s. 36 (3); see also p. 111, *post*. A proviso forfeiting a partner's share on his bankruptcy is void; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 151; see also *ibid.*, pp. 13, 28, 61, 68.

(*i*) Under the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (2); see p. 59, *ante*.

(*k*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 23 (2), 33 (2); see *Brown, Janson & Co.* v. *Hutchinson & Co.*, [1895] 1 Q. B. 737, C. A., *per* LINDLEY, L.J., at p. 738; title EXECUTION, Vol. XIV., p. 11. Under the former law, the taking in execution of a partner's share dissolved the partnership, and the execution creditor became a tenant in common with the other partners of the partnership property (*Skipp* v. *Harwood* (1747), 2 Swan. 586; *Taylor* v. *Fields* (1799), 4 Ves. 396; *Chapman* v. *Koops* (1802), 3 Bos. & P. 289; *Mayhew* v. *Merrick* (1849), 7 C. B. 229: *Aspinall* v. *London and North Western Rail. Co.* (1853), 11 Hare, 325, 330; compare *Johnson* v. *Evans* (1844), 7 Man. & G. 240).

(*l*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 34; *Esposito* v. *Bowden*

SECT. 1. SUB-SECT. 7.—*On Expulsion of Partner.*

Otherwise than by the Court.

173. Expulsion of a partner by a majority is invalid, unless power is reserved by express agreement (*m*). A power of expulsion conferred by articles of partnership cannot be exercised to determine a partnership at will arising after the expiration of the term (*n*). Such power must be exercised in the utmost good faith (*o*) by all the partners whose concurrence may be necessary under the partnership contract (*p*).

Power of expulsion of partner.

Rights of partner.

A partner whom it is proposed to expel is, as a general rule, entitled to an opportunity of meeting the case against him (*q*). He must be given a reasonable opportunity of explanation (*r*), and his partners are not entitled to spring a notice of dissolution on him without giving him preliminary warning and calling his attention to the cause of complaint (*s*).

SECT. 2.—*By the Court.*

SUB-SECT. 1.—*Courts having Jurisdiction.*

Jurisdiction.

174. The courts which have jurisdiction to dissolve a partnership in England are the following:—

High Court.

(1) The High Court of Justice, to the Chancery Division of which

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(1857), 7 E. & B. 763, Ex. Ch.; and see *Griswold* v. *Waddington* (1818), 15 Johnson's Reports, 57; affirmed (1819), 16 Johnson's Reports, 438. With regard to illegal partnerships, see pp. 16 *et seq.*, *ante*.

(*m*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 25.

(*n*) *Clark* v. *Leach* (1863), 1 De G. J. & Sm. 409.

(*o*) *Barnes* v. *Youngs*, [1898] 1 Ch. 414; *Carmichael* v. *Evans*, [1904] 1 Ch. 486. It must not be exercised for the exclusive benefit of one or more partners individually, but for the benefit of the whole partnership (*Blisset* v. *Daniel* (1853), 10 Hare, 493, 522; see also *Steuart* v. *Gladstone* (1879), 10 Ch. D. 626, 650, C. A.).

(*p*) *Smith* v. *Mules* (1852), 9 Hare, 556, 570; and see *Fisher* v. *Jackson*, [1891] 2 Ch. 84, 93, 94; *Blisset* v *Daniel*, *supra*.

(*q*) *Barnes* v. *Youngs*, *supra*. But this is not so when the power is vested in one partner only in terms which show that he is to be sole judge for himself (*Russell* v. *Russell* (1880), 14 Ch. D. 471, distinguishing *Blisset* v. *Daniel*, *supra*, and *Wood* v. *Woad* (1874), L. R. 9 Exch. 190). "The sole ground of the other decisions, that it was a power given to a number of persons, not to be exercised capriciously, of course disappears when you have a power given to a single person which could be exercised capriciously" (*Russell* v. *Russell*, *supra*, *per* JESSEL, M.R., at p. 480). The same cases have also been distinguished from a case in which the power of expulsion arose under a specific provision that no partner should directly or indirectly enter into any other business. "They are no authorities for holding that notice must be given in case of a specific provision. . . . It is rather analogous to the ordinary clause in a lease" (*Cooper* v. *Page* (1876), 34 L. T. 90, *per* HALL, V.-C., at pp. 92, 93). Nor is it necessary to hear the accused partner when the partner giving the notice is not in a *quasi*-judicial position, *e.g.*, when the notice of expulsion merely puts certain proceedings into train whereby the question whether another partner is entitled to expel him can be determined (*Green* v. *Howell*, [1910] 1 Ch. 495, C. A.). For an appropriate form of notice, see Encyclopædia of Forms and Precedents, Vol. IX., p. 605.

(*r*) *Wood* v. *Woad*, *supra*; *Blisset* v. *Daniel*, *supra*; compare *Cooper* v. *Page*, *supra*.

(*s*) *Barnes* v. *Youngs*, *supra*, *per* ROMER, J., at p. 418; compare *Green* v. *Howell*, *supra*. For appropriate forms of notice, see Encyclopædia of Forms and Precedents, Vol. IX., p. 605.

all causes and matters for the dissolution of partnerships or the taking of partnership accounts are specially assigned (*a*).

Palatine courts.

(2) The Chancery Courts of the Counties Palatine of Lancaster and Durham, in respect of persons and things within the areas of their respective jurisdictions (*b*).

County courts.

(3) The county courts, which have the same jurisdiction as the High Court in actions for dissolution of partnership in which the aggregate partnership assets do not exceed £500 in amount or value (*c*).

Lunacy judge

(4) The judge in lunacy, who has power to dissolve a partnership in the case of a partner becoming a lunatic (*d*).

SUB-SECT. 2.—*Action for Dissolution.*

Form of action for dissolution.

175. An action to enforce a dissolution of partnership must be commenced by writ and not by originating summons (*e*). It is no objection to such an action that the partnership is one at will only (*f*), or that it might be wound up under the statutory provisions (*g*) for winding up companies (*h*). If the terms of the partnership are disputed, the court may on dissolution order an inquiry (*i*); and alternative claims may be made for dissolution and rescission of the partnership contract (*k*).

(*a*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3); Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), s. 36 (5); see title COURTS, Vol. IX., pp. 60, 61. For the origin of the growth of the exclusive jurisdiction of equity, see title EQUITY, Vol. XIII., pp. 4 *et seq.*, 38, 39.

(*b*) See Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23), s. 3; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (2); title COURTS, Vol. IX., pp. 120 *et seq.*

(*c*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67 (7); see title COUNTY COURTS, Vol. VIII., p. 445. For provisions relating to the transfer to the Chancery Division of an action commenced in the county court, and for transfer to the county court from the Chancery Division of actions which might have been commenced in the county court, see title COUNTY COURTS, Vol. VIII., pp. 440, 442. Similar provisions for Ireland are contained in the County Offices and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56), ss. 33 (1), 35—37.

(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 119, re-enacting the first clause of the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), s. 123; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 414, 442, 443. The power is exercisable by a master (Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 27 (1); Rules in Lunacy, 1892, r. 10). In Ireland the Lord Chancellor may, when a partner becomes a lunatic, dissolve a partnership (Lunacy Regulation (Ireland) Act, 1891 (34 & 35 Vict. c. 22), s. 73).

(*e*) As to the general practice in the Supreme Court, see title PRACTICE AND PROCEDURE. As to the grounds upon which dissolution may be ordered, see pp. 90 *et seq.*, *post*. As to the effect of dissolution upon contracts of service with the firm, see title MASTER AND SERVANT, Vol. XX., pp. 94, 95; and see *ibid.*, p. 113.

(*f*) *Master* v. *Kirton* (1796), 3 Ves. 74.

(*g*) See title COMPANIES, Vol. V., p. 648.

(*h*) *Clements* v. *Bowes* (1852), 17 Sim. 167, 174.

(*i*) *Thorp* v. *Holdsworth* (1876), 3 Ch. D. 637 (where an order for dissolution was made on motion for judgment on admissions in the pleadings, the defendant disputing the terms of the partnership agreement, but admitting the partnership and not disputing the right to dissolve).

(*k*) *Bagot* v. *Easton* (1877), 7 Ch. D. 1, C. A.

SECT. 2. **By the Court.**

Reference to arbitration.

176. The right of a partner to claim a dissolution by the court may be controlled by an arbitration clause contained in the partnership articles (*l*). If such clause applies to all matters in dispute between the parties, the arbitrators have power to award a dissolution (*m*); and, upon the application of the defendant, the court may order a stay of the action and refer the matter to arbitration (*n*). But the court has complete discretion in the matter. Therefore, if charges of fraud or dishonesty or of want of good faith are made *bonâ fide* by one partner against the other, or if questions of law are likely to arise which are more fit for the court than a lay tribunal (*o*), or if the attempted reference is made vexatiously (*p*), a stay of the action for dissolution may, and generally will, be refused (*q*).

SUB SECT. 3.—*Grounds of Dissolution.*

(i.) *Insanity.*

Effect of insanity.

177. The insanity of a partner does not *per se* dissolve the partnership (*r*), but is a ground for the dissolution thereof by the court by reason of the incapacity of the insane partner to perform his part of the partnership contract (*s*); and the court will not compel

(*l*) As to the validity of such a clause, see *Lee* v. *Page* (1861), 30 L. J. (CH.) 857. Whether the matters in dispute fall within the clause is a question for the court to decide (*Piercy* v. *Young* (1879), 14 Ch. D. 200, C. A.), unless he parties have expressly agreed to leave it to the arbitrator (*Willesford* v. *Watson* (1873), 8 Ch. App. 473; *Gillett* v. *Thornton* (1875), L. R. 19 Eq. 599, 605); and see title ARBITRATION, Vol. I., pp. 445, 451.

(*m*) *Russell* v. *Russell* (1880), 14 Ch. D. 471, approved of in *Walmsley* v. *White* (1892), 40 W. R. 675, C. A.; see *Vawdrey* v. *Simpson*, [1896] 1 Ch. 166, 168; *Machin* v. *Bennett*, [1900] W. N. 146; *Belfield* v. *Bourne*, [1894] 1 Ch. 521, 523; *Law* v. *Garrett* (1878), 8 Ch. D. 26, C. A. (where the forum selected by the partner was a foreign commercial court); *Plews* v. *Baker* (1873), L. R. 16 Eq. 564; see also *Green* v. *Waring* (1764), 1 Wm. Bl. 475; *Simmonds* v. *Swaine* (1809), 1 Taunt. 549.

(*n*) Under the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4; see title ARBITRATION, Vol. I., p. 451. The onus of showing that the case is not suitable for arbitration is on the party opposing the application to stay (*Vawdrey* v. *Simpson, supra*; *Cook* v. *Catchpole* (1864), 10 Jur. (N. S.) 1068). The court will, in special circumstances, appoint a receiver pending the arbitration; see *Plews* v. *Baker, supra*; *Pini* v. *Roncoroni*, [1892] 1 Ch. 633; *Gillett* v. *Thornton, supra*. In *Law* v. *Garrett, supra*, a receiver was refused, but liberty was given to apply; so also in *Machin* v. *Bennett, supra*, but without prejudice to an application at a later stage.

(*o*) *Vawdrey* v. *Simpson, supra*; see *Russell* v. *Russell, supra*, questioning the reasoning of WICKENS, V.-C., in *Willesford* v. *Watson* (1871), L. R. 14 Eq. 572, 578; compare *Cave* v. *Crew* (1893), 41 W. R. 359; *Turnell* v. *Sanderson* (1891), 64 L. T. 654.

(*p*) *Barnes* v. *Youngs*, [1898] 1 Ch. 414; *Joplin* v. *Postlethwaite* (1889), 61 L. T. 629, C. A.

(*q*) *Witt* v. *Corcoran* (1873), 8 Ch. App. 476, n.; compare *Willesford* v. *Watson* (1873), 8 Ch. App. 473, 480.

(*r*) *Wrexham* v. *Hudleston* (1734), 1 Swan. 514, n.; *Waters* v. *Taylor* (1813), 2 Ves. & B. 299, 303; *Anon.* (1855), 2 K. & J. 441, 447. Until dissolution the power of a lunatic to bind his firm seems to continue notwithstanding the rule that the lunacy of the principal revokes the authority of an agent (*Yonge* v. *Toynbee*, [1910] 1 K. B. 215, C. A.). If, however, an action for dissolution be pending, the lunatic may be restrained from interfering (*J.* v. *S.*, [1894] 3 Ch. 72).

(*s*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (a); *Jones* v. *Noy*

partners to carry on the business in conjunction with the committee of the lunatic partner (*a*).

In order to constitute such a ground the disorder must be permanent and not merely of a temporary character, for if there is a prospect of recovery the court will not dissolve the partnership (*b*).

Insanity must be permanent.

If the court is not satisfied that the insanity is permanent and still exists at the time when relief is sought, an inquiry may be directed (*c*), but, if the partner has been found lunatic by inquisition, such inquiry may not be necessary (*d*).

Inquiry may be ordered.

178. Relief may be given not only on the application of any partner, but also on that of the committee or next friend of the insane partner or other person entitled to intervene on his behalf (*e*).

Applicants for relief.

179. The costs of the action, in the absence of special circumstances, are paid out of the partnership assets (*f*).

Costs of action.

180. When the partnership is a partnership at will, it is dissolved, in the absence of previous notice, from the issue of the writ (*g*); but, if notice to dissolve has been served on the lunatic partner, then from the date of such notice (*h*). If the partnership is for a fixed term, it is dissolved from the date of judgment (*i*); if, however, provision has been made in the articles for dissolution in the event of insanity, the dissolution takes effect from the date contemplated in them, and not from the date of judgment (*k*).

Date of dissolution.

(1833), 2 My. & K. 125, 129; *Leaf* v. *Coles* (1851), 1 De G. M. & G. 171, 174; *Sayer* v. *Bennet* (1784), 1 Cox, Eq. Cas. 107, 109.

(*a*) *Rowlands* v. *Evans*, *Williams* v. *Rowlands* (1861): 30 Beav. 302.

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (a); *Jones* v. *Noy* (1833), 2 My. & K. 125, 129; *Pearce* v. *Chamberlain* (1750), 2 Ves. Sen. 33, 35; *Wrexham* v. *Hudleston* (1734), 1 Swan. 514, n.; *Sayer* v. *Bennet*, *supra*; *Leaf* v. *Coles*, *supra*; *Jones* v. *Lloyd* (1874), L. R. 18 Eq. 265; *Anon.* (1855), 2 K. & J. 441, 452; *Sadler* v. *Lee* (1843), 6 Beav. 324.

(*c*) As in *Sayer* v. *Bennet*, *supra*; *Patey* v. *Patey* (1836), 5 L. J. (CH.) 198 (where, the action being brought by the lunatic, his committee was added as a party); *Kirby* v. *Carr* (1838), 3 Y. & C. (EX.) 184; S. C. *sub nom. Kirby* v. *Cox*, 8 L. J. (EX. EQ.) 31.

(*d*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (a); see *Milne* v. *Bartlet* (1839), 3 Jur. 358.

(*e*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (a); see *Besch* v. *Frolich* (1842), 1 Ph. 172; *Fisher* v. *Melles* (1870), L. R. 18 Eq. 268, n.; *Jones* v. *Lloyd*, *supra* (where a receiver was appointed on the application of the next friend, but it was doubted whether he could carry the action further, and whether a committee ought not to be appointed for this purpose); but see the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (a).

(*f*) *Jones* v. *Welch* (1855), 1 K. & J. 765, following the order in *Besch* v. *Frolich*, *supra*.

(*g*) *Kirby* v. *Carr* (1838), 3 Y. & C. (EX.) 184.

(*h*) *Mellersh* v. *Keen* (1859), 27 Beav. 236; *Robertson* v. *Lockie* (1846), 15 Sim. 285.

(*i*) And not retrospectively from issue of the writ: *a fortiori*, not from the date of commencement of the insanity (*Besch* v. *Frolich*, *supra*; *Sander* v. *Sander* (1845), 2 Coll. 276; *Leaf* v. *Coles* (1852), 1 De G. M. & G. 417; *Jones* v. *Welch*, *supra*).

(*k*) *Bayshaw* v. *Parker* (1847), 10 Beav. 532.

SECT. 2.

(ii.) *Disablement.*

By the Court.

Permanent incapacity.

181. Permanent incapacity, arising otherwise than from insanity, of a partner to perform his part of the partnership contract is a ground for dissolution by the court, on the application of any other partner (*l*).

(iii.) *Conduct Prejudicial to Partnership.*

Misconduct.

182. Such conduct by a partner as, in the opinion of the court, is calculated to prejudice the carrying on of the partnership business affords a ground for its dissolution by the court, on the application of an innocent partner (*m*). Regard must, however, be had to the nature of the partnership (*n*); thus, the adultery of a partner is no reason for dissolving a mercantile partnership; but the immoral conduct of one of two medical partners who also act as accoucheurs may be a sufficient ground (*o*), and embezzlement of trust funds of clients by a solicitor entitles his partner to an immediate dissolution (*p*).

(iv.) *Breach of Partnership Agreement and Unreasonable Conduct.*

Breach of contract.

183. Wilful persistent breaches of the partnership contract by a partner afford ground for dissolution by the court, but merely trivial or occasional violations are not sufficient, unless in the latter case they are also serious (*q*).

(*l*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (b); *Whitwell* v. *Arthur* (1865), 35 Beav. 140 (where the incapacity was due to paralysis: as, however, the health of the partner improved before the trial, further proceedings were stayed, but liberty to apply was reserved).

(*m*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (c).

(*n*) *Ibid.* As to what is infamous conduct in a professional respect, see, as to medical men, title MEDICINE AND PHARMACY, Vol. XX., pp. 321, 322; and as to solicitors, *Re a Solicitor, Ex parte Law Society*, [1912] 1 K. B. 302; title SOLICITORS; see also *Clifford* v. *Timms*, [1908] A. C. 12, affirming *Hill* v. *Clifford*, *Clifford* v. *Timms*, *Clifford* v. *Phillips*, [1907] 2 Ch. 236, C. A., and reversing *Clifford* v. *Timms*, [1907] 1 Ch. 420 (a case of "professional misconduct" by a dentist); *Clifford* v. *Phillips*, [1908] A. C. 15.

(*o*) See *Snow* v. *Milford* (1868), 18 L. T. 142, *per* Lord ROMILLY, M.R., at p. 143; *Anon.* (1855), 2 K. & J. 441, *per* WOOD, V.-C., at p. 445.

(*p*) *Essell* v. *Hayward* (1860), 30 Beav. 158; compare *Pearce* v. *Foster* (1886), 17 Q. B. D. 536, C. A., which shows that conduct may be prejudicial to the business, though not directly connected with it; *e.g.*, gambling on the Stock Exchange by a confidential clerk justifies his dismissal from a business which has nothing to do with stock and share dealings; and the conviction of a partner for travelling on the railway without a ticket, with intent to avoid payment of the fare, may justify a notice of expulsion (*Carmichael* v. *Evans*, [1904] 1 Ch. 486).

(*q*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (d); *Goodman* v. *Whitcomb* (1820), 1 Jac. & W. 589, 592; *Loscombe* v. *Russell* (1830), 4 Sim. 8, 11; *Anderson* v. *Anderson* (1857), 25 Beav. 190 (where one instance of breach of the partnership contract in eight years was held to be insufficient ground for the interference of the court; though, as both parties admitted that it was useless to continue the partnership, a dissolution was ordered). "It must be a studied, prolonged and continued inattention to the application of one party calling upon the other to observe that contract," *i.e.* the contract of partnership (*Marshall* v. *Colman* (1820), 2 Jac. & W. 266, *per* Lord ELDON, L.C., at p. 268).

Generally, the court interferes whenever the conduct of a partner in matters relating to the partnership business renders it not reasonably practicable for the other partner or partners to carry on the business on the footing originally contemplated, without injury to all parties (*r*).

Unreasonable conduct.

Thus, while mere partnership squabbles are not sufficient to induce the court to order a dissolution (*s*), if a state of complete and permanent animosity exists, so that the breach between the partners is irreparable and mutual confidence is destroyed, the court will grant relief (*a*). Similarly, neglect to account for money received, especially if so frequent as to be almost systematic (*b*), or the application of sums received to the payment of private debts (*c*), or refusal to account and the taking away of the partnership books (*d*), being acts inconsistent with the duty of a partner and destructive of the mutual confidence which ought to subsist between partners (*e*), afford good grounds for relief.

Grounds for relief.

184. The court will not order dissolution on the application of the partner guilty of misconduct (*f*); nor, on the other hand, will it usually order such a partner to pay the costs of an action for dissolution by another partner up to the trial (*g*).

No relief to defaulting partner.

(v.) *Partnership Business Carried on at a Loss.*

185. Every partnership is entered into with a view to profit, and, if the business can only be carried on at a loss, the whole purpose of the partnership fails, and it may be dissolved upon the application of any partner, although the original term for which it was formed has not expired (*h*).

Failure to make profits.

(*r*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (d); *Waters* v. *Taylor* (1813), 2 Ves. & B. 299; *Harrison* v. *Tennant* (1856), 21 Beav. 482; *Watney* v. *Wells* (1861), 30 Beav. 56, 60; *Smith* v. *Jeyes* (1841), 4 Beav. 503, 505.

(*s*) *Wray* v. *Hutchinson* (1834), 2 My. & K. 235.

(*a*) *Baxter* v. *West* (1860), 1 Drew. & Sm. 173; *Harrison* v. *Tennant*, *supra*; *Leary* v. *Shout* (1864), 33 Beav. 582; *Atwood* v. *Maude* (1868), 3 Ch. App. 369, 373; compare *Pearce* v. *Lindsay* (1860), 3 De G. J. & Sm. 139, C. A.

(*b*) *Cheesman* v. *Price* (1865), 35 Beav. 142.

(*c*) *Smith* v. *Jeyes*, *supra*.

(*d*) *Charlton* v. *Poulter* ("the Brewers' Case") (1753), 19 Ves. 148, n.

(*e*) *Smith* v. *Jeyes*, *supra*, at p. 506.

(*f*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (d). "No party is entitled to act improperly and then to say that the conduct of the partners and their feelings towards each other are such that the partnership cannot continue; and this court will not allow any person so to act and thus to take advantage of his own wrong" (*Harrison* v. *Tennant*, *supra*, *per* ROMILLY, M.R., at p. 492). Lord CAIRNS' *dictum* to the contrary effect in *Atwood* v. *Maude*, *supra*, at p. 373, has now been definitely displaced by the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (d).

(*g*) *Hawkins* v. *Parsons* (1862), 8 Jur. (N. S.) 452.

(*h*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (e); *Jennings* v. *Baddeley* (1856), 3 K. & J. 78; *Bailey* v. *Ford* (1843), 13 Sim. 495 (where the court, on motion before the hearing, appointed a person to sell the business and wind up the partnership); see *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737, *per* Lord CAIRNS, L.J., at p. 744. If the errors can be

SECT. 2.

(vi.) *Where Dissolution is Just and Equitable.*

By the Court.

On just and equitable grounds.

186. The court may dissolve a partnership in any case where circumstances have arisen which, in its opinion, render it just and equitable to do so (*i*).

SECT. 3.—*Return of Premiums.*

Discretion to order return of whole or part of premium.

187. If a partnership, on entering into which one partner has paid a premium to the other, is for a fixed term, and is prematurely dissolved, the court may, in the absence of any agreement regulating the matter, or waiver, or release express or implied (*k*), order the return of the whole or a proportionate part of the premium (*l*).

Exceptions.

This equity, however, does not arise if the dissolution is due to death (*m*) or bankruptcy, unless attributable to some breach of partnership duty on the part of the partner who received the premium (*n*); or if the partnership has been dissolved by an

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attributed to special circumstances and cannot clearly be traced to any inherent defect in the business, the court will refuse the relief (*Handyside* v. *Campbell* (1901), 17 T. L. R. 623). See also *Baring* v. *Dix* (1786), 1 Cox, Eq. Cas. 213; compare *Wilson* v. *Church* (1879), 13 Ch. D. 1, C. A., *per* COTTON, L.J., at p. 65: "If the purposes of the partnership cannot be carried into effect with any reasonable prospect of profit, the court can, and does, dissolve the partnership"; and see S. C., *sub nom. National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 176.

(*i*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (f). The question what is just and equitable within the meaning of this provision has not, apparently, formed the subject of judicial decision; but the similar provision in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 129, enabling the court to wind up a limited company when it is just and equitable, has not been read as being *ejusdem generis* with the preceding words of that enactment; see title COMPANIES, Vol. V., p. 397, and cases there cited.

(*k*) See *Bond* v. *Milburn* (1871), 20 W. R. 197, explained in *Rooke* v. *Nisbet* (1881), 50 L. J. (CH.) 588; compare *Andrewes* v. *Jones* (1865), 12 L. T. 229; *Brewer* v. *Yorke* (1882), 46 L. T. 289, C. A.

(*l*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 40. "The principle upon which the court interferes is that the consideration, in respect of which the money is paid, fails and is not obtained by the person who pays the money, in consequence of an unforeseen interruption" (*Freeland* v. *Stansfeld* (1854), 2 Sm. & G. 479, *per* STUART, V.-C., at p. 484); see similar statements of the principle in *Tattersall* v. *Groote* (1800), 2 Bos. & P. 131, *per* Lord ELDON, L.C., at p. 134; in *Bullock* v. *Crockett* (1862), 3 Giff. 507, *per* STUART, V.-C., at p. 512; and in *Edmonds* v. *Robinson* (1885), 29 Ch. D. 170, by KAY, J., at p. 175. As to premiums paid under misrepresentation, see *Jauncey* v. *Knowles* (1860), 29 L. J. (CH.) 95; and p. 69, *ante*.

(*m*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 40; *Whincup* v. *Hughes* (1871), L. R. 6 C. P. 78; *Ferns* v. *Carr* (1885), 28 Ch. D. 409. But if the partner taking the premium knows at the time that he is suffering from a fatal disease and this is not known to the partner paying the premium, on the death of the former during the term an apportionment may be ordered on the ground of fraud (*Mackenna* v. *Parkes* (1866), 15 L. T. 500); and see title CONTRACT, Vol. VII., p. 483.

(*n*) *Akhurst* v. *Jackson* (1818), 1 Wils. (CH.) 47 (where it is said: "Bankruptcy is the contingency incident to every partnership. . . . It is not a breach of the contract: it is a determination of the partnership by the means by which it was in its nature liable to be determined"). But the court has ordered a return of part of the premium where the partner who paid the premium was made bankrupt by the recipient (*Hamil* v. *Stokes* (1817), 4 Price, 161); and where the recipient became bankrupt, having

agreement containing no provision for a return of any part of the premium (*o*); or when the dissolution is brought about by the misconduct of the partner who has paid it (*p*). Incompetence is not misconduct and does not, in itself, form a bar to this equity, especially if such incompetence was known to the partner receiving the premium at, or almost at, the commencement of the partnership and was the ground of his demanding an increased premium (*q*).

Where equities are equal.

Where the partnership has been dissolved without any fault of either party (*r*), or if there are faults on both sides (*s*), or if the recipient of the premium has himself caused the dissolution (*t*), the equity will be enforced by the court (*u*).

Amount of premium returnable.

188. In determining the amount of premium to be returned the primary consideration is that of time, that is, the ratio of the actual to the agreed term of the partnership; the premium, being treated as paid for the whole term, is apportioned between the time which the partnership lasted and the unexpired residue (*a*).

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been in embarrassed circumstances at the commencement of the bankruptcy, the partner who paid the premium had no notice thereof (*Freeland* v. *Stansfeld* (1854), 2 Sm. & G. 479); but a return will not be ordered where he had notice (*Akhurst* v. *Jackson* (1818), 1 Wils. (CH.) 47).

(*o*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 40 (b); *Lee* v. *Page* (1861), 30 L. J. (CH.) 857; *Belfield* v. *Bourne*, [1894] 1 Ch. 521, 527; compare *Handyside* v. *Campbell* (1901), 17 T. L. R. 623.

(*p*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 40 (a); *Atwood* v. *Maude* (1868), 3 Ch. App. 369; *Yates* v. *Cousins* (1889), 60 L. T. 535; *Bullock* v. *Crockett* (1862), 3 Giff. 507; *Bluck* v. *Capstick* (1879), 12 Ch. D. 863 (where the unpaid premium was ordered to be paid by the guilty partner). Conduct, though objectionable and such as would entitle his partner to a dissolution, is not sufficient to deprive the partner paying the premium of his right to return of premium (*Wilson* v. *Johnstone* (1873), L. R. 16 Eq. 606); nor is it material that the latter is the party who seeks the dissolution (*Atwood* v. *Maude*, *supra*).

(*q*) *Atwood* v. *Maude*, *supra*, at p. 375; *Brewer* v. *Yorke* (1882), 46 L. T. 289, C. A., where BRETT, L.J., at p. 293, said: "Mere incompetence, however great, without proof of damage caused thereby, ought not to be ground for declining, upon a dissolution of partnership, to return the proportionate amount of premium"; but HOLKER, L.J., dissented from this statement of the law (*ibid.*, at p. 295).

(*r*) *Atwood* v. *Maude*, *supra*; compare *Airey* v. *Borham* (1861), 29 Beav. 620.

(*s*) *Astle* v. *Wright* (1856), 23 Beav. 77; *Pease* v. *Hewitt* (1862), 31 Beav. 22.

(*t*) See cases cited in note (*p*), *supra*; *Bullock* v. *Crockett*, *supra*; and see *Bury* v. *Allen* (1845), 1 Coll. 589 (where the misconduct was principally that of the partner receiving the premium); *Hamil* v. *Stokes* (1817), 4 Price, 161.

(*u*) Compare the cases, relating to apprenticeship, cited in title MASTER AND SERVANT, Vol. XX., pp. 104, note (*n*), 105, note (*k*).

(*a*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 40, which provides that regard is to be had to two matters, namely: (1) the terms of the partnership contract, and (2) the actual duration of the partnership. "The court has always treated it, I believe, as a mere arithmetical question" (*Wilson* v. *Johnstone*, *supra*, *per* WICKENS, V.-C., at p. 609); see *Bury* v. *Allen*, *supra*; *Pease* v. *Hewitt*, *supra*; *Brewer* v. *Yorke*, *supra*. But it is difficult to apply "the principle of extension of the premium over the whole term of the partnership" where part of the consideration is not referable to the whole of the agreed period (*Bullock* v. *Crockett*, *supra*); and in many decisions before the Partnership Act, 1890 (53 & 54 Vict. c. 39), it

SECT. 3. **Return of Premiums.**

Question dealt with at trial.

189. The question of a return of premium should be dealt with at the trial of the action for dissolution; afterwards the leave of the court is necessary, and this is only given if the circumstances are such that the court would give leave to bring a supplemental action (*b*).

Power of arbitrator.

When the articles contain an arbitration clause wide enough to empower the arbitrators to award a dissolution, they also have power to consider the terms of the dissolution, including the question of the amount, if any, of premium to be returned (*c*).

Partnership at will.

190. If a premium is paid by a partner on entering into a partnership at will, none, as a general rule, is returnable, in the absence of fraud, or of an express stipulation on the point (*d*).

SECT. 4.—*Notice of Dissolution.*

Advertisement of dissolution.

191. Any partner is entitled to give public notice of a dissolution or change in the membership of the firm, and to require the concurrence of his partners for that purpose in any necessary or proper acts which cannot be done without such concurrence (*e*).

Old customers.

192. Old customers of a firm, who deal with it after a change in its membership, are entitled to treat the former apparent partners as still being partners until they have actual notice of the change. As regards them, notice of the dissolution published in the *Gazette* (*f*) is not *per se* sufficient (*g*). But evidence has been admitted of facts showing that it was probable that an old customer had seen the *Gazette* (*h*).

Notice to old customers.

Notice to old customers is usually given by circular letter, but any mode by which actual knowledge is given suffices. Change by a bank of its forms of cheque may be sufficient notice to an old customer who has drawn cheques in the new form (*i*). One insertion of an advertisement of dissolution, in a newspaper proved to be taken by the customer and to have been left at his house, has been admitted as evidence of notice, though not proved to have reached his hands (*j*); but evidence of such insertion was excluded where it was not proved that he was in the habit of taking the

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was said that the court would consider all the circumstances; see, *e.g.*, *Lyon* v. *Tweddell* (1881), 17 Ch. D. 529, C. A.

(*b*) For example, if the facts were first discovered after the judgment in the action; see *Edmonds* v. *Robinson* (1885), 29 Ch. D. 170.

(*c*) *Belfield* v. *Bourne*, [1894] 1 Ch. 521, distinguishing *Tattersall* v. *Groote* (1800), 2 Bos. & P. 131.

(*d*) See *Tattersall* v. *Groote*, *supra*, at p. 134. But, in the case of a partnership for no definite time, the recipient cannot dissolve the partnership immediately and retain the premium; see *Featherstonhaugh* v. *Turner* (1858), 25 Beav. 382, 391.

(*e*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 37; see *Troughton* v. *Hunter* (1854), 18 Beav. 470; *Hendry* v. *Turner* (1886), 32 Ch. D. 355.

(*f*) As to publication of notice in the *Gazette*, see the text, *infra*.

(*g*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 36 (1); *Graham* v. *Hope* (1792), Peake, 208 [154]; *Gorham* v. *Thompson* (1791), Peake, 60 [42]; *Re Hodgson*, *Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, 184, C. A.

(*h*) *Godfrey* v. *Macauley* (1795), Peake, 209, n.

(*i*) *Barfoot* v. *Goodall* (1811), 3 Camp. 147.

(*j*) *Jenkins* v. *Blizard* (1816), 1 Stark. 418.

newspaper, though it circulated in the town where he resided (*k*). The execution by a customer of a power of attorney to the new firm has been held to be powerful evidence of knowledge of the retirement of a partner (*l*); and proof of the preparation and transmission by a solicitor of the draft of a deed of dissolution may throw upon him the burden of showing the abandonment of intention to dissolve (*m*).

New customers. Sufficient notice.

193. Sufficient notice is given to those who have not dealt with the firm before the date of the change or dissolution by the insertion of an advertisement in the *London, Edinburgh*, or *Dublin Gazette*, according as the firm has its principal place of business in England, Scotland, or Ireland (*n*). It is immaterial whether they have seen the advertisement in the *Gazette* or not; but an advertisement in any other newspaper cannot be given in evidence without preliminary proof that the customer was in the habit of taking that paper (*o*). A public advertisement in papers, taken at a reading room where the creditor was in the habit of reading the papers, has been received as evidence of knowledge, in a case in which there was no notice in the *Gazette* (*p*).

SECT. 5.—*Winding up of Partnership Business.*

SUB-SECT. 1.—*Continuation of Partner's Authority.*

After dissolution partnership continues for winding up only.

194. After dissolution, the partnership subsists merely for the purpose of completing pending transactions, winding up the business, and adjusting the rights of the partners (*q*); and for these purposes,

(*k*) *Norwich and Lowestoft Navigation (Proprietors)* v. *Theobald* (1828), Mood. & M. 153.

(*l*) *Hart* v. *Alexander* (1837), 2 M. & W. 484.

(*m*) *Paterson* v. *Zachariah and Arnold* (1815), 1 Stark. 71.

(*n*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 36 (2); see *Wrightson* v. *Pullan* (1816), 1 Stark. 375; *Godfrey* v. *Turnbull and Macauley* (1795), 1 Esp. 371, *sub nom. Godfrey* v. *Macauley* (1795), Peake, 209, n. As to the liability of a sleeping partner, see p. 38, *ante*. A notice of a dissolution in the *Gazette* is admissible to prove such dissolution without being stamped (*Jenkins* v. *Blizard* (1816), 1 Stark. 418); but a notice in the *Gazette* of an agreement to dissolve, in order to be admissible as proof of such agreement, must be stamped (*May* v. *Smith* (1795), 1 Esp. 283). As to stamp duty generally, see title REVENUE. For a form of notice of dissolution and other forms relating thereto, see Encyclopædia of Forms and Precedents, Vol. IX., p. 607; Vol. XVI., p. 453. The signature of the notice of dissolution must be verified by a statutory declaration made by a solicitor of the Supreme Court

(*o*) *Lecson* v. *Holt* (1816), 1 Stark. 186.

(*p*) *Rooth* v. *Quin and Jauncy* (1819), 7 Price, 193; but as to the weight of such evidence see *Hart* v. *Alexander*, *supra*, at pp. 491, 494; see also *M'Iver* v. *Humble* (1812), 16 East, 169.

(*q*) *Beak* v. *Beak* (1675), 3 Swan. 627, n.; *Crawshay* v. *Maule* (1818), 1 Swan. 495, 507. Where the business of a partnership, the term of which had expired, was continued by both partners merely for the purpose of realisation and winding up, it was held that their conduct showed an intention not to continue the former business, and that a clause in the partnership articles, providing for purchase by the survivor of the share of the other on his death, had ceased to be applicable (*Myers* v. *Myers* (1891), 60 L. J. (CH.) 311). As to drawing on partnership banking accounts by a surviving partner, see title BANKERS AND BANKING, Vol. I., pp. 604, 605.

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and these only, the authority, rights and obligations of the partners continue (*r*).

Power to pledge assets, receive debts etc.

195. Each partner has, after dissolution, authority to give a valid security on partnership property for money required for the completion of a pending contract (*s*); and any partner may, it seems, after dissolution, receive a debt and give a release or take a bill for it, although the terms of dissolution provide that, as between the partners, the debts should only be received by one of them (*a*).

Rights of creditors.

Where two partners enter into a joint speculation with a third party, and afterwards dissolve partnership, the dissolution of their partnership does not prevent the third party, who continues to rely upon their joint responsibility, from holding them jointly liable (*b*).

Lapse of time.

A recognition of a debt in a letter from one ex-partner of a dissolved firm to another was held not to amount to such a promise or undertaking (*c*) to pay the debt as to take it out of the Statutes of Limitation (*d*); and part payment of a debt by a continuing partner after dissolution does not prevent a Statute of Limitation from running in favour of a retiring partner (*e*).

Arrangement between partners.

An arrangement between the members of a dissolved partnership that the debts of the firm shall be paid and the affairs wound up by a particular partner does not bind creditors of the firm even if they have notice of such arrangement (*f*); but a charge by a partner on

(*r*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 38; compare *Booth* v. *Parks* (1828), 1 Mol. 465; *Wood* v. *Braddick* (1808), 1 Taunt. 104, 105; *Lewis* v. *Reilly and Watson* (1841), 4 Per. & Dav. 629. "There may be a partnership, where, whether the parties have agreed for the determination of it at a particular period, or not, engagements must, from the nature of it, be contracted, which cannot be fulfilled during the existence of the partnership; and the consequence is, that for the purpose of making good those engagements with third persons it must continue; and then, instead of being, as it was a general partnership, it is a general partnership; determined, except as it still subsists for the purpose only of winding up the concerns" (*Crawshay* v. *Collins* (1808), 15 Ves. 218, *per* Lord ELDON, L.C., at p. 226). "Where the partnership business is in one sense at an end, still you have not therefore put an end to the joint transactions. They must necessarily be carried on for the purpose of winding up the concern and everything belonging to it" (*Cruikshank* v. *M'Vicar* (1844), 8 Beav. 106, *per* Lord LANGDALE, M.R., at p. 116). With regard to the difference between a continuing partnership and one in course of winding up as affecting the liability of a retired partner for acts of the continuing partner, see *Smith* v. *Winter* (1838), 4 M. & W. 454; see also pp. 24, 37, *ante*.

(*s*) *Butchart* v. *Dresser* (1853), 10 Hare, 453; affirmed on appeal, 4 De G. M. & G. 542, C. A. As to the power of a surviving partner, after dissolution, to give security for a past partnership debt, see *Re Clough, Bradford Commercial Banking Co.* v. *Cure* (1885), 31 Ch. D. 324; and see p. 27, *ante*. As to pledges in favour of bankers, see title BANKERS AND BANKING, Vol. I., p. 634.

(*a*) *King* v. *Smith* (1829), 4 C. & P. 108. But as between the partners there would be accountability; see p. 47, *ante*.

(*b*) *Ault* v. *Goodrich* (1828), 4 Russ. 430.

(*c*) See title LIMITATION OF ACTIONS, Vol. XIX., pp. 58 *et seq.*

(*d*) *Re Hindmarsh* (1860), 8 W. R. 203.

(*e*) *Watson* v. *Woodman* (1875), L. R. 20 Eq. 721. The rule is different where the retirement is secret (*Re Tucker, Tucker* v. *Tucker*, [1894] 3 Ch. 429, C. A.); see title LIMITATION OF ACTIONS, Vol. XIX., pp. 74, 76.

(*f*) *Smith* v. *Jameson* (1794), 5 Term Rep. 601.

his private property to secure his firm's banking account (*g*) is not available as a security for debts to the bank which are incurred after his death by the surviving partners who continue the business (*h*).

SUB-SECT. 2.—*Distribution of Profits made after Dissolution.*

On purchase of share of outgoing partner.

196. Deeds of partnership frequently provide that, when a partner retires or dies, the continuing or surviving partners shall buy his share, or have the option of doing so, upon specified terms with regard to time and mode of payment, rate of interest, or proportion of profits instead of interest, and other matters. Where such a provision is made and complied with in all material respects by the continuing or surviving partners, the outgoing partner is not entitled to any further or other share of the profits made after dissolution, except to the extent, if any, prescribed by such provisions (*i*).

Effect of delay in valuation of share.

Where a surviving partner exercises an option to buy a deceased partner's share at a valuation, but such valuation is not completed till some months after the death, the dissolution takes effect as at the date of the death, and the executors of the deceased partner are entitled to a share of profits up to the date of the valuation and to interest on the amount of the valuation after that date. But compensation for his work will, as a rule, be allowed to the surviving partner before ascertaining the amount of profit divisible (*k*).

Where there is no purchase of share.

197. If there is no such provision (*l*), or if the terms of such an option (*l*) are not complied with, and the remaining partners continue to use the assets in the business, the outgoing partner or his estate has the option of taking either interest at 5 per cent. per annum on the value of his share of the assets, or such share of the profits made after dissolution as the court may find to be attributable to the use of such share (*m*). Where executors of a

(*g*) As to advances by bankers, see title BANKERS AND BANKING, Vol. I., pp. 630 *et seq.*

(*h*) *Bank of Scotland* v. *Christie* (1841), 8 Cl. & Fin. 214, H. L.

(*i*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 42 (2); compare *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318, with *Willett* v. *Blanford* (1842), 1 Hare, 253; and see p. 64, *ante*.

(*k*) *Yates* v. *Finn* (1880), 13 Ch. D. 839, 841; *Brown* v. *De Tastet* (1821), Jac. 284, 298, 299; see p. 63, *ante*. Such compensation was refused where the surviving partner was executor of the deceased, and carried on the trade for himself and the children of the deceased (*Burden* v. *Burden* (1813), 1 Ves. & B. 170; *Stocken* v. *Dawson* (1843), 6 Beav. 371, 376; affirmed on appeal, *Stocken* v. *Dawson* (1848), 17 L. J. (CH.) 282, 285; compare *Cook* v. *Collingridge* (1823), Jac. 607, 621, 623).

(*l*) See the text, *supra*, and p. 63, *ante*.

(*m*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 42 (1); see p. 63, *ante*. For the principle on which the court acted before this statute, see *Wedderburn* v. *Wedderburn* (No. 4) (1856), 22 Beav. 84, *per* ROMILLY, M.R., at p. 99; see also *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318. It was well established that the use of the assets after dissolution, by partners who continued the business, entitled the outgoing partner to share in the profits produced by their use until a final settlement of accounts (*Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298, 309; *Turner* v. *Major* (1862), 3 Giff. 442).

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deceased partner accept interest on the value of their testator's share from dissolution to the date of payment, they cannot subsequently elect to take a share of profits instead (*n*).

Duty of court to ascertain proportion.

Nature of inquiry.

Circumstances to be considered.

198. It is a question for the court what proportion of the profits made after dissolution are, in the special circumstances, properly attributable to the assets of a retiring, bankrupt, or deceased partner (*o*). So, when continuing partners continue to use the assets of the dissolved partnership in the business, a retiring partner may be entitled to an inquiry what assets have been so used, what use has been made of them, and an account of the profits made in such business since the dissolution (*p*); and, in ascertaining the amount of the share of an outgoing partner, the value of the goodwill of the business, if any, must be taken into account; but it depends upon circumstances whether or not it has any appreciable value (*q*). The share of profits payable after dissolution in respect of the assets of a retiring, bankrupt, or deceased partner is not necessarily the share to which he was entitled before dissolution (*r*).

Rules applicable where trust money used by partner who is trustee or executor.

199. In the case of a loan of trust money forming part of the estate of a deceased partner by his trustees, of whom two were his surviving partners, to the members of his late firm, although the loan may be secured by mortgage of partnership property (*a*), the trustees are personally liable not only to make good the money so used, but to account for the profits made by such use, or to pay interest at 5 per cent. per annum, and in such a case an inquiry will be directed whether it is to the interest of the *cestuis que trust* to take interest or profits (*b*). If the partners of such trustees have notice of the breach of trust they are under the same liability (*b*). So, where the executor of a deceased partner improperly uses his testator's assets in the business carried on by

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(*n*) *Smith* v. *Everett* (1859), 27 Beav. 446.

(*o*) *Simpson* v. *Chapman* (1853), 4 De G. M. & G. 154, *per* TURNER, L.J., at pp. 171, 172, following and approving *Willett* v. *Blanford* (1842), 1 Hare, 253.

(*p*) *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298, 309.

(*q*) *Smith* v. *Everett*, *supra*, at pp. 455, 456; and, as to disposal of goodwill, see p. 104, *post*.

(*r*) "The nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, and the conduct of parties after his death may materially affect the rights of the parties" (*Willett* v. *Blanford*, *supra*, *per* WIGRAM, V.-C., at p. 272). The inquiry should be whether the profits were made by any and what application of the fund constituting the capital at the date of dissolution, or by the application of any other and what funds (*Crawshay* v. *Collins* (1808), 15 Ves. 218; see Lord ELDON'S subsequent observations as to his decree in the latter case in *Crawshay* v. *Collins* (1826), 2 Russ. 325, 330, in *Brown* v. *De Tastet* (1821), Jac. 284, at p. 297, and in *Cook* v. *Collingridge* (1823), Jac. 607, 622, 623) Where trade was carried on by a surviving partner, with the larger capital of a deceased partner, wrongfully claiming to do so on his own account, the court apportioned the profits to capital, after making all proper allowances including compensation for management to the surviving partner (*Yates* v. *Finn* (1880), 13 Ch. D. 839).

(*a*) *Townend* v. *Townend* (1859), 1 Giff. 201; see *Flockton* v. *Bunning* (1868), 8 Ch. App. 323, n.

(*b*) *Flockton* v. *Bunning*, *supra*.

him as surviving partner, he is the person liable to account; but persons subsequently taken into partnership by him are not liable unless they have notice of the breach of trust (*c*).

Where an executor or trustee is charged with interest instead of profits, such interest may, upon special grounds—for example, where there was a duty to call in and accumulate—be calculated with yearly rests, although his partners may only be liable to make good the principal sum with simple interest (*d*).

Compound interest.

200. The circumstances in which the assets are employed after the expiration of the partnership term by one partner may be such as to imply a new partnership at will, in which event the rights of the parties may continue to be governed by provisions applicable to the previous partnership (*e*).

New partnership.

SUB-SECT. 3.—*Realisation and Disposal of Assets.*

(i.) *In General.*

201. Upon dissolution each partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the partnership property applied in payment of the firm's debts and liabilities, and to have the surplus assets applied in payment of what is due to the partners after deducting what may be due from them to the firm (*f*). Subject to any contrary agreement, this implies a right to have the assets sold (*g*) to provide a fund for discharge of liabilities, and for the adjustment of the rights of the partners among themselves.

Right of application of assets.

Implied right to sale.

Partnership articles often contain provisions intended to obviate a sale, especially in the event of a partial dissolution, and such provisions, if they can be acted upon, bind the partners. If, however, such provisions cannot be carried out, a sale may be necessary, although the articles may provide for the distribution of the assets among the partners *in specie*, and in this event any partner or his representatives may apply to the court to wind up the affairs of the firm (*h*).

Provisions to obviate sale.

(*c*) *Macdonald* v. *Richardson, Richardson* v. *Marten* (1858), 1 Giff. 81, 89.

(*d*) *Jones* v. *Foxall* (1852), 15 Beav. 388, 395, 396; *Williams* v. *Powell* (1852), 15 Beav. 461, 470. For the principles on which the court acts in cases of this kind, see also *Docker* v. *Somes* (1834), 2 My. & K. 655, *per* Lord BROUGHAM, at p. 655; *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318, *per* Lord SELBORNE, at p. 344; and see title MONEY AND MONEY-LENDING, Vol. XXI., p. 43.

(*e*) *Parsons* v. *Hayward* (1862), 4 De G. F. & J. 474; see p. 23, *ante*.

(*f*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 39. This provision gives express statutory recognition and effect to the equitable lien which a partner has on the property of the firm and on the shares of his co-partners; see, further, pp. 61, 62, *ante*.

(*g*) *Wild* v. *Milne* (1859), 26 Beav. 504; *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298; *Burdon* v. *Barkus* (1861), 3 Giff. 412; (1862), 4 De G. F. & J. 42, C. A.; *Steward* v. *Blakeway* (1869), 4 Ch. App. 603, 609; compare *Re Bourne, Bourne* v. *Bourne*, [1906] 2 Ch. 427, 430, 431, C. A.; *Rigden* v. *Pierce* (1822), Madd. & G. 353.

(*h*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s 39; *Taylor* v. *Neate* (1888), 39 Ch. D. 538; compare *Cook* v. *Collingridge* (1823), Jac. 607; and as to the principles upon which the court acts in ordering a sale, see

SECT. 5.

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(ii.) *Sale by Order of Court.*

When sale may be ordered.

202. A sale may be ordered by the court where an option for a surviving or continuing partner to purchase at a valuation is not exercised (*i*) or is a fraud upon the bankruptcy law (*k*); but where an agreement for purchase by a surviving partner at a valuation cannot be carried out in the precise manner stipulated, in consequence of the omission to provide for an umpire, the court may decline to order a sale and substitute itself for the arbitrators (*l*).

Sale of partnership land.

203. When land is partnership property, properly so called, the court will order it to be sold, even though there are no outstanding partnership debts (*m*); but when it is really the subject not of partnership, but of part ownership, it is not partnership property (*n*).

Order for sale by court.

204. A sale under an order of the court will be carried out in the manner most beneficial to the common interest (*o*). Such an order may be made on motion before trial of the action, where the partnership is clearly dissolved (*p*), or even where it is not dissolved but the position of the business is daily growing worse (*q*).

Mode of sale.

The matter is frequently referred to a master in order that he may consider the best course to pursue, and the best way of selling (*r*); if necessary, a receiver and manager may be appointed until sale (*s*); and generally the court will mould its order to meet the circumstances of each case. For instance, when one partner has a greatly preponderating interest in the concern, liberty may be given to him

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the text, *supra*. The same principles should, so far as practicable, guide the partners in disposing of the assets out of court. With regard to the valuation of and mode of dealing with unsaleable assets, see p. 103, *post*.

(*i*) *Downs* v. *Collins* (1848), 6 Hare, 418.

(*k*) *Wilson* v. *Greenwood* (1818), 1 Swan. 471; *Collins* v. *Barker*, [1893] 1 Ch. 578; *Whitmore* v. *Mason* (1861), 2 John. & H. 204.

(*l*) *Dinham* v. *Bradford* (1869), 5 Ch. App. 519. "It is not the very essence and substance of the contract, so that no contract can be made out except through the medium of the arbitrators" (*ibid.*, *per* Lord HATHERLEY, L.C., at p. 523; approved in *Hordern* v. *Hordern*, [1910] A. C. 465, 474, P. C.). But in *Collins* v. *Collins* (1858), 26 Beav. 306, the court declined to appoint an umpire on the refusal of the valuers of the parties to do so.

(*m*) *Wild* v. *Milne* (1859), 26 Beav. 504; and see *Re Bourne*, *Bourne* v. *Bourne*, [1906] 2 Ch. 427. As between the real and personal representatives of deceased partners, the proceeds of sale of partnership land are deemed to be personal estate; see p. 56, *ante*.

(*n*) *Steward* v. *Blakeway* (1869), 4 Ch. App. 603; see also p. 6, *ante*. In such a case a co-owner is entitled to partition, but not to a sale, except under the Partition Acts, 1868 (31 & 32 Vict. c. 40), and 1876 (39 & 40 Vict. c. 17); see title PARTITION, Vol. XXI., pp. 834 *et seq.*

(*o*) *Taylor* v. *Neate* (1888), 39 Ch. D. 538; *Leaf* v. *Coles* (1851), 1 De G. M. & G. 171.

(*p*) *Crawshay* v. *Maule* (1818), 1 Swan. 495; compare *Broadwood* v. *Goding* (1835), 5 L. J. (CH.) 96.

(*q*) *Bailey* v. *Ford* (1843), 13 Sim. 495.

(*r*) *Wilson* v. *Greenwood*, *supra*; *Madgwick* v. *Wimble* (1843), 6 Beav. 495, 502; *Leaf* v. *Coles*, *supra*; *Crawshay* v. *Maule*, *supra*, at p. 529; compare *Blyth* v. *Blyth* (1861), 4 L. T. 536.

(*s*) *Waters* v. *Taylor* (1813), 2 Ves. & B. 299 (where the court allowed the parties to submit proposals for the *interim* management of an opera house); and see title RECEIVERS.

to submit proposals for the purchase of the shares of the other partners (*t*).

The court may give liberty to all or any of the partners to bid, but in that event the conduct of the sale is not given to those who have such liberty; neither may they interfere in any way with the sale (*a*).

Liberty for partners to bid.

In the absence of fraud, a partner who is entrusted with the winding up of the partnership affairs is not solely liable for loss resulting from an injudicious sale of the assets (*b*).

Liability for loss on sale.

205. Book debts should be sold with the business when it is sold as a going concern (*c*).

Book debts.

Assets which are unsaleable must be charged in the accounts at a valuation (*d*).

Unsaleable assets.

(iii.) *Payment of Losses.*

206. In the absence of contrary agreement, losses, including losses of capital, are payable first out of profits, next out of capital, and, in case of deficiency, by the partners in the proportions in which they would be entitled to share profits (*e*).

How losses *primâ facie* payable.

Where partners agree to contribute capital in unequal shares but to divide the profits equally, and the assets prove insufficient to make good the capital, each partner is treated as liable to contribute an equal share of the deficiency, and then the assets are applied in paying to each partner rat ably what is due to him from the firm in respect of capital (*f*).

Loss of capital.

(iv.) *Application of Assets Realised.*

207. The assets, including contributions, if any, by partners to make up losses and deficiencies of capital, are applicable in the following manner and order:—

Order of application of assets.

(1) Payment of the liabilities of the firm to persons who are not partners;

(2) Repayment rateably of advances by partners to the firm;

(3) Repayment rateably of the capital of the partners;

(*t*) *Syers* v. *Syers* (1876), 1 App. Cas. 174, 183 (where an inquiry was directed what was the value of the interest of the other partners).

(*a*) *Wild* v. *Milne* (1859), 26 Beav. 504; *Dean* v. *Wilson* (1878), 10 Ch. D. 136.

(*b*) *Cragg* v. *Ford* (1842), 1 Y. & C. Ch. Cas. 280.

(*c*) *Johnson* v. *Helleley* (1864), 34 Beav. 63; and the title of a periodical published by a partnership firm has been held to form part of the assets which ought to be realised, for what it may be worth, on dissolution (*Bradbury* v. *Dickens* (1859), 27 Beav. 53).

(*d*) This rule has been applied to emoluments from personal appointments (*Smith* v. *Mules* (1852), 9 Hare, 556), and to an unassignable mail contract held by a partner (*Ambler* v. *Bolton* (1872), L. R. 14 Eq. 427). But a specific undertaking, which is the ob ect of the partnership, may be ordered to be carried out, and the ultimate account postponed until its completion (*McClean* v. *Kennard* (1874), 9 Ch. App. 336).

(*e*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 44 (a); and see p. 64, *ante*.

(*f*) *Garner* v. *Murray*, [1904] 1 Ch. 57. This was also the rule before 1890 (*Wood* v. *Scoles* (1866), 1 Ch. App. 369; *Binney* v. *Mutrie* (1886), 12 App. Cas. 160, P. C.). As to shares in a partnership, see, generally, pp. 55 *et seq ante*.

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(4) Distribution of the residue, if any, among the partners in the proportion in which profits are divisible (*g*).

Indebtedness in respect of outgoing partner's share.

208. In the absence of contrary agreement, the amount payable by the other partners in respect of the share of a deceased or outgoing partner is a debt from the other partners accruing at the date of death or dissolution, as the case may be (*h*).

(v.) *Disposal of Goodwill.*

Goodwill.

209. The goodwill of the business carried on by a partnership forms part of the assets to be realised upon distribution (*i*).

Sale of goodwill includes right to use name.

210. The sale of the goodwill of a business, in the absence of contrary agreement, includes the right to use the name of the firm (*k*), unless such use is calculated to lead the public to believe that the vendor is still carrying it on and thus to subject him to liability (*l*). Where, however, goodwill is assigned but the actual use of the name is not assigned, the rights arising from the assign-

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(*g*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 44 (b); *Binney* v. *Mutrie* (1886), 12 App. Cas. 160, P. C.

(*h*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 43

(*i*) *Re David and Matthews*, [1899] 1 Ch. 378, 382; *Jennings* v. *Jennings*, [1898] 1 Ch. 378, 384; *Hall* v *Barrows* (1863), 4 De G. J. & Sm. 150, 159; *Johnson* v *Helleley* (1864), 34 Beav. 63 (where book debts were ordered to be sold with the business, so that the purchaser might secure the customers of the old firm); *Page* v. *Ratliffe* (1896), 74 L. T. 343; *Hill* v. *Fearis*, [1905] 1 Ch. 466. Whether there is any goodwill or not seems to be a pure question of fact, and not of mixed law and fact (*A.-G.* v. *Boden*, [1912] 1 K. B. 539, 559). The grounds upon which goodwill ought to be treated and valued as a partnership asset are laid down in *Wedderburn* v. *Wedderburn* (No. 4) (1856), 22 Beav. 84, *per* ROMILLY, M.R., at p. 104, as follows: "The goodwill of a trade, although inseparable from the business, is an appreciable part of the assets of the concern, both in fact and in the estimation of a court of equity. Accordingly, in reported cases, Lord ELDON held that a share of it properly, and as of right, belonged to the estate of the deceased partner. It does not survive to the remaining partners, unless by express agreement; but it may by agreement, as it may be agreed that any particular portion of the partnership assets shall so survive. Goodwill manifestly forms a portion of the subject matter which produces profits which constitutes partnership property and which is to be divided between the surviving partners and the estate of the deceased partner according to the terms of the contract, and when that is silent according to their shares in the concern. There is considerable difficulty in defining accurately what is included under this term 'goodwill,' and it seems to be that species of connection in trade which induces customers to deal with a particular firm. It varies almost in every case, but it is a matter distinctly appreciable which may be preserved (at least to some extent) if the business be sold as a going concern, but which is wholly lost if the concern is wound up, its liabilities discharged, and its assets got in and distributed. I am of opinion then that, both on principle on the authority of decided cases, and on the ordinary rules of common sense, I must, whenever there is a reputation and connection in business constituting goodwill, treat that as part of the assets of the concern."

(*k*) *Banks* v. *Gibson* (1865), 34 Beav. 566, 569. As to the use of trade names, see title TRADE MARKS, TRADE NAMES, AND DESIGNS.

(*l*) *Chatteris* v. *Isaacson* (1887), 57 L. T. 177; *Hookham* v. *Pottage* (1872), 8 Ch. App. 91; *Burchell* v. *Wilde*, [1900] 1 Ch. 551, C. A.; *Townsend* v. *Jarman*, [1900] 2 Ch. 698; compare *Levy* v. *Walker* (1879), 10 Ch. D. 436, C. A.

ment are qualified by limiting the use of the name to which the goodwill is annexed, so as not to impose a personal liability on the assignors (*m*). If the goodwill is not sold, each partner may use the name of the firm, if he does not by doing so hold out the other partners as being still partners with him (*n*). If a partner agrees to retire and his partners buy his share but do not take any express assignment of the goodwill, they are not entitled to continue the use of his name as part of the style of the firm (*o*); and where a business is carried on under the name, solely or with any addition, of an outgoing partner who is still living and not bankrupt, a purchaser of the business including the goodwill is not entitled to use the name of the outgoing partner in such a way as to suggest that he is still connected with the business (*p*), unless the right to use the firm name is expressly assigned (*q*).

Rights of vendor.

211. The vendor of the goodwill of a business is not, in the absence of contrary agreement or fraudulent breach of faith, precluded from carrying on a similar business in his own name (*a*), or from announcing that fact by general public advertising (*b*). He may deal with customers of the old firm (*c*), but he must not, directly or indirectly, canvass or solicit the customers of the old firm, either personally by private circulars or by public advertisements of such a nature as to be, in effect, appeals to old customers (*d*).

Restrictions affecting vendor of goodwill.

Though the vendor may carry on a similar business, he must not do so in the name of the old firm, and must not represent his business as the same business or as a continuation of the business the goodwill of which has been sold (*e*), nor may he issue circulars which suggest that he is still carrying it on (*f*). This rule is founded on the principle that a vendor must not derogate from his own grant (*g*). It therefore binds the persons who, as vendors, obtain the benefit of the consideration for the goodwill; but it does not bind persons who are not beneficially interested in

(*m*) *Townsend* v. *Jarman*, [1900] 2 Ch. 698, 705.

(*n*) *Burchell* v. *Wilde*, [1900] 1 Ch. 551, C. A.; see p. 15, *ante*.

(*o*) *Gray* v. *Smith* (1889), 43 Ch. D. 208, C. A.; and see *Jennings* v. *Jennings*, [1898] 1 Ch. 378, 384, 388; *Rosher* v. *Young* (1901), 17 T. L. R. 347.

(*p*) *Scott* v. *Rowland* (1872), 26 L. T. 391.

(*q*) *Townsend* v. *Jarman*, *supra*, at p. 705.

(*a*) *Shackle* v. *Baker* (1808), 14 Ves. 468; *Harrison* v. *Gardner* (1817), 2 Madd. 198, 221.

(*b*) *Labouchere* v. *Dawson* (1872), L. R. 13 Eq. 322, approved of and adopted in *Trego* v. *Hunt*, [1896] A. C. 7.

(*c*) *Leggott* v. *Barrett* (1880), 15 Ch. D. 306, 310, 313, 315, C. A., overruling on this point *Ginesi* v. *Cooper & Co.* (1880), 14 Ch. D. 596.

(*d*) *Labouchere* v. *Dawson, supra*; *Curl Brothers, Ltd* v. *Webster*, [1904] 1 Ch. 685 (further extending the rule in *Trego* v. *Hunt, supra*).

(*e*) *Churton* v. *Douglas* (1859), John. 174, 195, 198; *Crutwell* v. *Lye* (1810), 17 Ves. 335; *Hookham* v. *Pottage* (1872), 8 Ch. App. 91.

(*f*) *Vernon* v. *Hallam* (1886), 34 Ch. D. 748, 752.

(*g*) A sale of the goodwill of a business may include the benefit of a covenant precluding competition by persons employed by the vendor in such business (*Jacoby* v. *Whitmore* (1883), 49 L. T. 335, C. A.; *Automobile Carriage Builders, Ltd.* v. *Sayer* (1909), 101 L. T. 419; *Townsend* v. *Jarman, supra, per* FARWELL, L.J., at p. 704); and, as to covenants in restraint of trade, see, generally, title TRADE AND TRADE UNIONS.

SECT. 5. Winding up of Partnership Business.

such consideration, for example, a bankrupt whose share in the goodwill is sold by his trustee in bankruptcy (*h*), or a partner who has been expelled under a provision in the articles (*i*), or a receiver who has carried on a business for the benefit of other persons under an order of the court (*j*).

The same rule applies where the goodwill becomes, on dissolution, the property of one of the partners, either by purchase in the ordinary way or pursuant to a provision in the articles (*k*).

Valuation of goodwill.

212. An agreement that on dissolution the partnership assets shall be taken by one partner includes goodwill, and it must be valued on the footing that the outgoing partner is entitled to carry on a similar business (*l*).

Partners restricted against competition.

213. On a sale by the court in a partnership action it is usual and proper to state in the particulars or conditions of sale that the vendors are to be at liberty to carry on a similar business (*m*). It follows that the value of the goodwill, as an asset to be disposed of, is enhanced if the outgoing partners are bound by contract not to carry on a similar business, and it is a question of construction, usually arising on the articles, whether or not they are so bound (*n*). A vendor of the goodwill, whether a partner or not, may of course preclude himself by contract from using the name of the firm (*o*).

Assets included on sale of business.

214. On the sale of a partnership business the goodwill (*p*) and

(*h*) *Walker* v. *Mottram* (1881), 19 Ch. D. 355, 364, C. A.

(*i*) *Dawson* v. *Beeson* (1882), 22 Ch. D. 504, 509, 511, C. A.

(*j*) *Re Irish, Irish* v. *Irish* (1888), 40 Ch. D. 49.

(*k*) *Jennings* v. *Jennings*, [1898] 1 Ch. 378; *Trego* v. *Hunt*, [1896] A. C. 7, overruling *Pearson* v. *Pearson* (1884), 27 Ch. D. 145, C. A.; compare *Gillingham* v. *Beddow*, [1900] 2 Ch. 242 (where a provision in articles that an outgoing partner might set up a similar business in the neighbourhood was held to be merely declaratory, and not to authorise solicitation of old customers). For definitions of goodwill, see *Trego* v. *Hunt*, *supra*, *per* Lord HERSCHELL, at p. 17, and *Churton* v. *Douglas* (1859), John. 174, 188. Lord ELDON'S definition of goodwill in *Cruttwell* v. *Lye* (1810), 17 Ves. 335, at p. 346, as "nothing more than the probability that the old customers will resort to the old place" must now be regarded as inadequate; see *Trego* v. *Hunt*, *supra*, at pp. 17, 27.

(*l*) *Reynolds* v. *Bullock* (1878), 26 W. R. 678; *Hall* v. *Barrows* (1863), 4 De G. J. & Sm. 150. But goodwill is not included in a valuation of the property and effects of the business (*Chapman* v. *Hayman* (1885), 1 T. L. R. 397).

(*m*) *Johnson* v. *Helleley* (1864), 34 Beav. 63. For the decree in *Cook* v. *Collingridge* (1823), Jac. 607, in which the principles applicable to the valuation of goodwill as an asset on the sale of a partnership business were laid down by Lord ELDON, L.C., see 27 Beav. 456, n.

(*n*) *Cooper* v. *Watson* (1784), 3 Doug. (K. B.) 413; S. C., *sub nom. Cooper* v. *Watlington*, 2 Chit. 451; *Kennedy* v. *Lee* (1817), 3 Mer. 441, 455.

(*o*) *Pomeroy* (*Mrs.*), *Ltd.* v. *Scalé* (1906), 23 T. L. R. 170. Whether a person selling a share in a business under a power of attorney is authorised to bind his principal not to carry on a competing business was discussed, but not decided, in *Hawksley* v. *Outram*, [1892] 3 Ch. 359, 375, 378, 381, C. A. A covenant, unlimited as regards space, not to carry on business in a specified name is not void as being in restraint of trade (*Vernon* v. *Hallam* (1886), 34 Ch. D. 748, 751); see title TRADE AND TRADE UNIONS.

(*p*) *Shipwright* v. *Clements* (1871), 19 W. R. 599; *Kingston, Miller & Co., Ltd.* v. *Thomas Kingston & Co., Ltd.*, [1912] 1 Ch. 575.

trade marks used in connection with the business (*a*) pass without express mention.

SECT. 5. Winding up of Partnership Business.

215. Although upon the construction of particular articles, where a general account and valuation is to be taken on the death of a partner, it may be that the goodwill should be included (*b*), the value of the goodwill should not, in the absence of contrary agreement, be included in the periodical balance sheets of a partnership firm; and, therefore, where the value of a deceased partner's share is, by agreement, governed by such balance sheet, his estate is not entitled to treat the goodwill as an asset (*c*).

When goodwill is to be treated as an asset.

Where a surviving partner sells the partnership business, the estate of his deceased partner is entitled to a share of the purchase-money representing the value, if any, of the goodwill; but, having regard to the rights of the surviving partners to carry on a similar business, such value may be infinitesimal (*d*).

216. Articles of partnership may of course contain such provisions as entitle surviving partners to retain the benefit of the goodwill, subject to payment of a share of profits to the estate of the deceased partner. It is a question of construction in each case whether the provisions in the articles have that effect or not (*e*); and the court will give effect to a provision in partnership articles that goodwill shall not be valued on the assets being taken over by a surviving partner (*f*).

Agreement for retention of goodwill.

Part VII.—Limited Partnerships.

SECT. 1.—*Definitions and Constitution.*

217. The formation of limited partnerships is authorised by the Limited Partnerships Act, 1907 (*g*) (in this part of the title frequently referred to as "the Act").

Statutory creation.

(*a*) *Shipwright* v. *Clements* (1871), 19 W. R 599; *Hall* v. *Barrows* (1863), 4 De G. J. & Sm. 150; compare *Benbow* v. *Low*, *Low* v. *Benbow* (1881), 44 L. T. 875.

(*b*) *Wade* v. *Jenkins* (1860), 2 Giff. 509.

(*c*) *Hunter* v. *Dowling*, [1895] 2 Ch. 223; *Scott* v. *Scott* (1904), 89 L. T. 582, following *Steuart* v. *Gladstone* (1879), 10 Ch D. 626, C. A.

(*d*) *Smith* v. *Everett* (1859), 27 Beav. 446; compare *Mellersh* v. *Keen* (1859), 27 Beav. 236. It was at one time considered that, on the death of a partner, the goodwill belonged exclusively to the surviving partners (*Hammond* v. *Douglas* (1800), 5 Ves. 539; *Lewis* v. *Langdon* (1835), 7 Sim. 421), but it is now settled that it forms part of the assets of the firm in which the estate of the deceased partner is entitled to share, and, in the absence of contrary agreement, they are entitled to have it sold with the other assets (*Re David and Matthews*, [1899] 1 Ch. 378, 382; see note (*i*), p. 104, *ante*).

(*e*) *Smith* v. *Nelson* (1905), 92 L. T. 313.

(*f*) *Hordern* v. *Hordern*, [1910] A. C. 465, P. C.

(*g*) 7 Edw. 7, c. 24, ss. 2, 4. The Act, which came into operation on the 1st January, 1908, for the first time renders it possible for a person to become an actual partner in a British mercantile firm, upon the terms

SECT. 1. Definitions and Constitution.

218. A limited partnership must not consist, if carrying on a banking business, of more than ten partners, and if carrying on any other business, of more than twenty (*h*), of whom one at least is a general partner and one at least is a limited partner (*i*).

Limited partnership. Limited partner.

219. A limited partner is one who contributes a stated amount of capital or property, and who is not liable for the firm's debts beyond that amount (*k*), unless he acts in such a way as to deprive himself of the privileges of a limited partner (*l*). A corporation may be a limited partner (*m*).

General partner.

220. A general partner is any partner other than a limited partner (*n*). General partners are liable for all the firm's obligations (*o*). They are, in effect, managing partners; and, if the firm is wound up by the court, they are, subject to certain modifications, in the same position as directors of a company (*p*).

Interpretation of terms.

221. Under the Act (*q*) "firm," "firm name," and "business" have the same meanings as in the Partnership Act, 1890 (*r*).

that his liability to the creditors of the firm shall be strictly limited, like that of a shareholder in a limited company, to a fixed amount, representing the capital invested by him in the business. He is in the position of a sleeping partner with limited liability. It was at one time and in some quarters anticipated that something of the same kind had been effected by the Partnership Law Amendment Act, 1865 (28 & 29 Vict. c. 86), commonly called "Bovill's Act," the main provisions of which are now incorporated in the Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 2, 3, by which the earlier Act was repealed (see pp. 8 *et seq.*, *ante*). But it was soon established by the decisions of the court that the first four sections of Bovill's Act were merely declaratory of the then existing law, and the investor under that Act found himself in a somewhat anomalous position. If his agreement was skilfully framed he was not a partner, but a creditor, precluded from proving in competition with other creditors of the firm, unless he took the wise precaution of obtaining some security for his loan; while if his agreement had been framed by an unskilful or careless practitioner who endeavoured to secure for him the rights of a partner, he might easily be saddled with the unlimited liabilities incurred by an ordinary acting or sleeping partner; see pp. 24, 34, *ante*.

(*h*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 4 (2). A partnership consisting of more than the prescribed number (see p. 16, *ante*) cannot be registered as a limited partnership: it must be incorporated as a limited company under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), unless it is formed pursuant to some other Act, or to letters patent, or is engaged in working mines in the Stannaries; see *ibid.*, s. 1; title COMPANIES, Vol. V., p. 44.

(*i*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 4 (2). For forms of limited partnership deed, see Encyclopædia of Forms and Precedents, Vol. XVI., pp. 454, 460.

(*k*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 4 (2).

(*l*) See p. 110, *post*; and see Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), ss. 4 (3), 6.

(*m*) *Ibid.*, s. 4 (4).

(*n*) *Ibid.*, s. 3.

(*o*) *Ibid.*, s. 4 (2).

(*p*) See p. 113, *post*.

(*q*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24) s. 3.

(*r*) 53 & 54 Vict. c. 39, ss. 4, 45; see pp. 4, 5, *ante*.

SECT. 2.—*Registration.*

SUB-SECT. 1.—*Effect of Non-registration.*

Registration essential.

222. If a limited partnership is not registered with the Registrar of Joint Stock Companies (*s*) it is treated as a general partnership; and the limited partners are then under the same liabilities as general partners (*t*). Moreover, each general partner is liable to a fine of £1 per day during default in registration (*u*).

Penalty for default.

SUB-SECT. 2.—*Particulars Required to be Registered.*

Statement on first registration.

223. On the formation of a limited partnership the following particulars must be registered, namely, the firm name, the general nature of the business, the principal business place, the full name of each partner, the date of commencement and term of the partnership, a statement that it is limited, the description of each limited partner as such, and the amount contributed by him, and whether in cash or how otherwise. These particulars are to be contained in a statement signed by all the partners and sent by post or delivered to the registrar (*v*).

Notice of changes in firm.

224. If any change is made in the firm name, the general nature, or principal place, of the business, the term or character of the partnership, the partners or the name of any partner, the sum contributed by any limited partner, or the liability of a partner by reason of his becoming a limited partner instead of a general partner, or *vice versâ*, a notice specifying such change, signed by the firm, must be sent by post or delivered to the registrar within seven days for registration (*a*).

Advertisement of changes.

225. Notice of any transaction by which a general partner becomes a limited partner, or of any assignment of a limited partner's share, must be advertised in the *London, Edinburgh*, or *Dublin Gazette*, according as the limited partnership is registered in England, Scotland, or Ireland (*b*).

SUB-SECT. 3.—*Provisions Relating to Registration.*

Registrar.

226. The Registrar of Joint Stock Companies is the registrar under the Act (*c*).

(*s*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 15; see title COMPANIES, Vol. V., p. 37.

(*t*) Limited Partnerships Act, 1907 (7 Edw. 7, c, 24), s. 5. As to such liabilities, see pp. 34 *et seq.*, *ante*.

(*u*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 9 (2).

(*v*) *Ibid.*, s. 8. For form of application for registration containing the prescribed statement, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 467.

(*a*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 9. For form of notice, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 470.

(*b*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 10.

(*c*) *Ibid.*, s. 15. The several offices for the registration of such companies in London, Edinburgh, and Dublin are the offices for the registration of limited partnerships carrying on business within those parts of the United Kingdom in which they are respectively situated (*ibid.*).

SECT. 2. **Registration.**

He must keep a register and index of all registered limited partnerships and statements in relation thereto (*d*).

Register. Certificates.

Every such statement is to be filed in the registry, and a certificate of registration is to be sent by post to the registering firm (*e*). Such certificate, or a copy, certified by the registrar or assistant registrar, of any registered statement, is evidence in all civil and criminal proceedings (*f*).

Right of inspection.

Any person may inspect the register and obtain a certified copy of, or extract from, any registered statement upon payment of the prescribed fees (*g*).

Penalty for false statement.

A person who knowingly makes, signs, sends, or delivers a false statement for registration is liable to imprisonment with hard labour for a maximum term of two years (*h*).

SECT. 3.—*Modifications of General Law of Partnership.*

SUB-SECT. 1.—*In General.*

Application of general law of partnership.

227. The rules of law and equity relating to partnership, as consolidated and amended by the Partnership Act, 1890 (*i*), apply to limited partnerships with the modifications enacted by the Limited Partnerships Act, 1907 (*k*). In addition to the provisions in relation to registration already mentioned (*l*), these modifications relate to the matters dealt with in the following sub-sections (*m*).

SUB-SECT. 2.—*Powers and Liabilities of a Limited Partner.*

Powers.

228. A limited partner may inspect the firm's books and examine into the state and prospects of the business personally or by his agent, and may advise with the other partners thereon (*n*), but he must not take any other part in the management of the business, and he cannot bind the firm (*o*); nor may he withdraw any part of his capital (*o*).

Liabilities.

So long as he complies with these provisions a limited partner is only liable for the firm's debts and obligations to the extent of his capital (*p*). If he withdraws any part of such capital he is liable to the extent of the amount so withdrawn (*q*), and, if he takes

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(*d*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 14.
(*e*) *Ibid.*, s. 13.
(*f*) *Ibid.*, s. 16 (2). For form of certificate, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 469.
(*g*) For inspection, not exceeding 1*s.*; for certificate of registration, not exceeding 2*s.*; for certified copies, not exceeding 6*d.* per folio or (in Scotland) per sheet of 200 words (Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 16 (1)).
(*h*) *Ibid.*, s. 12.
(*i*) 53 & 54 Vict. c. 39; see pp. 3 *et seq.*, *ante*.
(*k*) 7 Edw. 7, c. 24, s. 7.
(*l*) See p. 109, *ante*.
(*m*) See the text, *infra*, and p. 111, *post*.
(*n*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (1).
(*o*) *Ibid.*, s. 4 (3).
(*p*) *Ibid.*, s. 4 (2).
(*q*) *Ibid.*, s. 4 (3).

part in the management for any period, he is liable as a general partner for all debts and obligations incurred during such period (*r*).

SECT. 3. **Modifications of General Law of Partnership.**

SUB-SECT. 3.—*Death, Bankruptcy, or Lunacy of a Limited Partner.*

229. A limited partnership is not dissolved by the bankruptcy or death of a limited partner (*s*). His capital vests in his trustee in bankruptcy or his legal personal representative, who has, apparently, rights similar to those of an assignee of a share in an ordinary partnership (*t*).

Bankruptcy or death of limited partner.

If a limited partner becomes a lunatic, that event does not *ipso facto* dissolve the partnership, but, if his share cannot otherwise be ascertained or realised, the court may dissolve the partnership (*s*).

Lunacy.

SUB-SECT. 4.—*Other Modifications.*

230. When differences arise about ordinary matters of business, the decision rests with a majority of the general partners (*a*) instead of a majority of all the partners, as in the case of an ordinary partnership (*b*). The general partners may admit new partners without the consent of a limited partner (*c*), although in the case of an ordinary partnership the consent of all the partners is required (*d*).

Special powers of general partners.

231. A person to whom a limited partner assigns his share with the consent of the general partners stands, in one important respect, in a different position from the assignee of a share in an ordinary partnership (*e*). He becomes a limited partner, and has all the rights previously belonging to the assignor (*f*).

Assignment of share of limited partner.

If the share of a limited partner becomes charged to secure his separate debt this does not, as in the case of an ordinary partnership (*g*), entitle the other partners to dissolve the partnership (*h*).

Charge on share.

232. A limited partner is precluded from exercising the usual right of a partner in an ordinary partnership of dissolving the partnership by notice (*i*).

No right to dissolve by notice.

(*r*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (1); see Lindley, Law of Partnership, 8th ed., pp. 903, 904 (where the effect of an agreement as to the terms on which a partner may retire, or as to the rights of the trustee or executors of a bankrupt or deceased partner, are discussed); see also title COMPANIES, Vol. V., p. 75.

(*s*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (2); compare titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 161; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 221; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 442, 443; p. 87, *ante*.

(*t*) See pp. 51, 57, *ante*.

(*a*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (5) (a).

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (8); see p. 49, *ante*.

(*c*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (5) (d).

(*d*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (7); see p. 50, *ante*.

(*e*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31; see p. 57, *ante*.

(*f*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (5) (b).

(*g*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 33 (2); compare *ibid.*, s. 23 (2); see pp. 59, 87, *ante*.

(*h*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (5) (c).

(*i*) *Ibid.*, s. 6 (5) (e); compare Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 26, 32 (c); see p. 85, *ante*.

SECT. 3.

SUB-SECT. 5.—*Winding up on Dissolution.*

Modifications of General Law of Partnership.

233. Unless the court otherwise orders (*k*), the affairs of a limited partnership are, on dissolution, to be wound up by the general partners (*l*). In so doing they must, subject to the provisions of the Act (*m*), be guided by the rules applicable to the winding up of an ordinary partnership, treating the limited partners as sleeping partners (*n*).

Winding up otherwise than by the court.

SUB-SECT. 6.—*Winding up by the Court.*

(i.) *In General.*

How wound up.

234. A limited partnership, registered under the Act (*m*), may be wound up by the court as an unregistered company under the Companies (Consolidation) Act, 1908 (*o*). Such winding up is governed by the provisions of that Act (*p*) and of the Companies (Winding-up) Rules, 1909, relating to the winding up of registered companies (*q*), with certain exceptions and additions applicable to unregistered companies generally (*r*), and, with certain modifications applicable, to limited partnerships only (*a*).

Application of general practice.

The winding up of companies by the court generally is dealt with elsewhere (*b*), and it is therefore only necessary to point out in what respects the practice, procedure and principles adopted and acted

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(*k*) See p. 114, *post*.

(*l*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (3). For form of deed of dissolution, see Encyclopædia of Forms and Precedents, Vol XVI., p. 465.

(*m*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24).

(*n*) See p. 101, *ante*. This follows from the Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 7, which, in effect, renders the provisions governing an ordinary partnership applicable to a limited partnership in cases not specially provided for by the Act. The winding up by the general partners is, therefore, not a voluntary winding up within the meaning of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and there can be no winding up subject to the supervision of the court; see *ibid.*, s. 268 (1) (ii.); title COMPANIES, Vol. V., p. 648; and p. 113, *post*.

(*o*) 8 Edw. 7, c. 69, s. 267.

(*p*) *Ibid.*, s. 268.

(*q*) *Ibid.*, s. 273.

(*r*) The exceptions and additions are contained in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268; see title COMPANIES, Vol. V., pp. 647 *et seq.*

(*a*) The modifications applicable to the winding up of a limited partnership, other than those applicable to other unregistered companies, are contained in the Limited Partnerships (Winding-up) Rules, 1909 (Stat. R. & O., 1909, p. 608), which came into operation on the 1st April, 1909; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (vii.); title COMPANIES, Vol. V., p. 647, note (*u*). The concurrence of the President of the Board of Trade is required in any rules modifying the provisions of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), as applicable to the winding up of limited partnerships, and the Board has the same powers with regard to the appointment, removal, and salaries of officers, surveillance of liquidators, and duties, as in relation to the winding up of companies; see title COMPANIES, Vol. V., pp. 434—437.

(*b*) As regards registered companies, see title COMPANIES, Vol. V., pp. 391 *et seq.*; and as regards unregistered companies, see *ibid.*, pp. 647 *et seq.*

upon generally do not apply to the winding up of a limited partnership and what additional or substituted provisions are applicable (*c*).

A limited partnership, being for this purpose an unregistered company, cannot be wound up voluntarily or subject to the supervision of the court (*d*).

SECT. 3. Modifications of General Law of Partnership.

(ii.) *Definitions.*

No winding up voluntarily or under supervision.

Definitions.

235. In the application of the Companies (Consolidation) Act, 1908 (*e*), and the Companies (Winding-up) Rules, 1909, and the forms thereby prescribed, to the winding up of a limited partnership, the words "limited partnership" are substituted for "company," the words "general partner" for "director," "secretary" and "secretary or chief officer," the words "manager, clerk or servant" for "officer," the word "partner" for "member" and "shareholder," and the words "principal place of business as registered" for "registered office," except where the context or subject-matter otherwise requires (*f*), and except for the purposes of the Companies (Consolidation) Act, 1908 (*e*), s. 268, where "member" means only a "general partner" and "principal place of business" means "principal place of business as registered" (*g*).

(iii.) *Jurisdiction.*

Jurisdiction of High Court.

236. The High Court of Justice (*h*) is the only court which has jurisdiction to make an order for winding up a limited partnership registered in England (*i*), but the judge making such order may, then or afterwards, direct that the winding up of any limited partnership whose registered place of business is situated within the jurisdiction (*k*) of the Chancery Court of either of the Counties

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(*c*) The questions dealt with in this section are in the main arranged in the same order as the similar questions in title COMPANIES, Vol. V., pp. 391 *et seq.*, but in a few cases, *e.g.*, the right to inspect the file of proceedings (see p. 116, *post*), and the powers of the Board of Trade (see note (*a*), p. 112, *ante*), it has been thought more convenient to adopt a slightly different arrangement.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 267. It would seem to follow that the Official Receiver cannot present a petition for the winding up of a limited partnership under *ibid.*, s. 137 (2); see title COMPANIES, Vol. V., pp. 403, 648, and see note (*n*), p. 112, *ante*.

(*e*) 8 Edw. 7, c. 69.

(*f*) Limited Partnerships (Winding-up) Rules, 1909, r. 1. In Ireland, no rules have been framed under the Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), but a limited partnership in Ireland can be wound up under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and Rules made thereunder in 1910 (*Re Rodger and the Limited Partnerships Act*, 1907 (1911), unreported).

(*g*) Limited Partnerships (Winding-up) Rules, 1909, r. 6.

(*h*) This jurisdiction has not been specially assigned to any particular judge under the Companies (Consolidation) Act, 1908 (8 Edw. 7, s. 69), s. 132, but petitions have been heard and disposed of by the judges of the Chancery Division, who have jurisdiction to wind up companies (*Re Hughes & Co.*, [1911] 1 Ch. 342); and see title COURTS, Vol. IX., p. 61.

(*i*) The Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131, does not apply; it is excluded by the Limited Partnerships (Winding-up) Rules, 1909, r. 7.

(*k*) See also Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69),

SECT. 3. Modifications of General Law of Partnership.

Palatine of Lancaster or Durham, or of any county court having jurisdiction to wind up a company, shall proceed in such court (*l*).

(iv.) *Grounds for Winding up.*

Inferior courts.

Grounds for winding up by court.

237. A limited partnership may be wound up upon the same grounds as an unregistered company, namely, whenever it has been dissolved, or has ceased to carry on business, or is unable to pay its debts, or the court is of opinion that it is just and equitable for it to be wound up (*m*). If it carries on business as an assurance company, failure on its part to comply with certain statutory requirements affords an additional ground for winding up (*n*).

Inability to pay debts.

238. When failure to comply with a demand for payment of a debt of £50 or upwards is relied upon as evidence of inability to pay debts, the demand must have been served at the principal place of business as registered, by delivering it to one of the general partners or to some person having, at the time of service, the control or management of the business there, unless the court otherwise orders (*o*).

Just and equitable grounds.

239. In deciding whether it is just and equitable to wind up a limited partnership the court will probably have regard rather to the principles upon which ordinary partnerships are ordered to be dissolved than those upon which limited companies are ordered to be wound up (*p*). Where a limited partnership is being carried on at a loss, and the general partner, having made several drawings on account of profits, refuses without any sufficient reason to sign the annual general account under which drawings in excess of profits would be repayable, and otherwise acts in a way calculated

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s. 268 (1) (i.), as modified by the Limited Partnerships (Winding-up) Rules, 1909, rr. 1, 6; title COMPANIES, Vol. V., pp. 391, 650. This direction does not appear to be a transfer within the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 133; see title COMPANIES, Vol. V., pp. 541, 542. There is no express statutory provision nor rule enabling the proceedings to be sent back to the High Court. They are to "proceed" in the inferior court (Limited Partnerships (Winding-up) Rules, 1909, r. 7), but any decision of such court is subject to the ordinary right of appeal in the case of a palatine court to the Court of Appeal, and in the case of a county court to the High Court; see title COURTS, Vol. IX., pp. 59, 62, 63.

(*l*) Such court has all the powers of the High Court in relation to such winding up (Limited Partnerships (Winding-up) Rules, 1909, r. 7). As to such courts, see titles COUNTY COURTS, Vol. VIII., pp. 405 *et seq.*; COURTS, Vol. IX., pp. 120 *et seq.*

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268; and see title COMPANIES, Vol. V., pp. 650, 651.

(*n*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 23; and see *ibid.*, s. 15; see title COMPANIES, Vol. V., pp. 636 *et seq.* The Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (2), is not expressly excluded, but it is inapplicable, because a limited partnership cannot be wound up voluntarily or subject to supervision within the meaning of that Act; see note (*n*), p. 112, *ante*.

(*o*) Limited Partnerships (Winding-up) Rules, 1909, r. 11; and see note (*t*), p. 42, *ante*.

(*p*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 7.

prejudicially to affect the carrying on of the business, a winding-up order may be made as being just and equitable (*q*).

(v.) *Practice.*

240. A petition may be presented by any general partner or, in the name of the firm, by all the general partners (*r*). Creditors and contributories (*s*) may also petition either together or separately (*t*), but certain statutory restrictions imposed in the case of petitions by contributories of companies do not apply (*s*). Who may petition.

241. A petition for winding up must be presented to the High Court of Justice (*a*), and should be in the prescribed form as nearly as circumstances admit (*b*). It must be dated (*c*), and, if presented in the firm name, must be signed by all the general partners (*d*). Presentation and form of petition.

A petition, unless presented in the name of the firm by all the general partners jointly, if there are more than one, must be served upon the limited partnership at its principal place of business as registered, by delivering it to one of the general partners there, or to some person having at the time of service the control or management of the partnership business there, unless the court or a judge shall otherwise direct; and a petition presented in the name of the firm by all the general partners jointly, if there are more than one, or presented by any general partner, must be served on each of the limited partners personally, unless the court or a judge shall otherwise direct (*e*). Service of petition.

No express provision is made for the service of a petition presented by a creditor or a limited partner, but the rules contain a general provision that every notice and other document required to be served upon the limited partnership for the service of which no special mode is prescribed may be served by post or by leaving it at the principal place of business of the limited partnership as registered, in an envelope addressed to the limited partnership in the firm name as registered, and this provision probably applies (*f*).

(*q*) *Re Hughes & Co.*, [1911] 1 Ch. 342.

(*r*) Limited Partnerships (Winding-up) Rules, 1909, r. 11.

(*s*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (1) (a), (b), (3); title COMPANIES, Vol. V., pp. 401, 402.

(*t*) Limited Partnerships (Winding-up) Rules, 1909, r. 8. The word "contributory" is not expressly defined, but the joint effect of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 124, and the Limited Partnerships (Winding-up) Rules, 1909, rr. 1, 3, is that every partner is for this purpose a contributory. A limited partner may, therefore, present a petition (*Re Hughes & Co., supra*; see title COMPANIES, Vol. V., p. 398).

(*a*) Limited Partnerships (Winding-up) Rules, 1909, r. 8.

(*b*) *Ibid.*, rr. 9, 10. These rules exclude the Companies (Winding-up) Rules, 1909, rr. 11, 25, 28 (Stat. R. & O., 1909, p. 61), and R. S. C. (Ireland), 1905, Ord. 74, rr. 1, 3, and prescribe the form of petition and the form of title for all proceedings in the winding up.

(*c*) Limited Partnerships (Winding-up) Rules, 1909, r. 10.

(*d*) *Ibid.*, r. 9.

(*e*) *Ibid.*, r. 11; and see note (*t*), p. 42, *ante*.

(*f*) Limited Partnerships (Winding-up) Rules, 1909, r. 11. But in such a case it may be advisable to obtain the direction of the court.

SECT. 3. **Modifications of General Law of Partnership.**

242. The provisions of the Companies (Winding-up) Rules 1909, with reference to the distinctive number of the petition and other proceedings in the winding up, the presentation, filing, advertisement, and verification of the petition, and the attendance to satisfy the registrar that the rules have been complied with by the petitioner, are applicable, and must be complied with (*g*).

Procedure before hearing of petition.

243. The petition and other documents in the winding up are placed in a continuous file, which is kept at the registrar's office, and not in the Central Office of the High Court of Justice (*h*).

File of proceedings.

Right to inspect file and take copies.

Each general or limited partner is entitled free of charge to inspect the file of proceedings and to take copies or extracts (*i*). He may also be furnished with copies or extracts at the prescribed rate of payment (*k*).

Practice on and after hearing of petition.

244. The practice with regard to notice of intention to appear at the hearing, adjournment of the petition, substitution of a petitioner, the wishes of creditors and contributories, notice to, and the taking of possession by, the official receiver, and the completion, form, and gazetting of the winding-up order, is governed by the rules applicable to the winding up of a company (*l*).

Effect of winding-up order.

The effect of an order to wind up a limited partnership is the same as that of a similar order in the case of a company, but no complication can arise from the previous existence of a voluntary winding up (*m*).

(vi.) *Stay of Proceedings.*

Power to stay proceedings.

245. The provisions of the Companies (Consolidation) Act, 1908, and the Rules thereunder with respect to staying and restraining actions and proceedings against a company after the presentation of a petition for winding up and the making of a winding-up order (*n*), apply, in the case of a limited partnership (treated as an unregistered company), not only to actions against the firm, but also, where the application to stay or restrain is by a creditor, extend to actions and proceedings against any general or limited partner (*o*).

(*g*) Companies (Winding-up) Rules, 1909, rr. 11 (2), 16—21, 26, 27, 29—30, 32—36; and see title COMPANIES, Vol. V., pp. 404—406.

(*h*) Companies (Winding-up) Rules, 1908, r. 16; and see title COMPANIES, Vol. V., p. 558.

(*i*) Limited Partnerships (Winding-up) Rules, 1909, r. 16.

(*k*) Companies (Winding-up) Rules, 1909, r. 19. This rule, as modified, provides in effect that every person who has been a general partner, manager, clerk, or servant of the limited partnership, and every duly authorised officer of the Board of Trade, is entitled free of charge, and every contributory and every creditor whose claim or proof has been admitted is entitled, on payment of a fee of 1*s.* for each hour or part of an hour occupied, at all reasonable times to inspect the file of proceedings in the winding up and to take copies or extracts from any document there, or to be furnished with such copies or extracts at a rate not exceeding 4*d.* per folio of seventy-two words.

(*l*) See Companies (Winding-up) Rules, 1909, rr. 33, 34, 36, 37—41; see also title COMPANIES, Vol. V., pp. 408, 412, 413.

(*m*) See title COMPANIES, Vol. V., pp. 417 *et seq.*

(*n*) See *ibid.*, pp. 409, 533 *et seq.*, 543, 653.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 268 (1) (vii.), 270; see title COMPANIES, Vol. V., p. 653.

When an order has been made to wind up a limited partnership, no action or proceeding can be begun or continued against either the firm or any partner, except by leave of the court and subject to such terms as the court may require (*p*).

SECT. 8. **Modifications of General Law of Partnership.**

(vii.) *Proceedings by Official Receiver.*

Proceedings by official receiver.

246. The procedure with regard to a provisional liquidator, special manager (*q*), and official receiver (*r*), the statement of affairs (*s*), the preliminary report of the official receiver (*a*), the first meetings of creditors and contributories (*b*), and the further report of the official receiver (*c*), as prescribed in the winding up of companies, is applicable to limited partnerships with the following modifications:—

Statement of affairs.

247. The statement of affairs must be made out, submitted, and verified by the general partners.

Preliminary report.

The preliminary report must deal with the contributions of the partners, the estimated amount of assets and liabilities, the causes of failure (if any), and the question whether inquiry is desirable with regard to the promotion, formation, failure, or conduct of the business of the limited partnership (*d*).

First meeting.

248. The official receiver must give notice to each limited partner to attend the first meeting, and it is the duty of every such limited partner to attend (*e*). He must also give similar notice to each of the general partners and such of the managers, clerks, and servants as in his opinion ought to attend, and it is their duty to do so (*f*).

Further report.

249. The official receiver may make a further report to the court stating the manner in which the partnership was formed, whether in his opinion any fraud has been committed in its promotion, formation, or otherwise, and any other matters which he considers it desirable to bring to the notice of the court (*g*).

Public examination of promoters and partners.

On consideration of the further report the court may, if fraud is

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 142, 271; see title COMPANIES, Vol. V., pp. 419, 533, 653.
(*q*) See title COMPANIES, Vol. V., pp. 420 *et seq.*
(*r*) See *ibid.*, pp. 423 *et seq.*; Limited Partnerships (Winding-up) Rules, 1909, rr. 12, 14, 15.
(*s*) See title COMPANIES, Vol. V., pp. 425 *et seq.*
(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 148 (1); see also title COMPANIES, Vol. V., pp. 427, 428.
(*b*) See *ibid.*, p. 428.
(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 148 (2); see title COMPANIES, Vol. V., pp. 429 *et seq.*
(*d*) Limited Partnerships (Winding-up) Rules, 1909, r. 12.
(*e*) *Ibid.*, r. 15.
(*f*) Companies (Winding-up) Rules, 1909, r. 119; see also title COMPANIES, Vol. V., p. 428.
(*g*) Limited Partnerships (Winding-up) Rules, 1909, r. 12; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 148 (2); see title COMPANIES, Vol. V., pp. 429, 430.

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suggested, direct the public examination of any person who has taken part in the promotion or formation of the partnership, or has been a general or limited partner, with regard to the promotion, formation, or conduct of the business of the partnership, or his own conduct as a partner (*h*). The procedure is the same as in the case of the winding up of a company (*i*).

Fees and remuneration.

250. The fees and remuneration of the official receiver are the same as in the case of a company (*k*).

(viii.) *Powers and Duties of Liquidator.*

Powers and duties of liquidator.

251. The winding up is conducted by a liquidator (*l*), whose powers and duties are similar to those of the liquidator of a company (*m*), but he cannot prove in competition with separate creditors against the estate of bankrupt and insolvent contributories (*n*).

Committee of inspection.

The committee of inspection is elected in the same way and has the same powers as in the case of a company (*o*), and similar meetings of creditors and contributories are to be held (*p*).

Realisation of assets.

252. The jurisdiction and procedure with regard to delivery of assets and documents to the liquidator (*q*), payment into the bank (*r*), discovery by private examination (*a*), and proceedings for misfeasance against promoters, general partners, managers, clerks, or servants of the partnership (*b*), are the same as in the winding up of a company; and the retrospective rights of the liquidator are also similar (*c*).

(ix.) *The Contributories.*

Contributories.

253. The assets of a limited partnership, when realised by the liquidator, form the primary fund for payment of the debts and liabilities of the firm, the costs, charges and expenses of the winding up, and for adjustment of the rights of the partners among themselves. If such assets are insufficient, the partners, both past and present, limited and general, may be liable to contribute to

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(*h*) Limited Partnerships (Winding-up) Rules, 1909, r. 12.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (1); see title COMPANIES, Vol. V., pp. 430 *et seq.*

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268, repealing the Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (4); see title COMPANIES, Vol. V., p. 434.

(*l*) Limited Partnerships (Winding-up) Rules, 1909, r. 17.

(*m*) See title COMPANIES, Vol. V., pp. 438—464.

(*n*) Limited Partnerships (Winding-up) Rules, 1909, r. 17; see p. 120, *post.*

(*o*) See title COMPANIES, Vol. V., pp. 438, 464 *et seq.*

(*p*) See *ibid.*, pp. 466 *et seq.*

(*q*) See *ibid.*, pp. 472, 473.

(*r*) See *ibid.*, pp. 473, 474.

(*a*) See *ibid.*, pp. 474 *et seq.*

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 215, as modified by the Limited Partnerships (Winding-up) Rules, 1909, r. 1; and see title COMPANIES, Vol. V., pp. 478 *et seq.*

(*c*) *Ibid.*, pp. 485 *et seq.* It may, in some cases, be desirable for the liquidator to obtain a vesting order in respect of all, or some of, the assets.

the assets for these purposes. The partners so liable, or alleged to be so liable, are called "contributories" (*d*).

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As regards limited partners, the existing capital of a limited partner, of course, forms part of the assets of the firm; and he is not liable to contribute anything further, unless he has drawn out or received back part of his capital, in which case he is liable to contribute the amount so drawn out or received back. Further, if he has during any period been a general partner, he is liable as a general partner in respect of partnership debts and obligations incurred during that period (*e*).

Contribution by limited partners.

As regards general partners, a present general partner is under the same unlimited liability as in the case of an ordinary partnership (*f*). A past general partner is liable to contribute only in respect of debts and liabilities incurred while he remained a general partner; but, if he has been a limited partner, and has withdrawn any part of the capital contributed by him, as such, he is liable to contribute the amount so withdrawn (*g*).

Contribution by general partner.

Past partners, whether limited or general, are not liable to contribute unless the court finds that the existing partners are unable to pay the contributions required from them (*h*).

Past partners.

254. As against creditors who are not partners, no partner, whether limited or general, can prove in competition with such creditors for any money due to him from the firm in his character of a partner, although such sum may be taken into account in adjusting the rights of the partners among themselves (*i*).

Creditors having priority over claim of partners.

255. In the event of the death of a solvent contributory, the rights of the liquidator against his estate are the same as in the winding up of a company (*k*). But, if the contributory dies insolvent, and an order is made for the administration of his estate according

Proof against insolvent contributories.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 124; compare *ibid.*, s. 269 (1); and see title COMPANIES, Vol. V., pp. 487 *et seq.*, 651, 652. In the winding up of a company the persons liable to contribute are the shareholders whose shares are not in fact fully paid, or although purporting to be fully paid are held by the court to be wholly or partially unpaid. But the term "contributory" is also applied to all shareholders entitled to participate in the surplus assets, if any; and therefore the list of contributories includes the names of fully paid shareholders, although no calls can be made upon them; see *Re Anglesea Colliery Co.* (1866), 1 Ch. App. 555; title COMPANIES, Vol. V., p. 487. In the case of a limited partnership, therefore, the list of contributories probably includes the names of all the partners, whether liable to contribute to the assets or merely entitled to share in the surplus assets, if any.

(*e*) Limited Partnerships (Winding-up) Rules, 1909, r. 4, and see p. 110, *ante*. This and the following provisions (see the text, *infra*) are substituted for the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (see title COMPANIES Vol. V., pp. 161 *et seq.*), which does not apply to limited partnerships (Limited Partnerships (Winding-up) Rules, 1909, r. 3).

(*f*) See p. 34, *ante*.

(*g*) Limited Partnerships (Winding-up) Rules, 1909, r. 4 (2).

(*h*) *Ibid.*, r. 4 (3).

(*i*) *Ibid.*, r. 4 (4).

(*k*) See title COMPANIES, Vol. V., pp. 490 *et seq.*

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to the law of bankruptcy, the trustee of his estate represents him for the purposes of the winding up (*l*). Where such an order is made, or where a contributory becomes bankrupt or insolvent, the rights of the liquidator under the Companies (Consolidation) Act, 1908 (*m*), ss. 127, 151, are modified, and he is precluded from proving against the estate in competition with the separate creditors for value of the contributory (*n*).

Rectification of register.

256. For the purpose of settling the list of contributories the court has power to rectify the register of the limited partnership in respect of the name of any partner, the sum contributed by any limited partner, and the nature of the liability of any partner (*o*).

List of contributories.

The list of contributories is settled by the liquidator (*p*), and, subject to the modifications already mentioned (*q*), the provisions relating to contributories in the winding up of a company apply to the case of a limited partnership (*r*).

Calls. Proof of debts. Distribution.

257. The power of the court to make and enforce payment of calls and the procedure relating to the proof of debts and the distribution of the assets of a company among its creditors are dealt with elsewhere (*s*); and these provisions are applicable to the case of a limited partnership (*t*) subject to the modifications already mentioned (*u*).

(x.) *Surplus Assets.*

Distribution of surplus assets.

258. After the debts and liabilities of the firm have been discharged, the surplus assets are distributed among the contributories, that is, the partners, according to their rights and interests (*a*). These rights and interests are adjusted by the court (*b*), and are governed by the law applicable to an ordinary partnership (*c*) rather than by the principles acted upon in the winding up of a company. These principles are dealt with elsewhere (*d*).

(xi.) *Miscellaneous.*

Stay.

259. The power to stay proceedings in the winding up (*e*) and

(*l*) Limited Partnerships (Winding-up) Rules, 1909, r. 5.
(*m*) 8 Edw. 7, c. 69, ss. 127, 151; see *ibid.*, s. 269 (2); see also title COMPANIES, Vol. V., pp. 446, 447, 490.
(*n*) Limited Partnerships (Winding-up) Rules, 1909, r. 17.
(*o*) *Ibid.*, r. 13; see title COMPANIES, Vol. V., pp. 496 *et seq.*
(*p*) *Ibid.*, pp. 494 *et seq.*
(*q*) See pp. 118, 119, *ante*, and the text, *supra.*
(*r*) See title COMPANIES, Vol. V., pp. 487 *et seq.*
(*s*) *Ibid.*, pp. 500 *et seq.*, pp. 507 *et seq.*, 523 *et seq.*
(*t*) Limited Partnerships (Winding-up) Rules, 1909, Introduction.
(*u*) See pp. 112 *et seq.*, *supra.*
(*a*) Limited Partnerships (Winding-up) Rules, 1909, r. 4.
(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 269 (1).
(*c*) Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 7.
(*d*) See pp. 101 *et seq.*, *ante*; and compare the provisions applicable to a company as stated in title COMPANIES, Vol. V., pp. 529 *et seq.*
(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 144; and see title COMPANIES, Vol. V., pp. 543, 544.

the provisions with regard to appeals are the same as in the case of a company (*f*).

Appeals.

260. In considering whether there has been a fraudulent preference, the presentation of the petition for winding up a limited partnership corresponds to an act of bankruptcy in the case of an individual (*g*). It may be, therefore, that a winding-up order alters the date at which such a transaction is invalid (*h*).

Fraudulent preference.

261. The Deeds of Arrangement Act, 1887 (*i*), although it does not apply to companies (*k*), applies to partnerships, whether limited or unlimited (*l*).

Deeds of arrangement.

262. If, during the winding up, an application is made for the sanction of any compromise or arrangement (*m*), the court may hear a report by the official receiver on the terms of the scheme, the conduct of the general or limited partners, and any managers, clerks, or servants of the partnership, and any other matters which in the opinion of the official receiver or the Board of Trade ought to be brought to the attention of the court. This report is not placed upon the file unless the court so directs (*n*).

Sanction of compromise.

263. When any limited partnership has been wound up by the court on the ground of previous dissolution, or any other ground (*o*), and is about to be dissolved, the books and papers of the partnership and of the liquidators may be disposed of as the court directs (*p*).

Disposition of books and papers.

264. Subject to the above modifications, the miscellaneous practice applicable to the winding up of companies by the court (*q*) appears to apply to the winding up of limited partnerships by the court.

Miscellaneous practice.

(xii.) *Dissolution.*

265. On the completion of the winding up of a company, the court makes an order dissolving it (*r*), and this provision is applied

Order dissolving partnership.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 178; see title COMPANIES, Vol. V., pp. 548 *et seq.*

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 210, as modified by Limited Partnerships (Winding-up) Rules, 1909, Introduction, and r. 1; see title COMPANIES, Vol. V., pp. 544 *et seq.*

(*h*) *Re Russell Hunting Record Co., Ltd.*, [1910] 2 Ch. 78.

(*i*) 50 & 51 Vict. c. 57.

(*k*) *Re Rileys, Ltd., Harper* v. *Rileys*, [1903] 2 Ch. 590.

(*l*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 329 *et seq.*

(*m*) See title COMPANIES, Vol. V., p. 602.

(*n*) Companies (Winding-up) Rules, 1909, r. 74, as modified by the Limited Partnerships (Winding-up) Rules, 1909, rr. 1, 14; see title COMPANIES, Vol. V., p. 603.

(*o*) Limited Partnerships (Winding-up) Rules, 1909, r. 19.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 222 (1); see title COMPANIES, Vol. V., p. 563.

(*q*) See title COMPANIES, Vol. V., pp. 552 *et seq.*

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 172; see title COMPANIES, Vol. V., pp. 567 *et seq.*

SECT. 8. Modifications of General Law of Partnership.

by the rules to the case of a limited partnership which is wound up by the court otherwise than on the ground of previous dissolution (*s*).

(*s*) Limited Partnerships (Winding-up) Rules, 1909, r. 18. Of course, where the partnership has been dissolved before the winding up, an order purporting to dissolve it would be inappropriate. See forms of deed of dissolution in Encyclopædia of Forms and Precedents, Vol. XVI., p. 465. Where there has been no formal dissolution before the winding up, the order referred to seems to correspond to the declaration made by the judgment usual in an action for dissolution of an ordinary partnership; see pp. 88 *et seq.*, *ante*. But, as a limited partnership is, unlike a company, not a corporation, but merely a registered association of individuals under a contract, there is ground for the view that on the completion of the winding up it would *ipso facto* come to an end, even without a formal order for dissolution. But the order enables the registrar to enter a minute of the fact of dissolution on the register.

PART PERFORMANCE.

See CONTRACT; LANDLORD AND TENANT; SALE OF LAND; SPECIFIC PERFORMANCE.

PARTY AND PARTY COSTS.

See PRACTICE AND PROCEDURE; SOLICITORS.

PARTY WALLS.

See BOUNDARIES, FENCES, AND PARTY WALLS; EASEMENTS AND PROFITS À PRENDRE.

PASSAGE BROKERS.

See SHIPPING AND NAVIGATION.

PASSAGE COURT.

See ADMIRALTY; COURTS; INTERPLEADER.

PASSENGERS.

See CARRIERS; NEGLIGENCE; RAILWAYS AND CANALS; SHIPPING AND NAVIGATION.

PASSING-OFF.

See MISREPRESENTATION AND FRAUD; TRADE MARKS, TRADE NAMES, AND DESIGNS.

PASSIVE TRUST.

See TRUSTS AND TRUSTEES.

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See CONSTITUTIONAL LAW.

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Trade Names - TRADE MARKS, TRADE NAMES AND DESIGNS.

SECT. 1.—*Introductory.*

SUB-SECT. 1.—*General Nature of Letters Patent for Inventions.*

Meaning of "patent."

266. The word "patent" has been used somewhat loosely, and is frequently employed instead of the word "invention," often to denote the grant contained in a patent, and sometimes the privilege which is the subject-matter of such grant (*a*).

Meaning of "patent" in "patent law."

The term "patent," derived from Latin *patens*, merely signifies an open record made by the Crown in Chancery and under the Great Seal, and patents, or more correctly letters patent, are made for very many purposes besides granting sole rights to use inventions (*b*).

For the purposes of "patent law" "patent" means letters patent for an invention (*c*).

Invention as compared with authorship.

267. After a great controversy as to whether a man has as much natural and moral right to the produce of his mental exertions as to the profits of his corporeal labour and industry, it was held that an author has a natural right of property in his work (*d*). But an inventor is not in the same position as an author. An author creates his work. An inventor creates nothing. He merely, by his mental exertions and ingenuity, discovers what was already there. If Milton had not written "Paradise Lost," it would never have been written: if Watt had not discovered the use of high-pressure steam, someone else would have done so.

Invention is property only by virtue of monopoly.

An inventor may, of course, keep his invention to himself, and work it as a secret process, but, if he does so, he does so at the peril of losing any rights in it if it is discovered, and, except in virtue of some special grant, a man has no exclusive right of property in his invention (*e*). Such right may, however, be granted to him by letters patent of monopoly.

(*a*) The right which a patentee has by virtue of his patent is a chose in action (see title CHOSES IN ACTION, Vol. IV., p. 363; *Re Heath's Patent*, [1912] W. N. 137) created by the exercise of the Royal Prerogative, and is entirely distinct from the right of property in a chattel created under it (*Edwards & Co.* v. *Picard*, [1909] 2 K. B. 903, 905, C. A.). The letters patent do not give the patentee any right to use the invention; that is a right which he would have as effectually if there were no letters patent at all. What the letters patent confer is the right to exclude others from manufacturing in a particular way, and using a particular invention (*ibid.*, citing *Steers* v. *Rogers* (1893), 10 R. P. C. 245, 251, H. L.; [1893] A. C. 232, 235).

(*b*) Hindmarch on Patents, p. 77.

(*c*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 93.

(*d*) *Millar* v. *Taylor* (1769), 4 Burr. 2303; title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 136.

(*e*) Hindmarch on Patents, p. 228.

SECT. 1. Introductory.

Meaning of "monopoly."

268. A monopoly has been defined (*f*) as an institution or allowance by the King by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using anything (*g*).

Monopoly at common law.

269. At common law it was not every monopoly that was valid. Where a man had by his own charge and industry, or by his own wit and invention, brought any new trade into the realm, or any engine, tending to the furtherance of a trade, that was not used before, and that for the good of the realm, the King might grant him a monopoly patent for some reasonable time until the subjects might have learned the same, in consideration of the good that he brought by his invention to the commonwealth, otherwise not (*h*).

Effect of Statute of Monopolies.

The common law, as defined by the Statute of Monopolies (*i*), declared all grants of monopolies whatsoever apart from those already in existence to be void, save those specially exempted by the following proviso (*j*):—

"Provided also . . . . that any declaration before mentioned, shall not extend to any letters patent and grants of privilege for the term of fourteen years or under hereafter to be made of the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures which others at the time of making such letters patent and grants shall not use, so as also they be not contrary to the law nor mischievous to the State by raising the price of commodities at home or hurt of trade or generally inconvenient, the said fourteen years to be accounted from the date of the first letters patent or grants of such privilege hereafter to be made, but the same shall be of such force as they should be if this Act had never been made and of none other" (*k*).

With a few minor alterations, and taking into consideration that

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(*f*) By Sir E. Coke.
(*g*) 3 Co. Inst., c. 85, 181.
(*h*) *Darcy* v. *Allin* (1602), Noy, 173.
(*i*) Stat. (1623) 21 Jac. 1, c. 3.
(*j*) *Ibid.*, s. 6.
(*k*) The language of *ibid.*, s. 6, as Sir E. COKE points out, shows that the Statute of Monopolies (1623) 21 Jac. 1, c. 3, did not, as is often supposed, create patents of monopoly, but merely preserved those that were valid at common law. That being so, the necessity for the statute is not at first sight clear, and, to understand it, the political situation at the time of its enactment must be regarded. Owing to the extravagant claims made by the Crown, and owing to the fact that all disputes came before the Star Chamber, which was virtually created by stat. (1487) 3 Hen. 7, c. 1, and was abolished by stat. (1640) 16 Car. 1, c. 10, grave abuses arose. The statute was passed to remedy these, first by making all disputes triable in the courts of common law, and, secondly, by defining what were and what were not valid grants of monopolies. The reason why these historical matters are still so important lies in the fact that on this question Sir E. COKE was a violent partisan. In his writings he puts so narrow a construction on the meaning of a valid monopoly that many of his propositions are no longer law, and several of the present difficulties and anomalies have arisen from the dilemma of rejecting such an authority or of accepting propositions which have no other support in law; see pp. 150 *et seq.*, *post*, and the remarks of EYRE, C.J., in *Boulton* v. *Bull* (1795), 2 Hy. Bl. 463, 491.

innumerable decisions have crystallised any ambiguity of language into recognised forms, this is a statement of the present law.

SECT. 1. Introductory.

270. The grant, in order to be valid, must be made to a person capable of being grantee, there must be a proper subject of the privilege granted, and the grant must be limited in time.

Essentials of the grant.

SUB-SECT. 2.—*Capacity to Obtain Letters Patent.*

271. The true and first inventor must be the grantee of a patent, but it does not follow that every true and first inventor can obtain a patent, for no one is entitled to a patent as of right (*l*).

Capacity.

Any person, whether a British subject or not, may apply for a patent (*m*).

The words "any person" do not exclude a married woman, the property in whose invention vests in her as separate estate (*n*), nor an infant (*o*), nor a lunatic (*p*).

The only limitation arises from the fact that every application must contain a declaration to the effect that the applicant is in possession of an invention whereof he claims to be the true and first inventor (*q*). It therefore follows that the applicant must be in a position to make such declaration.

If a person claiming to be the inventor of an invention dies without making an application for the invention, application may be made by, and a patent granted to, his legal representative. Every such application must contain a declaration by the legal representative that he believes the deceased person to have been the true and first inventor (*r*).

272. There are certain persons, however, who are incapacitated from becoming the grantees of letters patent.

Incapacity.

It has been assumed (*s*) that the King could not become the grantee of a privilege of monopoly because he could not grant to himself; but as, in an ordinary patent, the King prohibits all others,

(*l*) Hindmarch on Patents, p. 4.

(*m*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 1.

(*n*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75); and see title HUSBAND AND WIFE, Vol. XVI., pp. 341 *et seq.*

(*o*) See *Cheavin* v. *Walker* (1877), 5 Ch. D. 850, C. A.; Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 83; and see title INFANTS AND CHILDREN, Vol. XVII., pp. 75 *et seq.*

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 83; and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 396 *et seq.*

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 1 (3). As to the meaning of true and first inventor, see p. 130, *post.*

(*r*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 43. This was an alteration of the previous law, as, under the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 34, the application had to be made within six months of the death of the inventor. See also p. 153, *post.*

(*s*) Hindmarch on Patents, p. 34. The question has never been the subject of a decision; but Mr. Hindmarch seems to have omitted to consider that a privilege of monopoly is not a grant to the patentee to manufacture according to his invention—for that he could do before (*Steers* v. *Rogers* (1893), 10 R. P. C. 245, 251, H. L.; [1893] A. C. 232, 235)—but a prohibition against all others so manufacturing; see note (*a*), p. 127, *ante.*

SECT. 1. Introductory.

including himself (*t*), from manufacturing, it is difficult to understand why he should not be able to prohibit everyone save himself, even though in form he is a grantee to himself.

Corporations cannot be the true and first inventors of an invented, as opposed to an imported, invention, for invention is an act of the mind. It follows that they are incapacitated from being the sole grantees of a patent for such invention, for they could not make the necessary declaration (*a*).

On the ground of public policy, certain persons are incapacitated from becoming grantees of patents (*b*), as an alien enemy, or one who is to hold the grant in secret trust for an alien enemy (*c*), or a person who has obtained the knowledge necessary for the invention by reason of some public office which he holds (*d*).

SUB-SECT. 3.—*True and First Inventor.*

(i.) *In General.*

True and first inventor or inventors must be the grantee or grantees.

273. It is necessary that the "true and first inventor" shall be the grantee of a patent (*e*). A true and first inventor must be the true and first inventor of every part of that which he claims to have invented (*f*). It follows, therefore, that in the case of joint inventors, that is to say, where the invention has been the outcome of the labour and ingenuity of more than one person, all such persons must be co-grantees (*g*). Provided that the true and first inventor or inventors be grantee or grantees, any number of other persons may be co-grantees of the patent, notwithstanding that they are not themselves true and first inventors (*h*).

Inventor.

274. An inventor is a person who discovers or finds out something new, a framer, contriver, or deviser of what was before unknown (*i*). Invention is an act of the mind, and the person whose mind performs the act is the true inventor. If, therefore, the invention is suggested to a person by another (*k*), or is taken from a book (*l*), or from a model (*m*), it has not originated in his mind, and he is not the true inventor (*n*). Nor is a patent granted to him as true inventor valid, for he has committed a fraud upon

True inventor.

(*t*) *Feather* v. *R.* (1865), 6 B. & S. 257; Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 29.

(*a*) Hindmarch on Patents, p. 35.

(*b*) Co. Litt. 2 b; Shep. Touch., ed , 234, 235.

(*c*) See plea in *Bloxam* v. *Elsee* (1825), 1 C. & P. 558; (1827) 6 B. & C. 169.

(*d*) *Patterson* v. *Gas Light and Coke Co.* (1876), 2 Ch. D. 812, C. A.; affirmed (1877), 3 App. Cas. 239.

(*e*) Statute of Monopolies (1623), 21 Jac. 1, c. 3, s. 6.

(*f*) *Losh* v. *Hague* (1838), 1 Web. Pat. Cas. 202; *Tennant* v. —— (1802), 1 Web. Pat. Cas. 125, n.; *R.* v. *Arkwright* (1785), Dav. Pat. Cas. 61.

(*g*) For forms of agreement between joint inventors as to their respective rights, see Encyclopædia of Forms and Precedents, Vol. X., pp. 101, 102.

(*h*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 1 (1). As to the devolution of the legal interest of a co-grantee, see *ibid.*, s. 37.

(*i*) Hindmarch on Patents, p. 22.

(*k*) *Tennant* v. ——, *supra*.

(*l*) *R.* v. *Arkwright*, *supra*; *Hill* v. *Thompson* (1818), 8 Taunt. 375.

(*m*) *Lewis* v. *Marling* (1829), 4 C. & P. 52; 10 B. & C. 22, C. A.

(*n*) *Gibson* v. *Brand* (1841), 1 Web. Pat. Cas. 627.

the Crown, not only by implication, but specifically; for his application for the patent must have been accompanied by a declaration that he was the true inventor (*o*), and he, knowing how he came by the invention, must have been aware that such declaration was false. Provided, however, that he was the true inventor, it matters not, so far as the first grant is concerned (*p*), whether his discovery was the result of an accident, of some happy thought, or of great study, labour, and expense (*q*).

True and first inventor.

In order to come within the benefit of the proviso of the Statute of Monopolies (*r*), the grantee must not only be a true but also the true and first inventor. The plea, therefore, that a person is not the true and first inventor may raise two issues—first, that a fraud has been committed on the Crown (*s*), and, secondly, that of the novelty of the invention (*t*).

Patent, a bargain; consideration, the disclosure of discovery

275. At common law the nature of a patent is that of a bargain between the inventor and the Crown, the consideration for which is the good brought by the invention to the commonwealth (*a*). For the purposes of a patent, therefore, the first inventor is he who discloses first to the public, and not he who in the secrecy of his closet discovers and keeps secret the invention (*b*). If several persons simultaneously discover the same thing, the party first communicating it to the public, under the protection of letters patent, is the true and first inventor (*c*). There may be many rivals who may be running on the same road at the same time, and the first who comes to the Crown and takes out a patent is the person who has the right to clothe himself with the authority of the patent and to enjoy its benefits (*d*).

Test of validity: absence of knowledge of public at time of grant.

The test is this, did the public in this realm (*e*) know of the invention at the time of the grant? If they did, the patent is void. If they did not, the patentee, provided he is a true, is also the true and first, inventor.

Discovery of lost art.

It follows from this that a man may be the true and first inventor of the rediscovery of a lost art (*f*).

(ii.) *As between Master and Servant.*

Master entitled to benefit of invention.

276. A man is allowed to use tools and devices to come by his invention, and a servant or workman may be, for this purpose, a

(*o*) See p. 153, *post*.

(*p*) These points may be material if an extension is applied for; see p. 199, *post*.

(*q*) *Crane* v. *Price* (1842), 4 Man. & G. 580.

(*r*) 21 Jac. 1, c. 3, s. 6.

(*s*) Hindmarch on Patents, p. 447; *Walton* v. *Potter* (1841), 1 Web. Pat. Cas. 585, 592.

(*t*) Owing to the fact that particulars have to be furnished of want of novelty (see p. 218, *post*), it would be highly dangerous to rely on this plea alone to raise this issue.

(*a*) *Ipswich Clothworkers' Case* (1614), Godb. 252; and see p. 128, *ante*, and p. 142, *post*.

(*b*) *Dollond* v. —— (1766), 1 Web. Pat. Cas. 43.

(*c*) *Forsyth* v. *Riviere* (1819), Chitty, Prerogatives of the Crown, 182.

(*d*) *Cornish* v. *Keene* (1835), 1 Web. Pat. Cas. 501, 508.

(*e*) As to inventions communicated from abroad, see pp. 132 *et seq*., *post*.

(*f*) *Stead* v. *Williams* (1843), 2 Web. Pat. Cas., 126, 135.

SECT. 1. Introductory.

mere tool. If so, the invention is that of the master, and not of the servant (*g*).

Assistance given, and supplemental improvements made, by servant.

If the master suggests the principle to the servant, and the servant assists him, then the master is the true and first inventor, and the servant is a machine, so to speak, which the master uses for the purpose of enabling him to carry his original conception into effect. If in the course of experiments the servant makes valuable discoveries, accessory to the main principle and tending to carry that out in a better manner, such improvements are the property of the inventor of the original and improved principle, and may be embodied in his patent, and, if so embodied, the patent is not avoided by evidence that the servant made the suggestion of the subordinate improvement of the primary and improved principle (*h*).

Substantive invention by servant.

277. If, however, the servant makes a substantive invention, the question whether he has done so being a question of fact in each case, he is the true and first inventor thereof; for the mere relation of master and servant does not make the master the true and first inventor of the invention of the servant, even though the servant has employed the master's time, materials and money in arriving at his invention (*i*).

Servant as trustee of patent for master.

278. A totally different and distinct question may arise, namely, as to whether, the patent having been properly granted to the servant as the true and first inventor, he or the master is entitled in equity to the benefit thereof. If satisfied from the relation of the parties, in all the circumstances of the case, a court of equity may grant a declaration that the servant holds the patent in trust for the master (*k*). Special contracts may be, and often are, entered into between master and servant to govern the relation between them regarding inventions, and a court of equity may grant specific performance of such contracts (*l*).

(iii.) *Invention Communicated from Abroad.*

"True and first inventor" is construed as including "true and first importer."

279. The fact that an invention has been communicated to a person by another within this realm is a fatal objection to the grant of a patent to that person as true and first inventor (*m*). But the matter is otherwise if the communication is made without the realm and the person so receiving it is the first to import the invention into the realm. At common law he who, in peril of his

(*g*) *Minter* v. *Wells* (1834), 1 Web. Pat. Cas. 132; *Bloxam* v. *Elsee* (1825) 1 C. & P. 558, 567.

(*h*) *Allen* v. *Rawson* (1845), 1 C. B. 551; and compare *Barber* v. *Walduck*, (1823), cited 1 C. & P. 567.

(*i*) *Saxby* v. *Gloucester Wagon Co.* (1883), Griffin, Patent Cases, 1888, 54, 56.

(*k*) *Pashley* v. *Linotype Co., Ltd.* (1903), 20 R. P. C. 633; *Edisonia, Ltd.* v. *Forse* (1908), 25 R. P. C. 546.

(*l*) See title SPECIFIC PERFORMANCE. As to damages for breach of contract between master and servant, see title MASTER AND SERVANT. Vol. XX., pp. 107 *et seq.* As to the duties of the servant towards his former master on the termination of the employment, see *ibid.*, pp. 126, 127.

(*m*) See p. 130, *ante*.

life and consumption of his estate or stock, brought in a new invention and a new trade within the kingdom was equally entitled to a patent with him who had made a new discovery of anything (*n*); and, as the Statute of Monopolies (*o*) was construed to intend to preserve all monopolies which would have been good at common law, the words "true and first inventor" have always been construed to include "true and first importer" (*p*).

Importation must be from without the realm.

280. The essential quality, common alike to the inventor and to the importer, which makes them "true and first inventors" within the meaning of the Statute of Monopolies (*o*), is this, that each, in his own way, is the first to make known within this realm a new invention. It follows, therefore, that the importation must be from outside the realm: it does not suffice if it merely is an importation from one part of the realm to another (*q*).

Test of validity: grantee the first to disclose within the realm.

281. The question as to whether the communication was made from abroad is one of fact in each case, the test being: was the grantee the first person to make known within this realm the invention? (*a*) Provided that it is *bonâ fide* a communication from abroad, the patent is not avoided merely because the machinery of such communication operated within the realm, as, for instance, if a foreigner, resident abroad, sends his clerk to communicate the invention orally to the grantee within the realm (*b*).

Foreigner resident abroad, as grantee.

282. Although in law a foreigner resident abroad may be the proper grantee, as true and first inventor, of a patent communicated to him by another foreigner resident abroad (*c*), yet by the Patent Office Rules no such patent will be granted (*d*).

Position of importer in relation to third party.

283. As, in the case of an inventor (*e*), it is irrelevant to consider how much labour, time, skill, or money was expended in coming by the invention, so, in the case of an importer, the law does not take into consideration his "merit" as an importer. He may be the mere servant or agent of the foreign inventor (*e*).

Position of importer as grantee.

In this statement, however, the relation of principal and agent must be understood to exist only *inter partes*. The Crown deals with the importer alone as its grantee. It follows, therefore, that, should the question become relevant, the knowledge of the grantee

(*n*) *Ipswich Clothworkers' Case* (1614), Godb. 252.

(*o*) 21 Jac. 1, c. 3.

(*p*) *Edgeberry* v. *Stephens* (1688), 2 Salk. 447; *Carpenter* v. *Smith* (1841), 1 Web. Pat. Cas. 530; *Nickels* v. *Ross* (1849), 8 C. B. 679; *Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 531.

(*q*) *Brown* v. *Annandale & Son* (1842), 1 Web Pat. Cas. 433, H. L.; *Roebuck* v. *Stirling & Son* (1774), 1 Web. Pat. Cas. 45, H. L.; *Walton* v. *Bateman* (1842), 1 Web. Pat. Cas. 613.

(*a*) *Darcy* v. *Allin* (1602), Noy, 173, 178. Hindmarch on Patents, p. 29, raises several points, which have never been actually decided, as to the effect of the nationality and domicil of the communicator and the grantee, and the *locus* of the communication.

(*b*) *Pilkington* v. *Yeakley Vacuum Hammer Co.* (1901), 18 R. P. C. 459, C. A.; *Re Jameson's Patent* (1902), 19 R. P. C. 246.

(*c*) *Re Wirth's Patent* (1879), 12 Ch. D. 303.

(*d*) Patent Office Rules, 9th May, 1884.

(*e*) *Crane* v. *Price* (1842), 4 Man. & G. 580; see p. 131, *ante*.

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is confined to his own actual knowledge, and that knowledge of his communicator cannot be used either for (*f*) or against (*g*) him.

Effect of international agreements.

284. In virtue of certain international agreements, a patentee in certain foreign countries can obtain a patent in this country in a peculiar way (*h*), which gives him certain advantages as to priority; but this question is not relevant in dealing with the meaning of first and true importer.

SUB-SECT. 4.—*Subject-matter of a Patent.*

(i.) *Nature of the Art.*

Use of words "manufacture," "trade," "art" in relation to subject-matter.

285. A patent contains a grant. That grant confers a privilege. The subject-matter of that privilege—loosely spoken of as the subject-matter of the patent—must be, with two limitations hereafter dealt with (*i*), for the sole working or making of any manner of new manufacture which others at the time shall not use (*k*). It therefore becomes important to consider the meaning of the word "manufacture," and how far that meaning is modified by the governing words "working," "making," and "use." The word "manufacture" may be defined, first, as the art or practice of making or constructing any piece of workmanship; secondly, as anything made by art (*l*). The word "art" has very often been used as an equivalent to the word "manufacture" for the purposes and within the meaning of the Statute of Monopolies (*m*). The older common law cases speak of a trade or engine tending to the furtherance of a trade (*n*), or a new invention and a new trade (*o*).

Words used in relation to corporeal articles capable of being bought or sold.

Be the word used "manufacture," "trade," or "art," the meaning is quite plain. It signifies the dealing with, in some way, corporeal articles, and not abstract ideas. Further, the Statute of Monopolies (*p*) goes on to deal with the question of raising the price of commodities at home, or of hurt of trade, and the form of the grant includes the vending of the invention. It has therefore been held (*q*) that the manufacture or art must be an art for the production of vendible articles, or articles of trade or commerce capable of being bought or sold.

Essential characteristics of invention: discovery and new art.

286. There are, therefore, two necessary ingredients to an invention before it can be the subject-matter of a patent—discovery and a new art. That every discovery does not produce a new art is clear. For instance, the person who first discovered that light acted upon the salts of silver made a great discovery, but he did

(*f*) *Wegmann* v. *Corcoran* (1879), 13 Ch. D. 65, C. A.
(*g*) *Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 531.
(*h*) See pp. 229 *et seq.*, *post*.
(*i*) See pp. 141, 142, and p. 152, *post*.
(*k*) See p. 128, *ante*.
(*l*) Johnson's Dictionary.
(*m*) 21 Jac. 1, c. 3; see *Mitchel* v. *Reynolds* (1712), 1 P. Wms. 181; 1 Hawk. P. C., c. 29, s. 20; Bac. Abr., tits. Monopoly, Prerogative.
(*n*) *Darcy* v. *Allin* (1602), Noy, 173, 182.
(*o*) *Ipswich Clothworkers' Case* (1614), Godb. 252.
(*p*) 21 Jac. 1, c. 3.
(*q*) *Boulton* v. *Bull* (1795), 2 Hy. Bl. 463; *R.* v. *Wheeler* (1819), 2 B. & Ald. 345, 349; *Cornish* v. *Keene* (1837), 3 Bing. (N. C.) 570.

not make a patentable invention, for he produced no new art; but the person who showed the public how this chemical truth could be used to produce the art of photography made a patentable invention. Again, when Galvani discovered the effect of an electric current from his battery on a frog's leg he made a great discovery, but no patentable invention (*r*). If a new art has been produced there has been a patentable invention; if not, there has only been an unpatentable discovery (*s*).

Question as to whether there is invention is one of fact.

287. Although the law on this matter is simple, its application to any particular case is often very difficult (*t*). The question as to whether there has been invention is one of fact in each case, and it is therefore idle to multiply cases which only decide the facts arising therein (*a*).

Evidence to be considered in arriving at conclusion of fact :—

Commercial utility as evidence of invention.

288. Although the question is one of fact, it is nevertheless useful to consider what evidence the court regards in coming to the conclusion upon the fact.

The commercial utility of the product is often very cogent, though not conclusive (*b*), evidence that there has been invention. If there has been a demand, and that demand has not been satisfied although many have tried, it is strong evidence in favour of the contrivance having required invention to contrive it (*c*); but care must be taken to distinguish this case from that where the demand itself has only recently come into existence, for in this latter case it may well be that the problem only lacked solution

(*r*) *Lane Fox* v. *Kensington and Knightsbridge Electric Lighting Co.*, [1892] 3 Ch. 424, C. A., *per* LINDLEY, L.J., at p. 428.

(*s*) *Reynolds* v. *Smith (Herbert) & Co., Ltd.* (1902), 20 R. P. C. 123; *Harwood* v. *Great Northern Rail. Co.* (1865), 11 H. L. Cas. 654; *Horton* v. *Mabon* (1862), 12 C. B. (N. S.) 437; *Saxby* v. *Gloucester Wagon Co.* (1881), 7 Q. B. D. 305; *Britain* v. *Hirsch* (1888), 5 R. P. C. 226, C. A.; *Welsbach Incandescent Gas Light Co.* v. *Daylight Incandescent Mantle Co.* (1899), 17 R. P. C. 141, C. A.; *Case* v. *Cressy* (1900), 17 R. P. C. 255, *per* BUCKLEY, J., at p. 261; *Acetylene Illuminating Co.* v. *United Alkali Co.* (1902), 20 R. P. C. 161, 173, C. A.; 72 L. J. (CH.) 214. The selection of a material the suitability of which was not previously known for a particular purpose may be the subject-matter of a patent if the selection involves invention (*Re Bosch's Application for a Patent* (1909), 26 R. P. C. 710, following *Kay* v. *Marshall* (1836), 2 Web. Pat. Cas. 34).

(*t*) *Vickers, Sons & Co.* v. *Siddell* (1890), 7 R. P. C. 292, H. L.

(*a*) *Lyon* v. *Goddard* (1893), 10 R. P. C. 334, C. A., *per* Lord ESHER, M.R., at p. 344. "Has there been an exercise of the inventive faculties? That depends on a true view of all the circumstances, and it cannot be governed in any one case by a finding of fact, on a totally different invention, by a tribunal like the House of Lords. We must apply our mind to the specific facts before us: and nothing is more pernicious, or likely to lead the court astray, than, when it has to decide a question of fact in one case, to wander into another case; to look at the decision of fact in that case, and then to see what differentiations there can be between the facts in the cited case and the one before the court. The court that travels on these lines always goes wrong" (*ibid.*, *per* BOWEN, L.J., at p. 346).

(*b*) *Riekman* v. *Thierry* (1896), 14 R. P. C. 105, H. L.; *Fawcett* v. *Homan* (1896), 13 R. P. C. 398, C. A.; 12 T. L. R. 507; *Longbottom* v. *Shaw* (1891), 8 R. P. C. 333, H. L.; *Morgan & Co.* v. *Windover & Co.* (1890), 7 R. P. C. 131, H. L.

(*c*) *Gosnell* v. *Bishop* (1888), 5 R. P. C. 41, 151, C. A.; *American Braided Wire Co.* v. *Thomson* (1890), 44 Ch. D. 274, C. A.; *Blakey & Co.* v. *Latham & Co.* (1889), 6 R. P. C. 184, C. A. 43 Ch. D. 23; *Elias* v. *Grovesend Tin*

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because there was no incentive to attempt it, and that, as soon as that incentive came, the solution was so obvious that it required no invention (*d*). The strongest evidence of this kind, however, sometimes shows that the invention, though apparently trifling, made the whole difference between commercial success and failure, and if this is so the court is very loth to say that there is no invention. The merest "scintilla" of invention may be sufficient to support the patent. Nor is the apparent simplicity of the invention, when once it has been invented and explained (*e*), nor the fact that it was come by through an accident (*f*), a bar to the patent.

The nature of the art itself as evidence of invention.

Again, the nature of the art itself may be some indication as to whether there has been invention or not. For instance, analogous use of different things is much less certain to produce analogous results in chemistry than it is in mechanics, and consequently the decisions of the courts show a greater inclination to attribute invention to a new use of chemical process than to a new use of mechanical contrivance, assuming that the question turns on analogous user (*g*).

It will be seen that these questions are only germane to the evidence which should be tendered, and not to the main question, which is one of pure fact and must satisfy two conditions—(1) there must have been an exercise of the inventive faculties; (2) there must be a new art.

Principle of nature not a new art without discovery of means of application.

289. From the meaning of the words it is clear that a principle of nature cannot be an art in itself. Therefore the discovery of a principle cannot be the subject-matter of a patent (*h*). But the discovery of a principle together with the means of putting it into practice may be good subject-matter (*i*).

The new art in this case is not the principle *per se*, for that *per se* is no art, nor the means of putting the principle into effect *per*

Plate Co. (1890), 7 R. P. C. 455, C. A.; *Gammons* v. *Battersby* (1904), 21 R. P. C. 322, C. A.

(*d*) *Losh* v. *Hague* (1838), 1 Web. Pat. Cas. 202, 207, C. A.; *Ehrlich* v. *Ihlee* (1888), 5 R. P. C. 198, 205; *Edison Bell Phonograph Corporation* v *Smith and Young* (1894), 11 R. P. C. 389, C. A.; *Hayward* v. *Hamilton* (1881), Griffin, Patent Cases, 1884-6, 117; *Parker and Smith* v. *Satchwell & Co.* (1901), 18 R. P. C. 299; *British Vacuum Cleaner Co* v. *Suction Cleaners, Ltd.* (1904), 21 R. P. C. 303.

(*e*) *Benno Jaffé und Darmstaedter Lanolin Fabrik* v. *Richardson (John) & Co., Ltd.* (1894), 11 R. P. C. 93, 261, C. A.

(*f*) *Liardet* v. *Johnson* (1778), 1 Web. Pat. Cas. 53; *Crane* v. *Price* (1842), 4 Man. & G. 580.

(*g*) *Badische Anilin und Soda Fabrik* v. *Levinstein* (1887), 12 App. Cas. 710.

(*h*) *Boulton* v. *Bull* (1795), 1 Carp. Pat. Cas. 117; *Household Coal and Iron Co.* v. *Neilson* (1843), 1 Web. Pat. Cas. 673, H. L.; *Crossley* v. *Potter* (1853), Macr. 240.

(*i*) *Neilson* v. *Harford* (1841), 1 Web. Pat. Cas. 331; *Walton* v. *Bateman* (1842), 1 Web. Pat. Cas. 613; *Hills* v. *London Gas Light Co.* (1860), 5 H. & N. 312; *Newton* v. *Vaucher* (1851), 6 Exch. 859, 865; *Harwood* v. *Great Northern Rail. Co.* (1860), 2 B. & S. 194, *per* BLACKBURN, J., at p. 214; *Cannington* v. *Nuttall* (1871), L. R. 5 H. L. 205, 225; *Dangerfield* v. *Jones* (1865), 13 L. T. 142; *Jones* v. *Pearce* (1832), 1 Web. Pat. Cas. 122; *Jupe* v. *Pratt* (1837), 1 Web. Pat. Cas. 145; *Automatic Weighing Machine Co.* v. *Knight* (1889), 6 R. P. C. 113, 297, C. A.; *Thomson* v. *Moore* (1889), 6 R. P. C. 626; 23 L. R. Ir. 599, 626; affirmed (1890), 7 R. P. C. 325, H. L.

se, for that may be old (*k*), but the process of utilising the principle. For instance, Watt discovered that the efficiency of the steam engine could be greatly increased by keeping the cylinder hot and condensing the steam outside instead of inside. In his patent he showed means of doing so. It was objected against his patent, first, that it was for a principle, and therefore bad for want of good matter, and, secondly, in the alternative, that it was for the means of keeping the cylinder hot, which was well known, and therefore bad for want of novelty. It was held, however, that it was for neither, but for the process of working a steam engine on a new principle by means disclosed (*l*).

New principle or application of old principle as subject-matter.

It is now settled beyond doubt that a process may be an art within the meaning and for the purposes of a patent (*m*). That being so, two alternatives present themselves– (1) the principle may be new; or (2) the principle may be old. In either case there may be good subject-matter, but the ambits of the two patents will be quite different. In the former case the pith and marrow of the invention is the principle, and, if the inventor has devised some way of carrying his new principle into effect, he is entitled to protect himself from all other modes of putting that principle into effect, that being treated as piracy of his original invention (*n*). In the latter case the pith and marrow of the invention is the means of carrying a known principle into effect, and protection will only be given for the particular means described (*o*).

(*k*) *Otto* v. *Linford* (1882), 46 L. T. 35, C. A.; *Neilson* v. *Harford* (1841), 1 Web. Pat. Cas. 331; *Househill Coal and Iron Co.* v. *Neilson* (1843), 1 Web. Pat. Cas. 673, H. L.; *Muntz* v. *Foster* (1844), 2 Web. Pat. Cas. 96; *Edison Bell Phonograph Corporation* v. *Smith* (1894), 11 R. P. C. 148, 389; 10 T. L. R. 522; *Electric Telegraph Co.* v. *Brett* (1851), 10 C. B. 838.

(*l*) *Boulton* v. *Bull* (1795), 2 Hy. Bl. 463; *Hornblower* v. *Boulton* (1799), 8 Term Rep. 95.

(*m*) *Crane* v. *Price* (1842), 4 Man. & G. 580; see *Hall* v. *Jarvis* (1822), 1 Web. Pat. Cas. 100; *Losh* v. *Hague* (1838), 1 Web. Pat Cas. 202, 207.

(*n*) *Jupe* v. *Pratt* (1837), 1 Web. Pat. Cas. 145; applied in *Chamberlain and Hookham* v. *Bradford Corporation* (1903), 20 R. P. C. 673, H. L.; *Ashworth* v. *English Card Clothing Co.* (1903), 20 R. P. C. 790, H. L.; *Consolidated Car Heating Co.* v. *Came* (1903), 20 R. P. C. 745, P. C.; [1903] A. C. 509; *Sandow* v. *Szalay* (1904), 21 R. P. C. 33, 333, C. A.; *Haskell Golf Ball Co.* v. *Hutchison* (No. 2) (1905), 22 R. P. C. 478; *Minter* v. *Wells* (1834), 1 Web. Pat. Cas. 127; *Househill Coal and Iron Co.* v. *Neilson*, *supra*, at p. 685; *Otto* v. *Linford*, *supra*; *Crossley* v. *Beverley* (1829), 1 Web. Pat. Cas. 106; *Badische Anilin und Soda Fabrik* v. *Levinstein* (1883), 24 Ch. D. 156; *Easterbrook* v. *Great Western Rail. Co.* (1885), 2 R. P. C. 201; *Automatic Weighing Machine Co.* v. *Knight* (1888), 6 R. P. C. 297, 304, C. A.; *Automatic Weighing Machine Co.* v. *Combined Weighing Machine Co.* (1889), 6 R. P. C. 367, C. A.; 58 L. J. (Q. B.) 647; *Automatic Weighing Machine Co.* v. *National Exhibitions Association* (1891), 8 R. P. C. 345; 9 R. P. C. 41, C. A.; *Nobel's Explosives Co.* v. *Anderson* (1894), 11 R. P. C. 519, C. A., *per* KAY, L.J., at p. 527.

(*o*) *Proctor* v. *Bennis* (1887), 36 Ch. D. 740, C. A.; *Siddell* v. *Vickers, Sons & Co.* (1888), 5 R. P. C. 416, C. A.; 39 Ch. D. 92; *Needham* v. *Johnson & Co.* (1884), 1 R. P. C. 49, C. A.; *Bovill* v. *Pimm* (1856), 11 Exch. 718; *Barber* v. *Grace* (1847), 1 Exch. 339; *Curtis* v. *Platt* (1863), 3 Ch. D. 135, n.; *Lister* v. *Leather* (1858), 8 E. & B. 1004; *Saxby* v. *Clunes* (1874), 43 L. J. (EX.) 228, H. L.; *Dudgeon* v. *Thomson* (1877), 3 App. Cas. 34; *Nordenfelt* v. *Gardner* (1884), 1 R. P. C. 61, C. A.; *Hocking & Co.* v. *Hocking* (1888), 6 R. P. C. 69, H. L.

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Improvement on something known.

290. An improvement on something known may be the subject-matter of a patent (*p*). Nor is it any bar to the patent that the art upon which it is an improvement is already the subject-matter of an existing patent (*q*). It may well be that the second patentee cannot use his improvement without infringing the first patent, and therefore must use it under licence from the first patentee, but that is not material on the question of whether his improvement patent has subject-matter or not (*r*).

Patent of addition.

291. Where a patent for an invention has been applied for or granted, the applicant or patentee may apply for a patent for any improvement or modification of the original invention as a patent of addition instead of as a substantive new patent. If granted, the patent of addition depends for its term on the original patent and certain fees are saved by the patentee (*s*).

New combination of matter already known.

292. A new combination may be the subject-matter of a patent although every part of the combination *per se* is old, for here the new art is not the parts themselves, but the assembling and working them together, which *ex hypothesi* is new (*t*). If the result produced by such a combination is either a new article, or a better article, or a cheaper article than before (*a*), such combination is an invention or a manufacture within the statute and may well be the subject-matter of a patent (*b*). It is none the less a new combination because the novelty consists in omitting some part of an old combination (*c*).

(*p*) Sir E. COKE says that it cannot be (*Bircot's Case* (1573), 3 Co. Inst. 184, Ex. Ch.), but this proposition has been overruled in terms again and again (*Ralston* v. *Smith* (1865), 11 H. L. Cas. 223; *Boulton* v. *Bull* (1795), 2 Hy. Bl. 463, 488), and, were it good law, it would vitiate many existing patents (*Morris* v. *Branson* (1776), cited 2 Hy. Bl. 489).

(*q*) *Lister* v. *Leather* (1858), 8 E. & B. 1004, 1017; *Crane* v. *Price* (1842), 4 Man. & G. 580; *Hichton's Patent Syndicate* v. *Patents and Machine Improvements Co., Ltd.* (1909), 26 R. P. C. 339.

(*r*) *Lister* v. *Leather, supra*; *Crane* v. *Price, supra.*

(*s*) See pp. 205, 206, *post*; Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 19. For a form of application for a patent of addition, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 495.

(*t*) *Newton* v. *Grand Junction Rail. Co.* (1846), 5 Exch. 334; *Boulton* v. *Bull, supra*, at p. 487; *Huddart* v. *Grimshaw* (1803), Dav. Pat. Cas. 265; *Hill* v. *Thompson* (1817), 1 Web. Pat. Cas. 235, 237; *Brunton* v. *Hawkes* (1821), 4 B. & Ald. 541, 550; *Lister* v. *Leather, supra*; *Morton* v. *Middleton* (1863), 1 Macph. (Ct. of Sess.) 718, 721.

(*a*) *Morton* v. *Middleton, supra*; *Crane* v. *Price, supra*; *Murray* v. *Clayton* (1872), 7 Ch. App. 570, 584; *Marconi* v. *British Radio Telegraph and Telephone Co.* (1911), 28 R. P. C. 181; 27 T. L. R. 274; *British Westinghouse Electric and Manufacturing Co.* v. *Braulik* (1910), 27 R. P. C. 209, C. A.

(*b*) *Crane* v. *Price, supra*; *Cannington* v. *Nuttall* (1871), L. R. 5 H. L. 205; *Minter* v. *Wells* (1834), 1 Cr. M. & R. 505; *Huddart* v. *Grimshaw, supra*; *Allen* v. *Rawson* (1845), 1 C. B. 551; *Lister* v. *Leather, supra.* For instance, if the shearing of cloth from list to list by shears is known and the shearing of it from end to end by rotatory cutters is known, a combination of the shearing of it from list to list by rotatory cutters may be good subject-matter (*Lewis* v. *Davis* (1829), 3 C. & P. 502).

(*c*) For instance, iron pipes were made by forcing iron strips, heated at each edge to the welding point, through a hole in a die plate, in the centre of which hole was a solid mandril. The strip was bent round and the edges forced together by a hole, while the mandril was for the purpose of keeping the centre of the pipe open. It was discovered that the mandril

It must, however, always be borne in mind that the exercise of the inventive faculties must have been called into play, and the mere combining of two elements of machinery or other things without invention is not the proper subject-matter of a patent. A combination may, but it does not follow that it must, be the subject-matter of a patent (*d*).

Combination must have exercised inventive faculty.

293. It being known that a certain class of things will operate in a certain way, or it being known that a certain process will produce certain results, the selection of the best of the class, or of the conditions under which the process will give the best results, may be the subject-matter of a patent (*e*).

Selection of one of a class of things or processes.

294. So far the class of inventions dealt with consists of some new means to arrive at either some new or old result. There is, however, a material difference between applying a new contrivance to an old object and an old contrivance to a new object (*f*). The same law still obtains, namely, that there must be an exercise of the inventive faculties and the production of a new art, but in this latter class of case it is most difficult to apply (*g*).

Classification of, and differentiation between, inventions.

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in fact was quite unnecessary and needlessly complicated the machine. It was held that the combination of passing strips of iron in the old way through the old hole but without the mandril was good subject-matter of a patent (*Russell* v. *Cowley* (1835), 1 Cr. M. & R. 864; and see *Booth* v. *Kennard* (1856), 1 H. & N. 527, Ex. Ch.; *Wallington* v. *Dale* (1852), 7 Exch. 888; *Minter* v. *Mower* (1837), 6 Ad. & El. 735; *Saxby* v. *Gloucester Wagon Co.* (1881), 7 Q. B. D. 305; *Pneumatic Tyre Co.* v. *Tubeless Tyre Co. and Capon Heaton* (1898), 15 R. P. C. 74, 236, C. A.; 14 T. L. R. 341; 16 R. P. C. 77, H. L.; 15 T. L. R. 127).

(*d*) *Williams* v. *Nye* (1889), 7 R. P. C. 37; *Thompson* v. *James* (1863), 32 Beav. 570; *Rushton* v. *Crawley* (1870), L. R. 10 Eq. 522.

(*e*) *Hills* v. *London Gas Light Co.* (1860), 5 H. & N. 312. For instance, it was well known that all solutions of potassium cyanide would dissolve gold out of its ores to some extent. It was found that a very dilute solution was far superior to a strong solution, and it was held that the selection of the very dilute solution was good subject-matter for a patent (*Cassel Gold Extracting Co.* v. *Cyanide Gold Recovery Syndicate* (1895), 12 R. P. C. 232, C. A.). Again, it was known that a certain chemical process at all material temperatures produced substance X and substance Y. X was useful commercially, Y was of no value. About 90 per cent. of the useless Y was produced for about 10 per cent of the useful X. It was discovered that by never allowing the temperature to rise above a certain point the production of the useful X was enormously increased. It was held that this selection of this particular condition of temperature was good subject-matter (*Saccharin Corporation* v. *Chemicals and Drugs Co.* (1899), 17 R. P. C. 28; and see *Hartley's Patent* (1777), 1 Web. Pat. Cas. 54: *Walton* v. *Potter* (1841), 3 Man. & G. 411; *R.* v. *Cutler* (1847), 3 Car. & Kir. 215; *Bush* v. *Fox* (1856), 5 H. L. Cas. 707 (application of a known machine to a new purpose); *Hill* v. *Thompson* (1817), 1 Web. Pat. Cas. 235, 237; *Macintosh* v. *Everington* (1836), 2 Carp. Pat. Cas. 180; *Walton* v. *Potter, supra*, *Munts* v. *Foster* (1844), 2 Web. Pat. Cas. 96, 103; *Penn* v. *Bibby* (1866), 2 Ch. App. 127 (application of an old material to a new purpose); *Hall* v. *Jarvis* (1822), 1 Web. Pat. Cas. 100; *Pow* v. *Taunton* (1845), 9 Jur. 1056; *Steiner* v. *Heald* (1857), 6 Exch. 607 (application of an old process to a new purpose)).

(*f*) *Losh* v. *Hague* (1838), 1 Web. Pat. Cas. 202, 207.

(*g*) The most instructive case (*Lane Fox* v. *Kensington and Knightsbridge Electric Lighting Co.*, [1892] 3 Ch. 424, C. A., *per* LINDLEY, L.J., at p. 429) on this class of invention is that of *Harwood* v. *Great Northern Rail. Co.* (1865), 11 H. L. Cas. 654, where the invention was for the application of a

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Application of old contrivance to new purpose.

295. A mere application of an old contrivance in the old way to an analogous subject without any novelty in the mode of applying such old contrivance to the new purpose is not such subject-matter as will support a patent (*h*). In every case arises a question of fact, whether the contrivance before in use was so similar to that which the patentee claims that there is no invention in the differences, if any, between the old contrivance and that for which the patentee claims a monopoly; and if there is none, then arises a further question of fact, namely, whether the purpose to which the contrivance was before applied and the new purpose are so analogous or cognate that there is no discovery or invention in the new application—whether, in short, it is mere application or not; for if there is invention or discovery producing a practical benefit (*i*) it is the valid subject of a patent. It must always be a question of degree—a question of more or less whether the analogy or cognateness of the purposes is so close as to prevent there being invention in the application. If there is any real invention, though a slight one, producing a beneficial result, there is subject-matter (*k*).

Use of tools.

The above question often arises in one particular form, that of the new and more advantageous use of old tools. The mere application of an old tool to hitherto untried material (*l*), or in a better and more skilful way (*m*), is not proper subject-matter for a patent. It would be a very extraordinary thing to say that because all mankind eats soup with a spoon that a man could take out a patent because he says you might eat peas with a spoon (*n*). The rights of the public would be unduly curtailed if this were so (*o*).

Product of manufacture as subject-matter.

296. Finally, a most important class must be considered. Is the product of a manufacture *per se* the subject-matter of a patent?

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well-known iron plate, which had been used for joining wooden beams together, to join iron rails together; what is called a "fishplate" on railways. Although the judgment in that case was not unanimous as to the facts, all the judges were agreed as to the law.

(*h*) *Losh* v. *Hague* (1838), 1 Web. Pat. Cas. 202, 208; *Kay* v. *Marshall* (1841), 8 Cl. & Fin. 245, H. L.; *Ralston* v. *Smith* (1865), 11 H. L. Cas. 223; *Willis* v. *Davison* (1863), 1 New Rep. 234; *Main* v. *Ashby & Co.* (1911), 28 R. P. C. 492. This principle holds good even although there is commercial success (*Thermos, Ltd.* v. *Isola, Ltd.* (1910), 27 R. P. C. 388).

(*i*) As in the case of *Crane* v. *Price* (1842), 4 Man. & G. 580.

(*k*) *Vickers, Sons & Co.* v. *Siddell* (1896), 7 R. P. C. 292, H. L. The question is one of pure fact in each case, and a multiplication of authority does not assist; but for a case where the court went very far in order to uphold a patent, see *Thomson* v. *American Braided Wire Co.* (1889), 6 R. P. C. 518, H. L.; 5 T. L. R. 537.

(*l*) *Brook* v. *Aston* (1857), 8 E. & B. 478; *Patent Bottle Envelope Co.* v. *Seymer* (1858), 5 C. B. (N. S.) 164.

(*m*) *Dredge* v. *Parnell* (1899). 16 R. P. C. 625, H. L.

(*n*) *Losh* v. *Hague, supra, per* Lord ABINGER, C.B., at p. 208.

(*o*) For instance, it being known that paraffin was beneficial in cleaning paper-making machines, it was discovered that the evils which the paraffin removed could be prevented altogether by treating the clean machine with paraffin before starting it. It was held that this was not proper subject-matter, for anyone who used paraffin, as he had a perfect right to do, would be prevented from using it on a clean machine (*Partington and Kneller-Partington Paper Pulp Co.* v. *Hartlepools Pulp and Paper Co.* (1895), 12 R. P. C. 295).

There is no decision on this point, but in these days when chemical patents are becoming more and more numerous the matter is of growing importance. At first sight it would seem that products *per se* would be good subject-matter, for they are something manufactured by art, which is one definition of manufacture, and the word "manufacture" in the Statute of Monopolies (*p*) is of extensive signification, and is applied not only to things made but to the practice of making (*q*).

Submission that produce is not *per se* subject-matter of patent.

The point, however, lies deeper than at first would be supposed (*r*). The nature of patent rights is that of a chose in action (*s*), that is to say, a right that can be enforced in a court of law; and the enforceable right is not to vest anything in the patentee (*t*), but to prevent anyone else making, using, or working the manufacture. In the sense of the word "manufacture" as hitherto used, namely, as equivalent to an art or trade, this is intelligible enough. But if a product *per se* is to be the subject-matter, the patentee has a right to prohibit anyone else not only from using some corporeal chattel in a particular way, but also from having that corporeal chattel at all. For instance, suppose a man discovers an element hitherto unknown and produces it in its pure state by any well-known process, he would be able to restrain anyone from digging up and selling the earth for the foundations of a house if that earth happened to contain a deposit of the element in a pure state, were the product of his invention *per se* subject-matter. If it is conceded that this is an absurdity, there is no logical difference between the case taken and that of the chemist who claims a dye stuff *per se* as the subject-matter of his patent. He discloses that A, B, and C, well-known chemical bodies, under certain conditions, make Q, a new and valuable dye stuff. He chooses to frame his claim so that Q, irrespective of the method, is the subject-matter *per se*. Another chemist makes X, Y, and Z, admittedly quite different chemically from A, B, and C, react together; and, in the molecular shuffle that follows, to his surprise Q results. He has not used his corporeal chattels X, Y, and Z in any way disclosed or claimed by the patentee, and yet he suddenly finds himself deprived of the free use of them, just as the builder was deprived of the use of his earth.

In the absence of any authority to show that a different law obtained for different classes of products, it is submitted that a product *per se* is not the subject-matter of a patent.

(ii.) *Novelty of the Art.*

Essential to validity of patent.

297. The statement that the subject-matter of a patent must be for the sole working or making of any manufacture (*a*) was made subject to two limitations (*b*). The first of these is that the manufacture shall be new, and that others at the time of the making of

(*p*) 21 Jac. 1, c. 3; see p. 134, *ante*.
(*q*) *Boulton* v. *Bull* (1795), 2 Hy. Bl. 463, *per* EYRE, C.J., at p. 492.
(*r*) It was never raised in the case cited in note (*t*), *infra*.
(*s*) See p. 127, *ante*.
(*t*) *British Mutoscope and Biograph Co., Ltd.* v. *Homer*, [1901] 1 Ch. 671.
(*a*) See p. 134, *ante*.
(*b*) See p. 134, *ante*.

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such patent or grant shall not use it (*c*). Novelty of the art is an essential to the validity of the patent, for otherwise there would be no benefit given to the public and consequently no consideration moving from the patentee; for the consideration which alone gives the Crown power to grant patents of monopoly is that the inventor shall bring into this realm some new trade or some engine tending to the furtherance of some trade (*d*), and, if the invention is not new, the inventor does not communicate to the public anything which they did not know before. If, therefore, the public has once become possessed of the knowledge of the invention, no patent granted subsequently will be valid (*e*). The public can become possessed of the knowledge of the invention in two ways—(1) by prior use of the invention, or (2) by prior publication (*f*).

Public knowledge sufficient to prevent validity.

Public user.

A public use of an art will avoid a subsequent patent for it for three reasons—(1) because the public use of an invention is evidence of public knowledge; (2) because the Statute of Monopolies (*g*) expressly requires that an invention granted by patent shall be such as others at the time of making the patent or grant do not use; and (3) because every patent expressly requires that the invention comprised in it shall be new as to the public use of it (*h*).

Questions to be considered as to prior uses.

298. The questions to be considered as to whether a prior use does or does not avoid a patent are two—(1) was the use public? and (2), assuming that which was used not to be identical with the invention, was it so near as to have given the public the knowledge of the invention? (*i*) Both are questions of fact.

Use must be in public.

299 Dealing with the first, the use must be a public use, and by that is meant not necessarily a use by the public, but a use in public (*j*). The use need not have taken place in any public resort, such as a market-place. It is sufficient if it is without concealment, as where the article was openly manufactured (*k*) or exhibited in a shop (*l*), all the workmen knowing of the method (*m*), or where the

(*c*) Statute of Monopolies (1623), 21 Jac. 1, c. 3, s. 6.

(*d*) *Darcy* v. *Allin* (1602), Noy, 173, 182; *Ipswich Clothworkers' Case* (1614), Godb. 252.

(*e*) There are three statutory exceptions to this statement; see pp. 144 *et seq.*, *post*.

(*f*) As to prior publication, see p. 146, *post*.

(*g*) 21 Jac. 1, c. 3.

(*h*) Hindmarch on Patents, p. 108.

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

(*j*) Where, for instance, a lock which anticipated the invention had been used on a man's gate, it was held that this was a public use (*Carpenter* v. *Smith* (1842), 9 M. & W. 300, 304).

(*k*) *Carpenter* v. *Smith* (1841), 1 Web. Pat. Cas. 536; *Heath* v. *Smith* (1845), 2 Web. Pat. Cas. 268; *Croysdale* v. *Fisher* (1884), 1 R. P. C. 17; *Lister* v. *Norton Brothers & Co.* (1886), 3 R. P. C. 199; *Podmore* v. *Wright & Co.* (1888), 5 R. P. C. 380; *Westley, Richards & Co.* v. *Perkes* (1893), 10 R. P. C. 181.

(*l*) *Humpherson* v. *Syer* (1887), 4 R. P. C. 407, C. A. There may be public user if the invention is exposed in a spot to which the public had not free access (*Stead* v. *Williams* (1843), 2 Web. Pat. Cas. 126, 136; *Stead* v. *Anderson* (1846), 2 Web. Pat. Cas. 147, 149). But the exhibition of a model to three or four persons is not public user (*Lewis* v. *Marling* (1829), 4 C. & P. 52, 55; *Bentley* v. *Fleming* (1844), 1 Car. & Kir. 587; *Winby* v. *Manchester etc. Steam Tramways Co.* (1889), 6 R. P. C. 359).

(*m*) *Saxby* v. *Gloucester Wagon Co.* (1883), Griffin, Patent Cases, 1888, 54.

article was publicly exhibited in a shipbuilding yard with no precautions to secure secrecy (*n*). The manufacture of an article openly is sufficient to avoid a subsequent patent, and it is not necessary that a single piece should have been sold (*o*).

The secret use of the invention by a person in the privacy of his own closet does not constitute an anticipation for the purposes of avoiding the patent (*p*).

Use may be by inventor or by member of public.

300. The same law obtains whether the use is by an ordinary member of the public or by the inventor himself. If he has confined the use to the secrecy of his chamber the patent is not avoided; otherwise no experiments would be possible, for as soon as an experiment had been successful there would have been a prior use (*q*). Nor does the use in the presence of persons who are in confidential or fiduciary relationship with the inventor (*r*), such as workmen employed by him on the manufacture (*a*), or someone who is to test the efficiency of the invention, make the use a public one.

Public sale is public use.

301. The public sale of an invention is public use of it, and, if made by the inventor himself, certainly avoids a subsequent patent, because, if the inventor could sell the invention, keeping the secret to himself, and, when it was likely to be discovered by another, take out a patent, he might have practically a monopoly for a much longer period than fourteen years (*b*). Besides which consideration, the public sale of an article before the date of a patent is evidence of the invention having been used and exercised for the purposes of commerce and not simply for the purpose of experiment (*c*). Therefore where, before the patent, even a single specimen of the article is sold within this realm (*d*), the patent is void, and it is

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(*n*) *Lifeboat Co.* v. *Chambers Brothers & Co.* (1891), 8 R. P. C. 418. A public exhibition on the road may be a public user (*Brereton* v. *Richardson* (1884), Griffin, Patent Cases, 1884-6, 54).

(*o*) *Hancock* v. *Somervell* (1851), Newton's London Journal, Vol. XXXIX., 158; *Mullins* v. *Hart* (1852), 3 Car. & Kir. 297; *Oxley* v. *Holden* (1860), 8 C. B. (N. S.) 666; *Betts* v. *Neilson* (1868), 3 Ch. App. 429, 436.

(*p*) *Young* v. *Rosenthal & Co.* (1884), 1 R. P. C. 29; *Dollond* v. — — (1766), 1 Web. Pat. Cas. 43; *Hills* v. *London Gas Light Co.* (1860), 5 H. & N. 312, 336.

(*q*) *Re Newall and Elliot* (1858), 4 C. B. (N. S.) 269.

(*r*) For the effect of a disclosure to the public by such persons, see p. 147, *post*; *Gadd and Mason* v. *Manchester Corporation* (1892), 9 R. P. C. 249, 516, C. A.

(*a*) *Smith* v. *Davidson* (1857), 19 Dunl. (Ct. of Sess.) 691; *Morgan* v. *Seaward* (1837), 1 Web. Pat. Cas. 187; *Useful Patents Co.* v. *Rylands* (1885), 2 R. P. C. 255; *Humpherson* v. *Syer* (1887), 4 R. P. C. 407, C. A.; *Kurtz* v. *Spence* (1887), 5 R. P. C. 161; *Betts* v. *Menzies* (1859), 1 E. & E. 990, 1008; (1862) 10 H. L. Cas. 117; *Bentley* v. *Fleming* (1844), 1 Car. & Kir. 587.

(*b*) *Morgan* v. *Seaward*, *supra*, at p. 194; *Losh* v. *Hague* (1838), 1 Web. Pat. Cas. 202, 205; *Germ Milling Co.* v. *Robinson* (No. 2) (1886), 3 R. P. C. 399, 408, C. A.

(*c*) *Wood* v. *Zimmer* (1815), 1 Web. Pat. Cas. 44, n.; *Germ Milling Co.* v. *Robinson* (No. 2), *supra*, at p. 405; *Gibson and Campbell* v. *Brand* (1841), 1 Web. Pat. Cas. 627; *Carpenter* v. *Smith* (1841), 1 Web. Pat. Cas. 530, 536; *Hollins* v. *Capper & Co.* (1888), 5 R. P. C. 289.

(*d*) *Honiball* v. *Bloomer* (1854), 2 Web. Pat. Cas. 199.

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immaterial whether the articles sold were made in the realm or abroad (*e*), or that the sale was a mere experiment to ascertain if the goods would stand wear or that buyers would take them (*f*).

Sale by person other than patentee.

A sale by some one other than the subsequent patentee may be the subject of different considerations. If, by the sale, the public has gained the knowledge of the invention, there has been a dedication of the invention to the public and no subsequent patent can be valid. Although there is some doubt as to the effect of a use or sale of an article made abroad which, though manufactured in accordance with the invention, does not in itself disclose to the public what the invention is (*g*), the more logical reasoning of the older cases would seem to be correct, namely, that such a sale will avoid the patent for the reason that, if it did not, he who had used the invention by selling the article would be restrained from doing what he had already done (*h*).

Distinction between use for profit and experiments incidentally profitable.

302. A distinction must be drawn between the use of an invention for profit and the carrying out of experiments which turn out to be successful and by a coincidence happen to bring profit to the inventor (*i*). But, though this is the principle of law, an inventor may lose his rights by continued user before application (*k*).

Exhibition without proof of sale.

303. So jealous is the law of any use of the invention for profit, that the exhibition of the articles subsequently patented (*l*), or the deposit of the articles in a warehouse for the purpose of sale (*m*), is sufficient to avoid the patent, even though no actual sale is proved.

Exhibition at industrial or international exhibitions.

An exception, however, is made in favour of certain exhibitions, since it is often of the greatest importance that an invention should become known to those interested in the trade to which it appertains at the earliest possible date, both in the interests of the public and of the inventor. The exhibition of an invention at an industrial or international exhibition, certified as such by the Board of Trade, or the publication of any description of the invention during the period of the holding of the exhibition, or the use of the invention for the purpose of the exhibition in the place where the exhibition is held, or the use of the invention during the period of the holding of the exhibition by any person elsewhere,

(*e*) *Jensen* v. *Smith* (1885), 2 R. P. C. 249.

(*f*) *Lister* v. *Norton Brothers & Co.* (1886), 3 R. P. C. 199; compare *Oxley* v. *Holden* (1860), 8 C. B. (N. S.) 666.

(*g*) *Sunlight Incandescent Gas Lamp Co.* v. *Incandescent Gas Light Co.* (1897), 14 R. P. C. 757.

(*h*) *Heath* v. *Smith* (1854), 3 E. & B. 256, *per* ERLE, J., at p. 273; *Cornish* v. *Keene* (1835), 1 Web. Pat. Cas. 501.

(*i*) As where a man contracted to lay a cable, and in carrying out the contract made experiments which turned out to be successful and embodied the invention, it was held that this did not amount to using his invention for profit, as the profit came from the contract, which was not to use the invention, but to lay a cable in any way he chose, and consequently the use of the invention was merely a coincidence (*Re Newall and Elliot* (1858), 4 C. B. (N. S.) 269, distinguishing *Re Adamson's Patent* (1856), 6 De G. M. & G. 420).

(*k*) *Re Adamson's Patent*, *supra*.

(*l*) *Lister* v. *Norton Brothers & Co.*, *supra*.

(*m*) *Mullins* v. *Hart* (1852), 3 Car. & Kir. 297.

without the privity or consent of the inventor, does not prejudice the right of the inventor to apply for and obtain a patent in respect of the invention, or the validity of any patent granted on the application, provided that (a) the exhibitor, before exhibiting the invention, gives the Comptroller (*n*) the prescribed notice of his intention to do so, and (b) the application for a patent is made before or within six months from the date of the opening of the exhibition (*o*).

By an Order in Council the Crown may apply this exception to any exhibition without a certificate from the Board of Trade, and may by the terms of the order relieve the exhibitor from the condition of giving notice to the Comptroller (*p*).

Use need not be continued to date of grant.

304. It is not necessary that the use should have been continued right down to the time of the grant of the patent (*q*). It has been frequently stated that there is no decision as to whether a rediscovery of a lost art can be the subject of a valid patent or whether the patent will be avoided for want of novelty, but it has been laid down that it is not necessary that the contrivance or machine should be in use up to the time of the letters patent, provided that it has been once in public use and the recollection of it has not been altogether lost (*r*); and by implication, therefore, if the recollection of the prior use has been altogether lost, a patent for the rediscovery of the invention might be good.

Identity of thing used with invention.

305. The second question in the test (*s*) as to whether a prior use of the invention avoids the patent or not is, supposing that there has been a public use, was the thing used the invention or not? If the thing used was the actual invention the patent is avoided. But it may be that the thing used falls short of the actual invention. If so, it becomes a question of fact whether the thing used is so like the invention that the difference is merely colourable or whether it would take invention to come by the patented invention even with the knowledge of the prior user. It is clear that this question is intimately connected with that of subject-matter, for, the extent of the advance in the public's knowledge having been narrowed down by the prior user, it at once becomes material to see if the step from the prior user to the invention, which is all that is new in the invention, is sufficient subject-matter to support the patent. In this connection the same question arises as that which is dealt with hereafter on the question of how much information is necessary in a document in order to constitute anticipation for the purposes of avoiding the patent (*a*).

(*n*) As to the Comptroller, see p. 168, *post*.

(*o*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 45 (1). In order to identify the invention the applicant must give the Comptroller a short description of it, together with drawings, where necessary, and any further information that the Comptroller may require (Patents Rules, 1908, r. 101 (Stat. R. & O., 1907, p. 779); see Encyclopædia of Forms and Precedents, Vol. X., p. 170).

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 45 (2).

(*q*) *Househill Coal and Iron Co.* v. *Neilson* (1843), 9 Cl. & Fin. 788, H. L.

(*r*) *Ibid.*, *per* Lord LYNDHURST, L.C., at p. 803.

(*s*) As to the first question, see p. 142, *ante*.

(*a*) See pp. 166, 167, *post*.

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Unsuccessful use no bar to patent for similar but successful invention.

306. As the mere use by way of experiment of the invention does not avoid the patent (*b*), so also unsuccessful experiments do not avoid a patent for a successful invention, nor does the user of a useless machine avoid a patent for a successful machine, notwithstanding that there are similarities between the two (*c*); nor is the exhibition of a model necessarily sufficient user of the actual machine (*d*).

Abandonment as evidence of unsuccessful experiments.

307. While it is not necessary, in order to avoid a patent for want of novelty, that the use should have been continued down to the time that the patent was granted (*e*), the fact that what was done was abandoned may be very strong evidence that the user was of unsuccessful experiments and not of the complete invention, and therefore does not avoid the subsequent patent (*f*).

Public knowledge owing to prior publication.

308. There is another way in which the public may gain the knowledge of the invention, and that is by a prior publication. As in the case of prior use, there are two questions of fact raised—(1) was there sufficient publication? and (2) if there was, did the document so published furnish sufficient knowledge?

Publication may be by writing or parol.

Was there sufficient publication?

309. The question as to whether there is sufficient publication depends on the following consideration. Was the document or communication part of the public stock of knowledge?—that is to say, had the public access to it in order to learn from it the knowledge which it contained? For, if a document is relied on, it is not necessary to show that any member of the public actually read it, provided they had an opportunity of doing so (*g*).

Public access to source of knowledge.

For instance, which is the commonest case of all, if the book is upon the shelves of some public library—in practice usually the Patent Office library—it is clearly accessible to the public, and the information therein contained is part of the public stock of knowledge, even though there is but one copy (*h*). Further, it is publication although the document is not in English, provided it is in some language with which those interested in the subject may be presumed to be familiar (*i*).

(*b*) See p. 143, *ante*.

(*c*) *Murray* v. *Clayton* (1872), 7 Ch. App. 570, 581; *Barlow* v. *Baylis* (1870), Griffin, Patent Cases, 1884–6, 44; *Daw* v. *Eley* (1867), L. R. 3 Eq. 496; *Pneumatic Tyre Co.* v. *East London Rubber Co.* (1896), 14 R. P. C. 77; *Jones* v. *Pearce* (1832), 1 Web. Pat. Cas. 122, 124; *Tangye* v. *Stott* (1865), 14 W. R. 128; *Stead* v. *Williams* (1843), 2 Web. Pat. Cas. 126, 135; *Winby* v. *Manchester etc. Steam Tramways Co.* (1889), 6 R. P. C. 359.

(*d*) *Lewis* v. *Marling* (1829), 1 Web. Pat. Cas. 493. This case has never been overruled, and therefore it must be taken that the law is at present as stated, but it is doubtful whether the case would be followed if the same circumstances arose (*Winby* v. *Manchester etc. Steam Tramways Co.*, *supra*).

(*e*) See p. 145, *ante*.

(*f*) *Household Coal and Iron Co.* v. *Neilson* (1843), 9 Cl. & Fin. 788, H. L.; *Morgan & Co.* v. *Windover & Co.* (1888), 5 R. P. C. 295, C. A.; 4 T. L. R. 425.

(*g*) *Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 531; *Patterson* v. *Gas Light and Coke Co.* (1877), 3 App. Cas. 239.

(*h*) *Ibid*

(*i*) *Lang* v. *Gisborne* (1862), 31 Beav. 133; *Harris* v. *Rothwell* (1887), 35 Ch. D. 416, 426, C. A.

310. The reason why it is sufficient to show that the book or document is accessible is that the court draws an inference that, if the public had an opportunity of making the information therein contained part of the general stock of public knowledge, they did so. This inference may, however, be rebutted (*k*).

Inference as to opportunity taken by public.

311. It is permissible to look at the intention of the publication as well as at the fact of the publication. Thus, where a report of a commission had been drawn up but not in fact published, the information therein contained was held to be part of the public stock of knowledge, for as soon as the referees in the performance of their public duty had prepared their report, the matter of that report was public property, and the referees had no power to agree among themselves to treat any communication therein contained as confidential (*l*). On the other hand, a patent will not now be held to be invalid by reason only of the invention in respect of which the patent was granted, or any part thereof, having been published prior to the date of the patent (*m*), if the patentee proves to the satisfaction of the court that the publication was made without his knowledge and consent and that the matter published was derived or obtained from him, and, if he learned of the publication before the date of his application for the patent, that he applied for and obtained protection for his invention with all reasonable diligence after learning of the publication (*n*).

Intention of the publication may be regarded.

Publication without knowledge or consent.

There is a further remedial enactment in the case of a particular class of documents, namely, specifications. There is no virtue in the document relied on as prior publication being a specification of another patent (*o*). On the contrary, an invention

Publication in specification.

(*k*) Thus, where it was proved that a single copy of a book was sent to the Patent Office library, and when it arrived was through some error put, not upon the ordinary shelves, but in a room accessible to the public for purposes other than reading and such that they would not expect to find a book there, and no information was given to the public that such a book was there or even existed at all in the catalogue or elsewhere, and where those who were most interested in the subject had failed at all material times to find the book or to find that such a book did in fact exist, the court held that the inference was rebutted and that the information therein contained was not part of the public stock of knowledge (*Plimpton* v. *Spiller* (1877), 6 Ch. D. 412, C. A.). In *Lang* v. *Gisborne* (1862), 31 Beav. 133, ROMILLY, M.R., at p. 135, said that as soon as a book is exposed for sale in a shop there is sufficient publication, but this statement has been in terms said to go too far (*Patterson* v. *Gas Light and Coke Co.* (1877), 3 App. Cas. 239).

(*l*) *Patterson* v. *Gas Light and Coke Co.*, *supra*.

(*m*) An exception is also made in the case of a publication made in connection with and for the purposes of an industrial exhibition; see p. 144, *ante*.

(*n*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 41 (2). This provision reversed the law as laid down in *Pickard and Currey* v. *Prescott*, [1892] A. C. 263.

(*o*) *Betts* v. *Menzies* (1862), 10 H. L. Cas. 117; *Cornish* v. *Keene* (1837), 3 Bing. (N. C.) 570; compare *Lawrence* v. *Perry* (1885), Griffin, Patent Cases, 1884–6, 143; *Munts* v. *Foster* (1843), 2 Web. Pat. Cas. 93; *Hill* v. *Evans* (1862), 4 De G. J. & F. 288; *Young* v. *Fernie* (1864), 10 L. T. 861. A provisional specification does not become public by abandonment (*Oxley* v. *Holden* (1860), 8 C. B. (N. S.) 666), unless it imparts sufficient information to the person subsequently working on it (*Betts* v. *Neilson*

SECT. 1. Introductory.

covered by any patent applied for on or after the 1st day of January, 1905, is not to be deemed to have been anticipated by reason only of its publication in a specification left pursuant to an application made in the United Kingdom not less than fifty years before the date of the application for the patent, or of its publication in a provisional specification of any date not followed by a complete specification (*p*).

Did prior publication furnish sufficient knowledge?

312. The second question of fact to be determined—namely, as to whether what has been published anticipates the invention—is rather more difficult to answer in the case of prior publication than it is in the case of prior user, for, in the latter case, there are two machines or two processes which can be compared in actual practice,

Importance as to nature of knowledge conveyed to the mind of the public.

while, in the former, the court has to construe words and then come to the conclusion what knowledge those words would convey to a public not knowing the present invention. Even where the prior document and the present specification are identical in language, it does not follow that the court can without evidence interpret the first as being an anticipation of the second. For where there are words of art, that is technical terms, it does not follow that those words of art bore the same meaning at the date of the prior publication as they did at the date of the specification. The true rule is: if the terms of the prior publication and the present specification are identical, and if it is not disputed that the terms of art in one have the same meaning as the same terms used in the other, which from the lapse of time between the dates of the two documents may not always be the case, the court ought without evidence to determine that the first publication anticipated the second. But if, after construction and after the meaning of the parties in the two documents has been ascertained by the court, there is any difference between the two things which may be essential or material to the invention, and which either party contends is essential, then the identity in substance of the two inventions described is a matter to be established by extrinsic evidence (*q*). But although extrinsic evidence may and often must be called, it is confined to evidence of what knowledge the prior document would have conveyed to the mind of a person who had not the knowledge given by the present invention. It is often very difficult for the most honest minds to divest themselves of their present knowledge and form a true opinion of what the prior document would have conveyed to them if they had not known what by this time they do know.

Expert evidence.

When the issue is that certain useful and sufficient information has been given to the public, the evidence of instructed and skilled men, conversant with the special literature, that no such information was in fact conveyed to their minds is far more to the point than

(1868), 3 Ch. App. 429; considered in *Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 531; *Hill* v. *Evans* (1862), 4 De G. J. & F. 288). As to provisional specification, see p. 155, *post*.

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 41 (1).

(*q*) *Betts* v. *Menzies* (1862), 10 H. L. Cas. 117. As to the admission of opinions of experts as evidence, see title EVIDENCE, Vol. XIII., pp. 480, 481

evidence of other like instructed and skilled men, who, speaking with all the new light thrown on the subject, conclude now that the information was then sufficient (*r*).

Question of quantum of knowledge imparted.

313. Assuming, however, that the court is satisfied that information would have been conveyed to the public, the question arises as to how much information is necessary to anticipate the invention. The test is, did the document supply sufficient information to enable the public to make a machine or carry out a process, which machine or process, if made or carried out, would have in fact anticipated the present invention? The latter half of this test has been already discussed on the question of prior user (*s*). On the question of the sufficiency of the information the document must be as full and complete as a specification. A barren general description, though containing some suggestive information or involving some speculative theory, will not avoid for want of novelty a subsequent invention unless it is ascertained that the antecedent publication involved the same amount of useful information (*t*).

The test of sufficiency.

314. It becomes, therefore, necessary to inquire what is the test of sufficiency in a specification (*a*).

Persons to whom information must be intelligible.

In the first place, it is plain that the specification of a patent is not addressed to people who are ignorant of the subject-matter. It is addressed to people who know something about it, and of these there are various kinds. If it is a mechanical invention, there are first of all the scientific classes, including scientific mechanicians of the first class, eminent engineers; then there are scientific mechanicians of the second class, managers of great manufactories, great employers of labour, persons who have studied mechanics—not to the same extent as the first class, the scientific engineers, but still to a great extent—for the purpose of conducting manufactories of complicated and unusual machines, and who, therefore, must have made the subject a matter of very considerable study; and this class includes foremen, being men of superior intelligence, who, like their masters, would be capable of invention, and, like the scientific engineers, would be able to find out what was meant even from slight hints, and still more from imperfect descriptions, and would be able to supplement, so as to succeed, even from a defective description, and, even more than that, would be able to correct an erroneous description. The other class consists of the ordinary workman, using that amount of skill and intelligence which is fairly to be expected from him—not a careless man, but a careful man, though not possessing that great scientific knowledge or power of invention which would enable him by himself, unaided, to supplement a defective description, or correct an erroneous description.

(*r*) *Von Heyden* v. *Neustadt* (1880), 42 L. T. 300, C. A., *per* JAMES, L.J. at p. 302.

(*s*) See pp. 142 *et seq.*, *ante*.

(*t*) *Betts* v. *Menzies* (1862), 10 H. L. Cas. 117.

(*a*) The law is most clearly laid down by JESSEL, M.R., in *Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 531, 568. As to provisional specification, see p. 155, *post*. As to complete specification, see p. 158, *post*.

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To be a good specification a specification must be intelligible to the last-mentioned class. It is a bad specification if the first two classes only understand it, and if the third class does not (*b*).

Combination of sources of information.

315. It follows from this statement of the law (*c*) that more than one prior document may be used to show anticipation, though no one of them by itself would do so, provided that the combining of the information therein contained does not require more than the ordinary intelligence of such a careful workman. On the other hand, if it requires a mosaic of extracts from annals and treatises spread over a series of years to prove anticipation, it is not sufficient, for if it could be shown that a patentee had made his discovery by studying, collating, and applying a number of facts disseminated in the pages of such works, his diligent study of such works would as much entitle him to the character of inventor as the diligent study of the works of nature would do (*d*).

(iii.) *Utility.*

Utility only evidence of good subject-matter.

316. The first and most ordinary sense of the word "utility" (*e*) is the commercial utility of the invention. This has no direct

(*b*) In *Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 531, at p. 576, after enunciating the proposition in the text, *supra*, JESSEL, M.R., goes on to emphasise the point that an insufficient specification is not made sufficient merely because someone supplemented or corrected a defect or an error. "This intelligent workman, reading it for the first time, came to the conclusion that what was an abstract, or a condensed statement, of the specification was wrong, and looking at the drawing he had sufficient intelligence, as he describes it, but, as I should describe it, sufficient inventive power, to correct the mistake . . . you must not mislead people by telling them to do something wrong, and leaving them to find out the mistake. Therefore, if this were really the meaning of the letterpress, then I think it is clearly insufficient, because it tells you to do something which cannot be done to make the thing useful, though he did, by his own intelligence, in looking at the drawing, find out what was required. You must not give people mechanical problems and call them specifications. You may set to a dozen engineers a mechanical problem, and perhaps eleven out of the twelve will find it out; you may set to a dozen selected workmen a mechanical problem, and perhaps, of that dozen, three-fourths will find it out; but that is not the meaning of a sufficient specification. . . ." (upon the objection that the experts ought to have found out the error) "I will assume that Mr. Bramwell ought to have found it out, and I will assume that Mr. Imray ought to have found it out, as well as Messrs. Cowper, May and Hulse. What then? That is not the class to which these things are addressed. Supposing that these great mechanical engineers had found it out, it would only show that they had sufficient capacity to solve this mechanical problem, and no more" (*ibid.*, at p. 576; see also *Arkwright* v. *Nightingale* (1785), 1 Web. Pat. Cas. 60; *Harmar* v. *Playne* (1809), Dav. Pat. Cas. 311, 318; *Sturz* v. *De la Rue* (1828), 5 Russ. 322, 327; *Galloway* v. *Bleadon* (1839), 1 Web. Pat. Cas. 521, 524; *Elliott* v. *Aston* (1840), 1 Web. Pat. Cas. 222, 224; *Bickford* v. *Shewes* (1839), 1 Web. Pat. Cas. 214; *Neilson* v. *Harford* (1841), 1 Web. Pat. Cas. 295, 314; *Gibson and Campbell* v. *Brand* (1841), 1 Web. Pat. Cas. 627, 629; *Household Coal and Iron Co.* v. *Neilson* (1843), 1 Web. Pat. Cas. 673, 676; 9 Cl. & Fin. 788, H. L.; *Morton* v. *Middleton* (1863), 1 Macph. (Ct. of Sess.) 713, 721; *Foxwell* v. *Bostock* (1864), 10 L. T. 144, 147).

(*c*) See p. 148, *ante*.

(*d*) *Von Heyden* v. *Neustadt* (1880), 14 Ch. D. 230, C. A., as reported, 42 L. T. 300; *Brunton* v. *Hawkes* (1821), 4 B. & Ald. 541.

(*e*) The word "utility" is singularly unhappy in its application in patent

effect on the validity of the patent. As has been seen (*f*), the commercial utility may be evidence of sufficient subject-matter, but being merely evidence it follows that the absence thereof cannot be pleaded as a bar in law to the validity of the patent.

Real test is novelty, not utility.

Further, it is to be noticed that "utility" *eo nomine* does not occur in the Statute of Monopolies (*g*), and on that ground the real test is that the thing shall be new, not that it shall be useful, and the condition imposed by the statute (*g*) has been complied with when it has been proved to be new (*h*).

Want of utility as a plea of invalidity.

317. Want of utility is often used as a compendious and inaccurate way of expressing two totally distinct grounds of invalidity. For instance, suppose a patent is obtained for improving a gun-lock by means of a certain hole through which air passes without powder, and suppose it turns out that the powder in fact passes through the hole with the air, it is often said that the invention is useless. There is here a confusion of language, for, if the statement is analysed, the following proposition becomes clear:—The passing of air without powder does not take place by the means described: *ex hypothesi* the passing of air without powder by the means described is the invention: therefore the invention does not exist. It is obviously meaningless to predicate of a non-existing thing that it is either useful or useless.

It does not follow from this that a patent may not be invalid on the ground that the supposed invention is useless. In the case referred to the patent was declared invalid (*i*), but the looseness and inaccuracy of the plea is more than a mere matter of words, for, unless the exact issue raised is understood, it is impossible to follow the reasons for which a patent is valid or the reverse.

Pleas of invalidity: (1) want of subject-matter; (2) insufficiency.

318. The question at issue may be raised by two pleas, which need not in the least be necessarily connected. The first is that of want of subject-matter (*k*). The subject-matter of a patent must be a new manufacture or art (*l*). It follows, therefore, that if there is no new manufacture or art there is no subject-matter for a patent; and if in fact there is no invention, there can be no new art.

Want of utility supporting plea of insufficiency

The second plea by which the issue may be raised is that of insufficiency, and it is in substance upon that plea that most of the cases quoted in support of the plea of utility were decided. In the

law. It has three distinct meanings, and confusion is constantly being created by the looseness with which the word is used, sometimes in the ordinary sense, sometimes in highly technical senses quite unjustified by any definition to be found in a dictionary.

(*f*) See p. 135, *ante*.

(*g*) 21 Jac. 1, c. 3.

(*h*) *Lewis* v. *Marling* (1829), 10 B. & C. 22: "The condition therefore, is that the thing shall be new, not that it shall be useful; and, although the question of utility has sometimes been left to a jury, I think the condition imposed by the statute has been complied with when it has been proved to be new," *per* PARKE, J., at p. 28.

(*i*) *Manton* v. *Parker*, (1814), Dav. Pat. Cas. 327.

(*k*) Advocated by Mr. Webster after the remarks of PARKE, B., as to the possible objections to the plea of utility, which were not taken at the bar, and were expressly left on that ground undecided (*Morgan* v. *Seaward* (1836), 1 Web. Pat. Cas. 170, 197, n.).

(*l*) See p. 134, *ante*.

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instance above given there was something which does exist and which is useless, namely, the description of the means by which the invention was sought to be carried into effect. Applying the test of sufficiency (*m*), no workman could make from the description in the specification a gun-lock having a hole through which only air would pass: therefore the specification is insufficient and the patent is void (*m*). Nor will the court entertain a discussion as to whether the patent can be made to work by other means, for this again is a confusion of language. For *ex hypothesi* the invention described in the specification does not work. The question, therefore, as to whether some other invention—possibly what the inventor thought he had described, but nevertheless other than that which in fact he has described—will work, though possibly interesting, is wholly immaterial (*n*).

Want of utility owing to mischievous nature as regards the State or public good.

319. There is another limitation in the Statute of Monopolies (*o*) besides that of novelty, namely that expressed by the words "so as also they be not contrary to law nor mischievous to the State by raising prices of commodities at home or hurt of trade or generally inconvenient (*p*)," and those inventions which are within this limitation have been called useless (*p*). Whatever name be applied to this class of inventions, the limitation certainly obtains, and no patent for an invention which is against public policy is valid. For instance, a patent for burgling a house would be invalid, for it would be absurd that one statute should reward persons for providing means of violating another (*q*). There is, however, a difference between violating and evading a law; and a patent for the purpose of evading a law is not necessarily against public policy (*r*).

SECT. 2.—*Application for a Patent.*

SUB-SECT. 1.—*Application.*

Several or joint application.

320. An application may be made for a patent by any person applying in the prescribed form (*s*).

(*m*) See p. 159, *post*.

(*n*) The origin of this confusion lies in an unfortunate expression of Sir E. Coke (3 Co. Inst. 184, where he lays down that it is a necessary ingredient in every patent that it shall have "*evidens utilitas*"). Sir E. Coke was using the word in a very different sense, and in that sense it may be used accurately, if awkwardly.

(*o*) 21 Jac. 1, c. 3, s. 6.

(*p*) By Sir E. Coke (3 Co. Inst. 184). The instance that he gives is no more fortunate than his expression; see note (*n*), *supra*. *Bircot's Case* (1573), 3 Co. Inst. 184, decided that a fulling mill was useless, not because it did not do what the inventor described, but for the exactly contrary reason, namely, that it worked all too well and put out of employment many hand fullers, which was against public policy, because it was ordained that man should full hats with his hands. This view has in terms been overruled (*Boulton* v. *Bull* (1795), 2 Hy. Bl. 463), but the expression "utility" has remained.

(*q*) Hindmarch on Patents, p. 142.

(*r*) *Re Vaisey's Patent* (1894), 11 R. P. C. 591, 593.

(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 1 (1), (2); Patents Rules, 1908, r. 5 (Statutory Rules and Orders, 1907, p. 779). A pamphlet containing "Instructions to Applicants" may be obtained at the Patent Office, 9, Southampton Buildings, Chancery Lane, London. Forms are provided, on one of which the application must be made (Patent Office

In the case of a joint application it must be stated which of the applicants is or are the true and first inventor or inventors (*t*).

Declaration.

321. The applicant or applicants must make a declaration that he or they is or are in possession of an invention the title of which must be set out (*a*), and of which invention one or more of them claims to be the true and first inventor or inventors, and that to the best of his or their knowledge and belief the said invention is not in use by any other person or persons (*b*). If the applicant is the legal representative of a person who has died possessed of an invention (*c*) he must produce the usual evidence of his title at the Patent Office (*d*).

Address for service.

When filled in, the form must be signed by the applicant or joint applicants—in the case of a firm by each member of the firm—and an address for service, being either that of the applicant or his agent, must be provided (*e*). The Comptroller may subsequently require that this address shall be within the United Kingdom (*f*).

Where application made.

322. Applications must be made at or to the Patent Office (*g*). They may be sent through the post (*h*), in which case the rules

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Rules, 1908, r. 10; Sched. II., Forms, No. 1—1D. Form No. 1 is not applicable to the case of a corporation; but a foreign corporation may apply on Form 1A (*Re Société Anonyme du Générateur du Temple's Application for a Patent* (1895), 13 R. P. C. 54)): the distinction between the forms depends upon whether the application is for a patent for an invention as opposed to one for an importation, and whether it is made in the ordinary way as opposed to one made under the special international and colonial procedure (see p. 229, *post*), and whether it is made for a substantive patent or for one of addition (see p. 205, *post*), or for a secret patent (see p. 189, *post*). As to proceedings on application, see the text *infra*.

(*t*) Patents Rules, 1908, Forms Nos. 1—1D; see Encyclopædia of Forms and Precedents, Vol. X., pp. 58 *et seq.* For the numbers of these forms under the Patents Rules, 1908, see Encyclopædia of Forms and Precedents, Vol. XVI., pp. 491 *et seq.*; and see *ibid.*, Vol. XVI., pp. 495, 496. A patent cannot be granted where the true and first inventor refuses the grant (*Wool, Hide and Skin Syndicate* v. *Riches* (1902), 19 R. P. C. 127, *per* KEKEWICH, J.; followed in *Re A. and B.'s Application* (1910), 28 R. P. C. 454).

(*a*) Patents Rules, 1908, Forms Nos. 1—1D. For further particulars as to the title, see p. 154, *post*.

(*b*) Patents Rules, 1908, Forms Nos. 1—1D.

(*c*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 43; *Edmunds' Patent* (1886), Griffin, Patent Cases, 1884-6, 281.

(*d*) Patents Rules, 1908, r. 11; and see p. 129, *ante*.

(*e*) Patents Rules, 1908, r. 8. For forms of indorsement of address for service, see Encyclopædia of Forms and Precedents, Vol. X., p. 61.

(*f*) Patents Rules, 1908, r. 8. The Comptroller-General of Patents, Designs, and Trade Marks, and the examiners, officers and clerks of the Patent Office are appointed, and may be removed, by the Board of Trade, subject to the approval of the Treasury (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 63). The Comptroller-General carries on his duties at the Patent Office, 25, Southampton Buildings, Chancery Lane, London, which is provided by the Treasury (*ibid.*, s. 62 (1)). The salary of the Comptroller-General is £1,500 per annum, and it, as well as the salaries of the other officials and staff of the Patent Office, are appointed by the Board of Trade with the concurrence of the Treasury (*ibid.*, s. 63).

(*g*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 1 (2). They should be made to the Comptroller, Patent Office, 25, Southampton Buildings, Chancery Lane, London; see the Instructions to Applicants.

(*h*) Patents Rules, 1908, r. 7.

SECT. 2. Application for a Patent.

concerning the ordinary course of the post are observed (*i*), or they may be left at the Patent Office. In either case they are opened and numbered in the order of their receipt at the Patent Office (*k*). Certain fees are payable upon the application (*l*).

Fees.

Documents accompanying application.

323. The application must be accompanied by two copies of either the provisional or the complete specification (*m*) drawn up on the prescribed forms (*n*). Furthermore, where the Comptroller deems it desirable, he may require that suitable drawings be supplied with the specification, or at any time before the acceptance of the same, and such drawings are deemed to form part of the specification (*o*). The drawings must bear the name of the applicant, but no descriptive matter (*a*), save the requisite numbering or other necessary identification marks; and a facsimile must be filed prepared on tracing cloth (*b*). The drawings must be delivered at the office with the specifications, or when required by the Comptroller (*c*), unless the applicant wishes the drawings of the provisional specification to be used for the complete specification, in which case he should give instructions to that effect (*d*). Where the invention is a chemical one, the Comptroller may require typical samples and specimens to be furnished before the acceptance of the complete specification (*e*), and in duplicate, if so required (*f*).

SUB-SECT. 2.—*Title.*

Title commencing specification.

324. Every specification, whether provisional or complete (*g*), must commence with a title (*h*), which title is embodied in the grant and is therefore part of the patent.

(*i*) Patents Rules, 1908, r. 7; and see title POST OFFICE, pp. 657 *et seq.*, *post*.

(*k*) Patents Rules, 1908, r. 12. An application left at the Patent Office after office hours must bear the date of the following office day (*Re Matthews and Strange's Application for a Patent* (1910), 27 R. P. C. 288).

(*l*) Patents Rules, 1908, r. 4, Sched. I.: *i.e.*, application with provisional specification only, £1; with complete specification, £4. Fees cannot be paid by cheque or money order, or in cash, but applicants must use the stamped forms. For further information as to obtaining these forms, see the Instructions to Applicants, p. 3.

(*m*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 1 (3); Patents Rules, 1908, Forms Nos. 1—1D.

(*n*) *Ibid.*, Forms Nos. 2, 3.

(*o*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 2 (3). Copies of the instructions as to the preparation of drawings may be obtained from the Patent Office; and see Patents Rules, 1908, rr. 19—25 (detailing requirements as to size, arrangement, paper, suitability for reproduction, delivery at the office etc.).

(*a*) *Ibid.*, r. 23.

(*b*) *Ibid.*, r. 24.

(*c*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 2 (3).

(*d*) Patents Rules, 1908, r. 26.

(*e*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 2 (5); Patents Rules, 1908, r. 36.

(*f*) *Ibid.*, r. 36. Certain formalities are required for the delivery of such samples and specimens (*ibid.*). *Quære* whether, where the Comptroller requires further samples, his decision is subject to an appeal to a law officer (*Re J. Y. J.'s Applications for Patents* (1910), 28 R. P. C. 625). As to appeals to a law officer, see p. 178, *post*.

(*g*) As to provisional specification, see p. 155, *post*. As to complete specification, see p. 158, *post*.

(*h*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 2 (4). The title

325. The title should give a fair general description of the nature of the invention. This obviously connotes that within certain limits it must not be too wide. For instance, with regard to an invention consisting of an improved lamp, a title "for an improved method of lighting cities, towns and villages," was held to be too vague (*i*).

Title must not be too wide.

The objection that the title is too narrow and does not include the invention is more serious and may be fatal to the patent (*k*), because in this case there is no specification agreeing with the title (*l*). If the disagreement goes further and amounts to actual false suggestion, then *a fortiori* the patent may be held to be invalid (*m*).

Title must not be too narrow.

Mere vagueness in the title, not amounting to disagreement with the specification, and in the absence of fraud, is not a ground for avoiding the patent after it has once been granted (*n*); and, as the specification and the patent itself are construed together (*o*), a title in itself defective may be cured by the specification (*p*). An objection that the title is defective may, however, be taken by the Crown before the granting of the patent, in accordance with statutory regulation (*q*).

Effect of vagueness in title.

SUB-SECT. 3.—*Provisional Specification.*

326. The specification which has to be lodged with the application is of one of two kinds, provisional or complete, and their purposes are different and distinct. While the complete specification has a double object (*r*), namely, to furnish sufficient and

Function of specifications in general and of provisional specification in particular.

is really a short statement of the invention (*Household Coal and Iron Co.* v. *Neilson* (1843), 1 Web. Pat. Cas. 673, 678; 9 Cl. & Fin. 788, H. L.).

(*i*) *Cochrane (Lord)* v. *Smethurst* (1816), 1 Stark. 205; see also *Campion* v. *Benyon* (1821), 6 Moore (C. P.), 71; *Felton* v. *Greaves* (1829), 3 C. & P. 611; *Derosne* v. *Fairie* (1835), 2 Cr. M. & R. 476; *Cook* v. *Pearce* (1843), 8 Q. B. 1044; *Nickels* v. *Haslam* (1844), 7 Man. & G. 378; *Beard* v. *Egerton* (1847), 2 Car. & Kir. 667.

(*k*) *Croll* v. *Edge* (1850), 9 C. B. 479; *Oxley* v. *Holden* (1860), 8 C. B. (N. S.) 666.

(*l*) *Cook* v. *Pearce, supra*; *Campion* v. *Benyon, supra*; *R.* v. *Metcalf* (1817), 2 Stark. 249; *Bainbridge* v. *Wigley* (1810), 1 Carp. Pat. Cas. 270.

(*m*) *R.* v. *Wheeler* (1819), 2 B. & Ald. 345; *Bloxam* v. *Elsee* (1825), 1 C. & P. 558; (1827) 6 B. & C. 169; *Morgan* v. *Seaward* (1837), 2 M. & W. 544; *Gibson and Campbell* v. *Brand* (1841), 1 Web. Pat. Cas. 627, 634.

(*n*) *Cook* v. *Pearce, supra*; *Nickels* v. *Haslam, supra*; *Oxley* v. *Holden, supra*; *Pirrie* v. *York Street Flax Spinning Co.* (1892), 10 R. P. C. 34; 31 L. R. Ir. 3 (the last occasion on which the question of defective title was raised); see also *Sandow, Ltd.* v. *Szalay* (1905), 23 R. P. C. 6, 14, H. L. (where it was held that it does not follow that the complete specification does not include a detailed way of performing the invention set out in the provisional specification, although the latter is not mentioned in the complete specification).

(*o*) *Hornblower* v. *Boulton* (1799), Dav. Pat. Cas. 221, 230; *Newton* v. *Vaucher* (1851), 6 Exch. 859, 866; *Neilson* v. *Harford* (1841), 8 M. & W. 806; *Oxley* v. *Holden, supra*, at p. 707.

(*p*) *Hills* v. *London Gas Light Co.* (1860), 5 H. & N. 312; *Electric Telegraph Co.* v. *Brett* (1851), 10 C. B. 838; see *Sandow, Ltd.* v. *Szalay, supra*.

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 3 (2)

(*r*) See p. 159, *post*.

SECT. 2. Application for a Patent.

certain information to the public respecting what they are prohibited from doing whilst the privilege continues, and what they will be enabled to do after it has expired (*s*), the provisional specification has neither of these two objects in view: its object is to disclose what the nature (*t*) of the invention is (*u*).

Consideration governing choice of specification.

327. The choice which the applicant has to make is governed in practice by the following considerations:—

(1) If he leaves the complete specification with his application he runs no risk of having his patent avoided on the ground of disconformity (*a*), and it may be to his commercial interest to have a patent granted with as little delay as possible;

(2) If he leaves his provisional specification with his application, and if, by the time for leaving the complete specification, he has come to the conclusion that his invention is a failure, he need not go to the expense of lodging a complete specification. Further, provisional protection is given to him during the period between the date of the application and the date of the sealing of the patent, during which period he may use and publish the invention without prejudice to his claim for a patent (*b*).

Provisional protection.

Description in provisional specification.

328. As with the title so with the provisional specification, a fair and honest description must be given of the nature of the invention. It is manifest, however, that the provisional specification, though not so full and detailed as the complete specification, is intended to be fuller and more particular than the title. A further difference is also material. As has been seen (*c*), a defective title may be cured by the specification. A provisional specification, on the

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(*s*) *Macfarlane* v. *Price* (1816), 1 Stark. 199; *Young* v. *Rosenthal & Co.* (1884), 1 R. P. C. 29, *per* GROVE, J., at p. 31; *Allen* v. *Duckett & Son* (1893), 10 R. P. C. 397.

(*t*) A provisional specification must describe the nature of the invention (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 2 (1)).

(*u*) Before 1852, there was no provisional specification, and the patent was granted upon a condition that a specification—that is, a document answering to the present complete specification—should be enrolled in the Court of Chancery within a certain time. Provided that he were not found out (and that amounted to saying, provided that he did not go outside his title, for that was the only knowledge till his specification was enrolled that the law officers had) there was nothing to prevent a patentee from preparing a specification for a totally different invention from that for which he had applied. The object of the provisional specification is to prevent this very thing happening to the prejudice of another person who applies between the date of the application and the leaving at the Patent Office of the complete specification (*Newall* v. *Elliott and Glass* (1864), 10 Jur. (N. S.) 954; *Penn* v. *Bibby* (1866), 2 Ch. App. 127; *Lucas* v. *Miller* (1885), 2 R. P. C. 155; *Moseley* v. *Victoria Rubber Co.* (1887), 4 R. P. C. 241; *Morgan & Co.* v. *Windover & Co.* (1887), 4 R. P. C. 417, 422; 3 T. L. R. 748; affirmed (1888), 5 R. P. C. 295, C. A.; 4 T. L. R. 425; *Woodward* v. *Sansum & Co.* (1887), 4 R. P. C. 166, C. A.; 56 L. T. 347, *per* LOPES, L.J.; *Cassel Gold Extracting Co.* v. *Cyanide Gold Recovery Syndicate* (1895), 12 R. P. C. 232, 257, C. A.; *Pneumatic Tyre Co.* v. *Leicester Pneumatic Tyre and Automatic Valve Co.* (1899), 16 R. P. C. 531, H. L., *per* Lord MACNAGHTEN, at p. 541).

(*a*) See p. 161, *post*.

(*b*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 4

(*c*) See p. 155, *ante*.

other hand, cannot be used in aid of a defective complete specification for the purpose of explaining or enlarging it, and if the complete specification is vitiated for non-disclosure of the invention, the whole patent is vitiated (*d*).

Matters to be considered in preparing provisional specification.

329. In considering how a provisional specification should be drawn and what matters it should contain, it must be remembered that, if there is variance, it will not be the provisional but the complete specification that will be vitiated (*e*); and consequently regard must be had to what the invention is at that time (*f*).

Having ascertained that, a fair description of the invention must be given. Where it is possible this should be given in writing, but sometimes it is proper, or even necessary to clearness of expression, to make use of diagrams or drawings, and, where this condition of things obtains, drawings should be employed (*g*). Several points must be observed in drawing the specification, however:—

(1) A description of the nature of the invention does not require a description of the manner in which the same is to be performed (*h*).

(2) There is no obligation to enter into more detail than is necessary to give a fair description of the invention (*i*).

(3) There is no obligation to restrict within the particular limitations of a claim what is the invention (*k*).

(4) Although the provisional specification is for the above considerations wide and has a larger ambit than the complete specification, it must nevertheless be drawn with the utmost good faith (*l*).

(*d*) *Mackelcan* v. *Rennie* (1862), 13 C. B. (N. S.) 52.

(*e*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 6 (3); *Siddell* v. *Vickers* (1888), 39 Ch. D. 92, 97, C. A.; *Bailey* v. *Robertson* (1878), 3 App. Cas. 1055; considered in *Horrocks* v. *Stubbs* (1886), 3 R. P. C. 221; *United Telephone Co.* v. *Harrison, Cox-Walker & Co.* (1882), 21 Ch. D. 720: *Watling* v. *Stevens* (1886), Griffin, Patent Cases, 1884-6, 240; *Hutchison* v. *Pattullo* (1888), 5 R. P. C. 351; *Re Gaulard and Gibbs' Patent*, [1889] W. N. 60, C. A. For a series of forms applicable to various inventions, see Encyclopædia of Forms and Precedents, Vol. X., pp. 62, 64, 67.

(*f*) *Woodward* v. *Sansum & Co.* (1887), 4 R. P. C. 166, C. A.; 56 L. T. 347; *British Dynamite Co.* v. *Krebs* (1879), 1 Goodeve's Patent Cases, 88, H. L., *per* Lord CAIRNS, L.C., at p. 92.

(*g*) *Macfarlane* v. *Price* (1816), 1 Stark. 197; *Bloxam* v. *Elsee* (1825), 1 C. & P. 558, 564; *Hastings* v. *Brown* (1853), 1 E. & B. 450, 454; *Daw* v. *Eley* (1867), L. R. 3 Eq. 496, 500, n.; and see Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 2. Drawings are part of the specification (*Morgan* v. *Seaward* (1835), 1 Web. Pat. Cas. 167, 173; *Morton* v. *Middleton* (1863), 1 Macph. (Ct. of Sess.) 718, 722), and may form a sufficient specification alone (*Brunton* v. *Hawkes* (1820), 1 Carp. Pat. Cas. 405, *per* ABBOTT, C.J., at p. 410; *Foxwell* v. *Bostock* (1864), 10 L. T. 144; *Poupard* v. *Fardell* (1869), 18 W. R. 127).

(*h*) *United Telephone Co.* v. *Harrison, Cox-Walker & Co.*, *supra*, at p. 747; and see pp. 159, 160, *post*.

(*i*) *Penn* v. *Bibby* (1866), 2 Ch. App. 127, *per* Lord CHELMSFORD, L.C.; *Pneumatic Tyre Co.* v. *East London Rubber Co.* (1896), 14 R. P. C. 77, 98; 13 T. L. R. 97; *Moseley* v. *Victoria Rubber Co.* (1887), 4 R. P. C. 241, 248; 57 L. T. 142.

(*k*) Instructions to Applicants, r. 6; see in *Cassel Gold Extracting Co.* v. *Cyanide Gold Recovery Syndicate* (1895), 12 R. P. C. 232, C. A., *per* SMITH, L.J., at p. 257.

(*l*) *R.* v. *Arkwright* (1785), 1 Web. Pat. Cas. 64; *Woodward* v. *Sansum*

SECT. 2. SUB-SECT. 4.—*Complete Specification.*

Application for a Patent.

Time for lodging complete specification.

330. If no provisional specification is sent, the complete specification must accompany the form of application (*m*). Otherwise the applicant may leave the complete specification at any subsequent time within six months from the date of the application (*n*). Where application is made on the prescribed form (*o*) for an extension of time for leaving the complete specification, the Comptroller must, on payment of the prescribed fee (*p*), grant the extension of time applied for, but not exceeding one month (*q*).

Reference to examiner.

331. Where a complete specification is left after a provisional specification, the Comptroller refers both to an examiner (*r*).

Discrepancy between provisional and complete specification.

If the examiner reports that the invention particularly described in the complete specification is not substantially the same as that which is described in the provisional specification, the Comptroller may—

(1) refuse to accept the complete specification until it has been amended to his satisfaction; or,

(2) with consent of the applicant, cancel the provisional specification, and treat the application as having been made on the date at which the complete specification was left, and the application then has effect as if made on that date.

Additional invention in complete specification.

Where the complete specification includes an invention not included in the provisional specification (*s*), the Comptroller may allow the original application to proceed so far as the invention included both in the provisional and in the complete specification is concerned, and treat the claim for the additional invention included in the complete specification as an application for that invention made on the date at which the complete specification was left (*a*).

& Co. (1887), 4 R. P. C. 166, 178, C. A.; 56 L. T. 347; *Cartwright* v. *Eamer* (1800), Goodeve's Patent Cases, 112; *Morgan* v. *Seaward* (1835), 1 Web. Pat. Cas. 167. *per* ALDERSON, B., at p. 174; *Neilson* v. *Harford* (1841), 8 M. & W. 806; *Simpson* v. *Holliday* (1865), 12 L. T. 99.

(*m*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 1 (3).

(*n*) *Ibid.*, s. 5 (1). If a complete specification is not left within six months or the extended time, if any, the application is deemed to be abandoned (*ibid.*, s. 5 (2)).

(*o*) Patents Rules, 1908, r. 27, Form No. 6; Encyclopædia of Forms and Precedents, Vol. X., p. 88; and see *ibid.*, Vol. XVI., pp. 492, 493. In the case of foreign patents, see Patents Rules, 1908, Form No. 5; Encyclopædia of Forms and Precedents, Vol. XVI., p. 496.

(*p*) £2 (Patents Rules, 1908, Sched. I.).

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 5 (1).

(*r*) *Ibid.*, s. 6 (1). For a series of forms of complete specifications applicable to various inventions, see Encyclopædia of Forms and Precedents, Vol. X., pp. 63, 65, 70.

(*s*) And the fact that two inventions are applicable to or form parts of the same machine, apparatus, or process is not to be taken to prove that they constitute one invention (Patent Office Rules, 1908, r. 13 (1)). The Comptroller has entire discretion in deciding whether a specification contains more than one invention, and the law officer does not usually interfere with his decision (*Re Z.'s Application for a Patent* (1910), 27 R. P. C. 285). As to appeals to a law officer, see p. 178, *post*.

(*a*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 6 (3). Where an applicant has put in two or more provisional specifications for cognate inventions, the Comptroller, if of opinion that they constitute a single invention, may accept one specification and grant a single patent thereon (*ibid.*, s. 16).

A patent cannot be held to be invalid on the ground that the complete specification claims a further or different invention to that contained in the provisional specification, if the invention therein claimed, so far as it is not contained in the provisional specification, was novel at the date when the complete specification was put in, and the applicant was the first and true inventor thereof (*b*). SECT 2. **Application for a Patent.**

332. As has been seen, the functions of the title and the provisional specification are merely to disclose the nature of the invention (*c*). The function of the complete specification is to furnish sufficient and certain information to the public respecting what they are prohibited from doing whilst the privilege continues and what they will be enabled to do after the privilege has expired (*d*). The complete specification must therefore particularly describe and ascertain the nature of the invention and the manner in which the same is to be performed (*e*). Function of complete specification.

The essentials of the complete specification are therefore (1) sufficiency, (2) certainty, and (3) particularity. Essentials.

333. It has long been held that the consideration for a patent is the good that the inventor brings to the commonwealth (*f*), and that being so, if the inventor does not divulge to the public what his invention is, so that, when the privilege expires, the public will be able to use the same, the consideration fails, and the grant is therefore void. Sufficiency.

The description may be in writing alone, or, where necessary or expedient, it may be accompanied by drawings. It must be a fair one, expressed in terms which are sufficiently clear to enable those to whom it is addressed to carry out the invention (*g*). The specification, however, is not addressed to those wholly ignorant of the art, but to a workman reasonably skilled in the art (*h*), and it is such a workman who must be able to carry out the invention from the description in the specification alone. Sufficiency in clearness.

That being so, a question of fact arises in each case as to what was the state of the art at the date of the grant, and consequently whether the workman would be able from the knowledge he then possessed to carry out the invention from the description in the specification. For it is not necessary to describe what the workman would know. For instance, if it is necessary to use molten gold it would not be necessary to describe how the gold is to be put into a crucible and the crucible heated, because the workman would know how to do that; and so it may not be

(*b*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 42. As to an objection to a patent that it has been granted for more than one invention, see p. 179, *post*.

(*c*) See pp. 154 *et seq.*, *ante*.

(*d*) Hindmarch on Patents, p. 159.

(*e*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 2.

(*f*) *Ipswich Clothworkers' Case* (1614), Godb. 252; *Darcy* v. *Allin* (1602), Noy, 173.

(*g*) *Macfarlane* v. *Price* (1816), 1 Stark. 199; *Bloxam* v. *Elsee* (1825), 1 C. & P. 558, 564. An ambiguous specification will vitiate the patent (*British Ore Concentration Syndicate, Ltd.* v. *Minerals Separation, Ltd.* (1909), 27 R. P. C. 33, *per* Lord HALSBURY, at p. 47: compare *Linotype and Machinery, Ltd.* v. *Hopkins* (1910), 27 R. P. C. 109, 112).

(*h*) See p. 149, *ante*.

SECT. 2. Application for a Patent.

necessary to state precisely all the former known parts of a machine and then apply them to those of the improvement; but on many occasions it may be sufficient to refer generally to them. So, also, in the instance of a common watch, it may be sufficient for the patentee to say—take a common watch and add or alter such and such parts, describing them (*i*). In the same way the specification may, and very often does, refer to another document, as to a former specification.

Sufficiency of explanation.

334. On the other hand, the description must be sufficient for a workman not only to understand the general nature of the invention, but also to carry it into effect (*k*). It therefore follows that if experiment is necessary in order to carry out the invention the specification is insufficient (*l*).

Effect of necessity for experiments.

A distinction must be here made between experiments which go to supplement the information contained in the specification and experiments which go to give necessary skill to the workman. The necessity for the former vitiates the patent, but the necessity for the latter does not. The nature of the invention may be such that it can only be carried out by a skilled manipulator, and provided that a sufficient description is otherwise given the necessity for practice to acquire that skill does not vitiate the patent (*m*).

Certainty.

Effect of misleading description.

335. Just as an insufficient description avoids a patent, so a description which actually misleads the public is equally fatal; and therefore if a patentee mentions that as an essential ingredient in the patent article which is not so, nor even useful, and thereby misleads the public, his patent will be void (*n*); and this will be so if a material statement in the specification is incorrect or untrue (*o*). On the other hand, although the specification must not describe a manner in which it is impossible to carry out the invention, it is not necessary to describe every manner in which it is possible to carry it out (*p*).

Particularity.

336. The description must, however, be given with the utmost good faith (*q*). It is therefore incumbent upon the inventor not

(*i*) *Harmar* v. *Playne* (1809), Dav. Pat. Cas. 311, 318.

(*k*) "You must not set people mechanical problems and call them specifications" (*Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 531, *per* JESSEL, M.R., at pp. 576, 577; compare *Watson, Laidlaw & Co., Ltd.* v. *Pott, Cassels and Williamson* (1911), 28 R. P. C. 565; and see *Vidal Dyes Syndicate, Ltd.* v. *Levinstein, Ltd.* (1912), 29 R. P. C. 245, C. A., following *Simpson* v. *Holliday* (1866), L. R. 1 H. L. 315, *per* FLETCHER MOULTON, L.J., at pp. 269, 271, 272).

(*l*) *Plimpton* v. *Malcolmson, supra; Turner* v. *Winter* (1787), Dav. Pat. Cas. 145, 154. For instance, where fusion was necessary to one part of the invented process, and the specification directed heat to be continued until the effect was produced, it was held that the omission of any direction to fuse was fatal to the patent (*Turner* v. *Winter, supra*).

(*m*) *Boulton* v. *Bull* (1795), 2 Hy. Bl. 463, 497, 498; *Neilson* v. *Harford* (1841), 1 Web. Pat. Cas. 314; *Plimpton* v. *Malcolmson, supra*, at p. 568; see *Edison and Swan Electric Light Co.* v. *Holland* (1888), 4 T. L. R. 686; *British Dynamite Co.* v. *Krebs* (1879), Goodeve's Patent Cases, 88, 91.

(*n*) *Lewis* v. *Marling* (1829), 1 Web. Pat. Cas. 493, 495.

(*o*) *Neilson* v. *Harford* (1841), 8 M. & W. 806; compare "*Z*" *Electric Lamp Manufacturing Co., Ltd.* v. *Marples, Leach & Co.* (1910), 27 R. P. C. *per* FLETCHER MOULTON, L.J., at p. 746.

(*p*) *Bickford* v. *Skewes* (1837), 1 Web. Pat. Cas. 211, 218.

(*q*) *Lewis* v. *Marling, supra*, at p. 496; *Sturtz* v. *De La Rue* (1828), 1 Web. Pat. Cas. 83.

only to disclose a way of carrying out his invention, but the best way that he knows (*r*). For instance, where a patentee disclosed an invention whereby he made verdigris, and from the specification an ordinary workman could make verdigris, such method being otherwise good subject-matter for a patent, the patent was avoided when it was shown that he had not disclosed what he knew to be the fact and of what in practice he had availed himself, namely, that an addition of nitric acid in the process made the production of verdigris cheaper and quicker (*s*); and the principle is carried so far that where an inventor wrapped up, in the technical language of chemical recipes, salts known by common names under which they might have been purchased from an ordinary druggist, and so misled the public into believing that the ingredients of his invention were complex chemical bodies instead of ordinary merchandise, the patent was held void (*a*).

Illustration.

337. It follows from this that, where he legitimately may do so, it is the duty of the patentee to put into the complete specification any knowledge that he may have acquired after the provisional specification (*b*).

Knowledge acquired after provisional specification.

Where, however, anything turns upon it the complete specification must conform with the provisional (*c*). Here, again, it becomes a question of fact to be determined in each case. The rule which governs the decision may be stated in the following way :—Does the general description of the invention in the provisional specification fairly foreshadow the particular improvement described in the complete specification or not? (*d*) It follows from this that if that which turns out to be an essential part of the invention is not mentioned in the provisional specification the complete specification does not conform (*e*).

Conformity with provisional specification.

SUB-SECT. 5.—*Claims.*

338. In order that the public may have sufficient and certain information respecting what they are prohibited from doing whilst the privilege continues (*f*), the patentee must particularly describe and ascertain the nature of his invention. In order that, after the privilege is expired, the public may be enabled to do what the patentee has invented (*g*), he must particularly describe and ascertain the manner in which the same is to be performed (*h*); and the ambit of his invention must be circumscribed by definite claims (*i*).

Necessity for claims.

(*r*) *R.* v. *Arkwright* (1785), 1 Web. Pat. Cas. 64, 66; *Turner* v. *Winter* (1787), 1 Web. Pat. Cas. 77.
(*s*) *Wood* v. *Zimmer* (1815), Holt (N. P.), 58; *Bovill* v. *Moore* (1816), 2 Marsh. 211.
(*a*) *Savory* v. *Price* (1823), Ry. & M. 1.
(*b*) *Crossley* v. *Beverley* (1830), 1 Web. Pat. Cas. 112, 117; *Jones* v. *Heaton* (before 1841), 1 Web. Pat. Cas. 404, n.
(*c*) See p. 158, *ante*, and p. 164, *post*.
(*d*) *Vickers, Sons & Co.* v. *Siddell* (1890), 15 App. Cas. 496; *Penn* v. *Bibby*, *Penn* v. *Jack*, *Penn* v. *Fernie* (1866), L. R. 3 Eq. 308.
(*e*) *Nuttall* v. *Hargreaves*, [1892] 1 Ch. 23, C. A.
(*f*) See pp. 128, 129, *ante*.
(*g*) See p. 159, *ante*.
(*h*) Hindmarch on Patents, p. 159.
(*i*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 2.

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What must be claimed.

339. The meaning of the word "claim" is quite clear, and what must be claimed is the invention. That being so, if the claiming clause in the specification claims less than the invention the patent will be useless and perhaps void. In neither case will it give the patentee a monopoly for that which he has invented, because that has not been claimed as the invention. It may also be that, though the inventor has made a real invention, he may be unaware of that to which his invention in fact is due, and, if he does not claim that particular thing, his invention has not been claimed and his patent is void (*k*).

If, on the other hand, the claiming clause in the specification claims more than the invention, the patent will be void (*l*).

Claim need not distinguish that which is new from that which is old.

340. As has been seen (*m*), it may be good subject-matter of a patent to invent a new combination of things *per se* old, or to improve a thing *per se* old, or to invent something to be used in combination with something *per se* old. It may be expedient or even necessary to mention in the claiming clause of the specification something which, though not the invention itself nor *per se* proper subject-matter of letters patent, helps to explain the invention. If the claiming clause is drafted so as to claim this thing *per se*, the patent is clearly bad, for it claims something which is not the invention. The mention, however, of such a thing in the claiming clause does not vitiate the patent. The old rule used to be that the claiming clause must clearly distinguish that which was old in the process or apparatus from that which was new, and only claim that which was new (*n*). This doctrine has, however, been considerably modified, and upon the authorities it is now established that if the claiming clause does in fact claim the invention and does not claim anything that is old *per se*, the patent is not avoided because in the

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(*k*) For example, a patentee discovered that, by heating certain chemicals in a closed retort, a certain valuable chemical product was the result: he described his method accurately, and then claimed the process: what he did not know was that the material of which the retorts were made was an essential to the process. The patent was held to be void (*Badische Anilin und Soda Fabrik* v. *La Société Chimique des Usines du Rhône* (1897), 14 R. P. C. 875). The matter may be looked at in two ways—either the description of the manner in which the invention is to be performed and the nature of it is insufficient, or else the claim is for more than what in fact has been invented, that is to say, for the process when carried out in retorts other than those made of the essential material, when in fact the invention cannot produce that which is claimed, on which ground the patent is equally void.

(*l*) For instance, where the patentee had discovered that certain alkalies and acids when combined together would produce a good and useful cement, and the specification stated that other alkalies and acids would answer the purpose, it was held that if it was a claim of all acids and alkalies it was clearly bad, as there are some that would not answer the purpose. If it was a claim of those only which would answer the purpose it was as clearly bad, in consequence of not stating those which would answer the purpose and distinguishing them from those that would not (*Stevens* v. *Keating* (1848), 2 Exch. 772); and see *Kelvin* v. *Whyte, Thomson & Co.* (1907), 25 R. P. C. 177.

(*m*) See p. 138, *ante*.

(*n*) See *Kay* v. *Marshall* (1836), 2 Web. Pat. Cas. 39; *Richerby* v. *Duncan & Co.* (1908), 25 R. P. C. 248.

claiming clause that which is old is not distinguished from that which is new (*o*).

This question is, however, always subject to one overriding essential: the claim must not be ambiguous. If it is ambiguous it is not a claim at all, for from the very meaning of the word "claim" it must, in order to be good, give sufficient and certain information to those to whom it is addressed as to what is claimed (*p*).

But claim must not be ambiguous.

341. A distinction must be made between two very different things—first the purpose of the subject-matter of the invention, and secondly the purpose to which the invention can be put. If the first fails the patent is void (*q*). Consequently, if the claiming clause claims a purpose of the subject-matter of the invention which fails the patent is void (*r*). On the other hand, if a claim is made for the purpose to which the invention, otherwise properly described and claimed, may be put, the patent is not avoided merely because such purpose in fact fails (*s*).

Distinction between purpose of subject-matter and purpose of invention.

SUB-SECT. 6.—*Construction of Specifications.*

342. The construction of specifications is for the court as a matter of law (*t*). The ordinary canons of construction apply (*u*). The ordinary meaning of the English language is applied except where words of art are used, when it becomes a question of fact as to what meaning such words bore at the time of the grant (*v*).

General rule.

(*o*) *British United Shoe Machinery Co., Ltd.* v. *Fussell, Ltd.* (1908), 25 R. P. C. 631, following *Harrison* v. *Anderston Foundry Co., Ltd.* (1876), 1 App. Cas. 574, considering *Foxwell* v. *Bostock* (1864), 4 De G. J. & Sm. 298; and see *Lynch* v. *Phillips* (1909), 26 R. P. C. 389.

(*p*) For instance, where a patentee had claimed a combination machine for clipping horses and it became a material issue as to whether the invention claimed consisted of four subordinate parts or not, it was held that it was not sufficiently clearly claimed as such. "I have read and re-read with the greatest anxiety, the specification in the present case. I cannot find from beginning to end of it any sentence or any number of sentences as to which by any reasonable interpretation you can say that they make a claim to a subordinate combination of these particular items as constituting in itself a novelty, a new manufacture, a thing to be protected by the patent (*Clark* v. *Adie* (1877), 2 App. Cas. 315, *per* Lord CAIRNS, L.C., at p. 326).

(*q*) See pp. 134, 135, *ante*.

(*r*) See *Stevens* v. *Keating* (1848), 2 Exch. 772; note (*l*), p. 162, *ante*.

(*s*) For instance, where a patentee described and claimed a certain metallic material, and claimed secondly "the manufacture of capsules of the new material," which manufacture was admitted *per se* not to be subject-matter of a patent, it was held that this, being merely a claim to a particular use to which the invention would be put, did not vitiate the patent (*Neilson* v. *Betts* (1871), L. R. 5 H. L. 1).

(*t*) *Bovill* v. *Pimm* (1856), 11 Exch. 718, 740; *Hills* v. *London Gas-Light Co.* (1857), 27 L. J. (EX.) 60; and see *Clark* v. *Adie* (No. 2) (1877), 2 App. Cas. 423, *per* Lord BLACKBURN, at p. 436; *Seed* v. *Higgins* (1860), 8 H. L. Cas. 550, 561; *British Dynamite Co.* v. *Krebs* (1879), Goodeve's Patent Cases, 88.

(*u*) See titles DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.*, 444 *et seq.*; EVIDENCE, Vol. XIII., pp. 429, 430. The practice of examining and cross-examining expert witnesses as to the construction of specifications is irregular and prejudicial to proper trial (*Graphic Arts Co.* v. *Hunters, Ltd.* (1910), 27 R. P. C. 677).

(*v*) *Hill* v. *Evans* (1862), 4 De G. F. & J. 288; *Elliott* v. *Turner* (1845), 2 C. B. 446, Ex. Ch.; *Derosne* v. *Fairie* (1835), 1 Web. Pat. Cas. 154; *Neilson* v. *Harford* (1841), 1 Web. Pat. Cas. 331, 370; *Wallington* v. *Dale*

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Construction applied to specification as a whole.

343. The specification is construed as a whole and the claiming clauses are not taken as isolated sentences, but are given the meaning which is a fair one considering their environment (*a*), which includes not only the specification, but also the title (*b*). The provisional specification may be used for the purpose to which it is addressed, namely, to describe and ascertain the general nature of the invention (*c*), but it cannot be used to supply a defect in the complete specification (*d*).

Effective result sought for.

Although redundant claims do not invalidate a patent (*e*), the claiming clauses should if possible be construed so that each will be effective, and accordingly an attempt will be made to construe them as claims for different things (*f*).

Construction applied impartially.

344. The specification is construed impartially, neither for nor against the patentee (*g*). The court will certainly not be astute

(1852), 7 Exch. 888; *United Telephone Co.* v. *Bassano* (1886), 3 R. P. C. 295, C. A.; 31 Ch. D. 630; *Boyd* v. *Horrocks* (1891), 9 R. P. C. 77, H. L.; *Patent Exploitation, Ltd.* v. *Siemens Brothers & Co., Ltd.* (1904), 21 R. P. C. 541, 549, H. L.; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 449. In considering the state of knowledge at the time when the patent was obtained antecedent specifications may be consulted (*Couchman* v. *Greener* (1884), 1 R. P. C. 197, 199, H. L.; *Leeds Forge Co., Ltd.* v. *Deighton's Patent Flue and Tube Co., Ltd.* (1902), 19 R. P. C. 285, C. A.; see p. 148, *ante*); but only in cases where the meaning of the specification is ambiguous and not clear (*Crosthwaite* v. *Steele* (1889), 6 R. P. C. 190; *Jandus Arc Lamp and Electric Co., Ltd.* v. *Johnson* (1900), 17 R. P. C. 361). Knowledge subsequently acquired must not be applied (*King, Brown & Co.* v. *Anglo-American Brush Corporation* (1892), 9 R. P. C. 313, H. L., *per* Lord WATSON, at p. 319; *Nobel's Explosives Co., Ltd.* v. *Anderson* (1894), 11 R. P. C. 519, C. A., *per* Lord ESHER, M.R., at p. 523).

(*a*) *Neilson* v. *Harford* (1841), 1 Web. Pat. Cas. 295, 312; *Russell* v. *Cowley and Dixon* (1835), 1 Web. Pat. Cas. 457, 470; *Edison and Swan United Electric Light Co.* v. *Woodhouse and Rawson* (1887), 4 R. P. C. 99, 107, C. A.; *Edison Bell Phonograph Corporation, Ltd.* v. *Smith and Young* (1894), 11 R. P. C. 389, C. A., *per* Lord ESHER, M.R., at p. 395; *Parkinson* v. *Simon* (1894), 11 R. P. C. 493, C. A.; affirmed (1895), 12 R. P. C. 403, H. L.; *Ingersoll Sergeant Drill Co.* v. *Consolidated Pneumatic Tool Co., Ltd.* (1907), 25 R. P. C. 61, H. L., *per* Lord LOREBURN, L.C., at p. 83. The proper way to read a specification is not to read the claim first, but, looking at the whole instrument, to read the specification first to see what the patentee says he has invented, and then to read the claim fairly to see whether he claims more than he desires to patent (*Arnold* v. *Bradbury* (1871), 6 Ch. App. 706; cited with approval in *Edison Bell Phonograph Corporation, Ltd.* v. *Smith and Young, supra;* and followed in *Tubes, Ltd.* v. *Perfecta Seamless Steel Tube Co., Ltd.* (1900), 17 R. P. C. 569). The court may not refer to a part of the specification struck out by amendment (*Lake* v. *Rotax Motor Accessories, Ltd.* (1911), 28 R. P. C. 532, 538, C. A., following *Hattersley & Sons* v. *Hodgson* (1906), 23 R. P. C. 192, C. A.).

(*b*) *Oxley* v. *Holden* (1860), 8 C. B. (N. S.) 666; *Househill Coal and Iron Co.* v. *Neilson* (1843), 1 Web. Pat. Cas. 679, H. L.; *Newton* v. *Vaucher* (1851), 6 Exch. 895, 864.

(*c*) *Parkinson* v. *Simon* (1894), 11 R. P. C. 493, 502, C. A.

(*d*) *Mackelcan* v. *Rennie* (1862), 13 C. B. (N. S.) 52.

(*e*) *Wenham Gas Co.* v. *Champion Gas Lamp Co.* (1891), 9 R. P. C. 49, 55, C. A.

(*f*) *Parkinson* v. *Simon*, (1894), 11 R. P. C. 493, 502, C. A.; and see *Cassel Gold Extracting Co.* v. *Cyanide Gold Recovery Syndicate* (1895), 12 R. P. C. 232, 257, C. A.; *British United Shoe Machinery Co., Ltd.* v. *Hugh Claughton, Ltd.* (1906), 23 R. P. C. 321.

(*g*) *Stevens* v. *Keating* (1848), 2 Exch. 772; at *nisi prius* (1847), 2 Web. Pat. Cas. 181, *per* POLLOCK, C.B., at p. 187; *Dudgeon* v. *Thompson* (1877), 3 App. Cas. 34, 53.

to construe it against a patentee (*h*). This is sometimes called a "benevolent" mode of construction. Perhaps that is not the best term to use; but it may be described as construing a specification fairly, with a judicial anxiety to support a really useful invention if it can be supported on a reasonable construction of the patent. Beyond that the benevolent construction does not go (*i*).

SUB-SECT. 7.—*Procedure.*

(i.) *Examination of Application.*

Refusal or amendment of application on examiner's report.

345. The Comptroller refers every application to an examiner (*k*). If the examiner reports that the nature of the invention is not fairly described, or that the application, specification, or drawings have not been prepared in the prescribed manner, or that the title does not sufficiently indicate the subject-matter of the invention, the Comptroller may refuse to accept the application or may require that the application, specification, or drawings be amended before he proceeds with the application; and in the latter case the application, if the Comptroller so directs, bears date as from the time when the requirement is complied with (*l*). Where the complete specification is left after a provisional specification, the Comptroller refers both specifications to an examiner as stated above (*m*).

Investigation of previous specifications.

346. It is the duty of the examiner to make an investigation for the purpose of ascertaining whether the invention claimed has been wholly or in part claimed or described in any specification (other than a provisional specification not followed by a complete specification) published before the date of the application, and left

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(*h*) *Bickford* v. *Skewes* (1841), 1 Q. B. 938; *Plimpton* v. *Spiller* (1877), 6 Ch. D. 412, 422, C. A.; *Otto* v. *Linford* (1882), 46 L. T. 35, 39, C. A.

(*i*) *Hinks & Son* v. *Safety Lighting Co.* (1876), 4 Ch. D. 607, *per* JESSEL, M.R., at p. 612; and see *Russell* v. *Cowley and Dixon* (1835), 1 Web. Pat. Cas. 457; *Simpson* v. *Holliday* (1866), 12 L. T. 99, *per* Lord WESTBURY, at p. 100; *Harrison* v. *Anderston Foundry Co.* (1876), 1 App. Cas. 574, 581; *Cropper* v. *Smith* (1884), 1 R. P. C. 81, 89, C. A.; 26 Ch. D. 700; cited with approval in *Benno Jaffé und Darmstaedter Lanolin Fabrik* v. *Richardson & Co.* (1894), 11 R. P. C. 93, 261, C. A.; *Needham* v. *Johnson & Co.* (1884), 1 R. P. C. 49, *per* LINDLEY, L.J., at p. 58; *Automatic Weighing Machine Co.* v. *Knight* (1889), 6 R. P. C. 297, 307, C. A. The court will, so far as is possible, construe every specification with candour (*Sellers* v. *Dickinson* (1850), 5 Exch. 312, 324; *Tetley* v. *Easton* (1852), Macr. 48, 74), and will endeavour to give to the patentee the benefit of any ambiguous expression (*Edison Bell Phonograph Corporation, Ltd.* v. *Smith* (1894), 11 R. P. C. 389, 400, C. A.); but the words "these our Letters Patents shall be construed in the most beneficial sense for the advantage of the Patentee" do not mean that the language is to be strained in favour of the patentee, but that if his language can be fairly construed so as to render his patent valid, it is to be so construed (*Hattersley & Sons* v. *Hodgson* (1906), 23 R. P. C. 192, H. L., *per* Lord LINDLEY, at p. 203). Where a claim can be construed so as either to make a patent reasonable and sensible or to make it utterly absurd, the court will give effect to the former of the two readings (*Plimpton* v. *Spiller* (1877), 6 Ch. D. 412, C. A., *per* JESSEL, M.R., at p. 423; followed in *Westinghouse* v. *Lancashire and Yorkshire Rail. Co.* (1884), 1 R. P. C. 98; *Haworth* v. *Hardcastle* (1834), 1 Web. Pat. Cas. 480, 485).

(*k*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 3 (1).

(*l*) *Ibid.*, s. 3 (2).

(*m*) *Ibid.*, s. 6 (1).

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pursuant to any application for a patent made in the United Kingdom within fifty years next before the date of the application (*a*). If the examiner finds that the invention has been completely anticipated, he may at once make a provisional report to that effect, and the Comptroller may treat this as a final report (*b*) and refuse to grant the patent (*c*).

Report as to anticipation

Amendment of specification as a result of report.

When anticipation, either complete or partial, has been reported, the applicant must be informed, and may, within two months, amend his specification so as to remove the objection (*d*). Thereupon, if the Comptroller is satisfied that the objection has been removed, he must, in the absence of any other ground of objection, accept the specification (*e*). But, if when the applicant has been so informed and the time for amendment has expired, the Comptroller is not so satisfied, he must appoint a time for hearing the applicant (*f*).

Investigation of specifications subsequent to application, but founded on prior application.

347. The investigation thus provided for extends further, and an invention may be held to have been anticipated even where the anticipation is contained in a specification deposited by another person at a later date than that on which the application which is being investigated was made, provided that such later specification is deposited pursuant to an application which was made prior to the application in question (*g*), that is, the examiner's report is not complete until it is no longer possible for any such specification in pursuance of a prior application to be deposited. If during this period a later specification is left at the Patent Office, which is found to anticipate the specification under examination and to be in pursuance of a prior application, then the applicant must be informed, and within two months must either inform the Comptroller that he considers that no amendments are necessary, or apply for leave to amend his specification by way of disclaimer, stating specifically what amendments, if any, he is prepared to make in it to remove the objection of anticipation. If these amendments are satisfactory, the Comptroller may allow them to be made; otherwise he must give the applicant a hearing (*h*).

(*a*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 7 (1); *Re Parsons and Stoney's Application for a Patent* (1910), 27 R. P. C. 491.

(*b*) Patents Rules, 1908, rr. 29, 32.

(*c*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 7 (4).

(*d*) *Ibid.*, s. 7 (2); Patents Rules, 1908, r. 30; the time may in proper cases be extended (Official Notice, 16th November, 1909; Illustrated Official Journal (Patents), 17th November, 1909); see note (*g*), p. 209, *post*. The amended specification must be investigated in the same way as the original specification (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 7 (2)).

(*e*) *Ibid.*, s. 7 (3).

(*f*) *Ibid.*, s. 7 (4); Patents Rules, 1908, r. 31. As to the procedure before and on the hearing, see Official Notice, 16th November, 1909, and p. 167, *post*.

(*g*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 8 (1), (2). An application is prior to another if the patent when granted would be of prior date to the patent granted pursuant to that other (*ibid.*, s. 8 (3)). *Ibid.*, s. 8, was directed not to come into force until ordered by the Board of Trade (*ibid.*, s. 8 (4)). The order enforcing it was laid before Parliament on 18th and 19th November, 1908.

(*h*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 8 (2). As to the procedure on the hearing, see p. 167, *post*.

348. A patent is not invalidated by a specification anticipating it if such specification is fifty years old or more (*i*).

When anticipation is no bar.

Anticipation is no bar to the patent if the applicant can prove to the satisfaction of the court that the matter published was derived or obtained from him and was published without his knowledge and consent, and, if he learnt of the publication before he made his application, that he applied for and obtained protection for his invention with all reasonable diligence after learning of the publication (*j*).

When reports may be inspected.

349. Reports of examiners are not in any case to be published or open to public inspection, and are only liable to production or inspection in any legal proceeding if the court or officer having the power to order discovery certifies that such production or inspection is desirable in the interests of justice (*k*).

(ii.) *Hearing before Comptroller.*

Hearing after investigation as to previous specifications.

350. On appointing a time for the hearing above referred to (*l*), the Comptroller must give the applicant at least ten days' notice of the appointment. The applicant must, as soon as possible, notify the Comptroller whether or not he desires to be heard. After the hearing, or without a hearing if the applicant has not attended or has notified his desire not to be heard, unless the specification has been amended to his satisfaction (*m*), the Comptroller must determine whether a reference to prior specifications ought to be made in the applicant's specification by way of notice to the public, or whether in the event of the invention claimed having been wholly or specifically claimed in an earlier specification, he should refuse to grant a patent (*n*).

Hearing after extended investigation.

Similar procedure prevails in relation to the extended investigation above referred to (*o*). In this case, after the hearing, or without a hearing if the applicant has not attended or has notified his desire not to be heard, the Comptroller must determine what reference, if any, to other specifications ought to be made in the applicant's specification by way of notice to the public (*p*).

(*i*) Patent and Designs Act, 1907 (7 Edw. 7, c. 29), s. 41 (1).

(*j*) *Ibid.*, s. 41 (2).

(*k*) *Ibid.*, s. 68; and see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 40, 43, 105.

(*l*) See p. 166, *ante*; Pa ents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 7.

(*m*) As to amendment of specification, see p. 166, *ante*, and pp. 170 *et seq.*, *post*.

(*n*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 7 (4); Patents Rules, 1908, r. 31, modified by Official Notice, 16th November, 1909. The form in which such reference to prior specifications is to be made is as follows:—"Reference has been directed in pursuance of section 7, subsection 4, of the Patents and Designs Act, 1907, to specification No. of " (Patents Rules, 1908, r. 32). Patents Rules, 1908, rr. 30, 31, are somewhat modified by Official Notice, 16th November, 1909. As to appeals to the law officer, see p. 178, *post*.

(*o*) See p. 166, *ante*; Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 8.

(*p*) *Ibid.*, s. 8 (2); Patents Rules, 1908, r. 93. As to appeals to the law officer, see p. 178, *post*.

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351. Generally, before exercising adversely to the applicant the discretionary powers given to him by the statute or rules, the Comptroller must give ten days' notice, or such longer notice as he thinks fit, to the applicant, of the time when he may be heard personally or by his agent before the Comptroller (*q*). Within five days, unless the Comptroller appoints a longer time, the applicant must notify in writing to the Comptroller whether or not he intends to be heard (*r*). At any time the Comptroller may require the applicant to attend before him and make oral explanations or to submit a statement in writing within a time and with respect to matters notified by the Comptroller (*s*).

Notice of hearing.

Attendance of applicant.

Evidence.

The evidence at the hearing before the Comptroller is given by statutory declaration in the absence of directions to the contrary, but the Comptroller has power to order *viva voce* evidence to be taken before him (*t*).

Notification of decision.

The Comptroller must notify his decision to all parties affected (*a*).

(iii.) *Powers of Comptroller.*

General powers.

352. (1) Where the examiner reports that the nature of the invention is not sufficiently disclosed and defined to enable him to make the investigation already referred to (*b*), the Comptroller may require amendment of the specification and drawings, or any of them, and may direct that the application shall bear such date subsequent to its original date, and not later than the date when the requirement is complied with, as he may consider reasonably necessary to give sufficient time for the subsequent procedure relating to such application (*c*).

(2) He may, on request in writing, correct any clerical error (*d*).

(3) He must give the applicant an opportunity of being heard, if so required, whenever he intends to exercise his discretionary powers adversely to the applicant (*e*).

(4) He has power to take directions of the law officers if he is in doubt or difficulty (*f*).

(5) He may refuse to grant any patent for an invention which he thinks would in use be contrary to law or morality (*g*).

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 73; Patents Rules, 1908, r. 102. As to powers of the Comptroller generally, see the text, *infra*.

(*r*) Patents Rules, 1908, r. 103.

(*s*) *Ibid.*, r. 104.

(*t*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 77.

(*a*) Patents Rules, 1908, r. 105.

(*b*) See p. 165, *ante*; Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 7 (1).

(*c*) Patents Rules, 1908, r. 28. As to the powers of the Comptroller on the report of the examiner, see, further, pp. 165, 166, *ante*.

(*d*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 70. The request must be made on Form No. 30 (fee 5*s*.) (Patents Rules, 1908, r. 95).

(*e*) See the text, *supra*.

(*f*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 74.

(*g*) *Ibid.*, s. 75. He may refuse to grant a patent if in his opinion the invention is not within the meaning of the word "invention" in *ibid.*, s. 93

(6) A certificate purporting to be under the hand of the Comptroller as to anything authorised by the statute is *primâ facie* evidence (*h*).

(7) He has a general power of amendment where no special provision is made, and also power to enlarge time and to dispense with evidence (*i*).

(iv.) *Appeal from Comptroller's Decision.*

When appeal lies.

353. An appeal (*k*) lies to the law officer (*l*) from the decision of the Comptroller in the following cases:—

(1) Where the Comptroller refuses to accept an application or requires an amendment in it (*m*);

(2) Where the Comptroller refuses to accept a complete specification (*n*);

(3) Where the Comptroller decides to refuse the patent or to require the insertion of references on the ground of anticipation by previous specifications (*o*).

Procedure.

354. All such appeals must be made on the prescribed form (*p*), which must be filed within fourteen days of the decision, and a copy sent to the Law Officers' Department (*q*), and, where there has been opposition, to the opponent or applicant, as the case may be (*r*). The law officer may examine witnessess on oath and administer oaths for that purpose (*s*); he may regulate the practice and

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(*Re Cooper's Application for a Patent* (1901), 19 R. P. C. 53; *Re Johnson's Application for a Patent* (1901), 19 R. P. C. 56).

(*h*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 78.

(*i*) Patents Rules, 1908, rr. 108, 109, 112.

(*k*) The procedure in such appeals is governed by the Law Officers' Rules, rr. 1—14 (Patents Rules, 1908, pp. 77, 78, made in virtue of Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 40).

(*l*) *I.e.*, the Attorney-General or Solicitor-General for England (*ibid.*, s. 93). The Attorney-General is not a court, and no prohibition will lie to him (*Ex parte Simon* (1888), 4 T. L. R. 754, C. A.; and see title CROWN PRACTICE, Vol. X., p. 151).

(*m*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 3 (3).

(*n*) *Ibid.*, s. 6 (4).

(*o*) *Ibid.*, s. 7 (4).

(*p*) Patents Rules, 1908, Form No. 4 (fee £3).

(*q*) At the Royal Courts of Justice, London; by prepaid letter post if desired (Law Officers' Rules, rr. 3, 14).

(*r*) Law Officers' Rules, rr. 1—3. No appeal may be entertained of which notice is not given within the above-mentioned time, unless by leave obtained from the law officer (*ibid.*, r. 5). Seven days' notice of the hearing must be given, but, by leave of the law officer, shorter notice may be given (*ibid.*, r. 6). As to the parties to be served with notice, see *ibid.*, r. 7.

(*s*) See Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 77; Law Officers' Rules, r. 8. Attendance for cross-examination of any person who has made a declaration in the matter in question may be ordered (*ibid.*, r. 9), and conduct money must be tendered to witnesses required to attend for cross-examination (*ibid.*, r. 10). As to documentary evidence, see *ibid.*, r. 13. The law officer does not allow the cross-examination of witnesses if there was ample opportunity for filing declarations at the hearing before the Comptroller (*Re Pitt's Patent* (1888), 5 R. P. C. 343, 345); nor does he allow further evidence to be given except with reference to matters which have occurred since the hearing before the Comptroller (Law Officers' Rules, r. 8; *Hampton* v. *Facer* (1887), Griffin, Patent Cases, 1888, 13; *Re Cheesbrough's Patent* (1884), Griffin, Patent Cases, 1884-6, 303).

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procedure before him; and he may order costs to be paid by either party (*t*).

SUB-SECT. 8.—*Amendment of Specifications.*

(i.) *At Instance of Comptroller.*

On examiner's report.

355. If the examiner reports that the specification or drawings accompanying the application have not been prepared in the prescribed manner, the Comptroller may require that they be amended before he proceeds with the application (*u*).

Specification including more than one invention.

Where a person making application for a patent has included in his specification more than one invention, the Comptroller may require or allow him to amend such specification and drawings, or any of them, so as to apply to one invention only, and the applicant may make application for a separate patent for any invention excluded by such amendment (*x*).

Invalid complete specification or disconformity.

Where a complete specification is left after a provisional specification, and the examiner reports that it has not been prepared in the prescribed manner, the Comptroller may refuse to accept the complete specification until it has been amended to his satisfaction (*a*). Similarly, if the examiner reports disconformity between the two specifications, the Comptroller may refuse to accept the complete specification until it has been amended to his satisfaction (*b*).

(ii.) *At Instance of Applicant or Patentee.*

Request for amendment.

356. An applicant may at any time, by request in writing left at the Patent Office, seek leave to amend his specification, including drawings forming part thereof, by way of disclaimer (*c*), correction,

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(*t*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 40; and see Law Officers' Rules, rr. 11, 12.

(*u*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 3 (2). Drawings may be added by way of amendment (*Re Lang's Patent* (1890), 7 R. P. C. 469). As to the report of the examiner, see pp. 165 *et seq.*, *ante*.

(*x*) Patents Rules, 1908, r. 13 (1).

(*a*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 6 (2).

(*b*) *Ibid.*, s. 6 (3). For further instances (under *ibid.*, ss. 7, 8) of amendment of specifications, see p. 166, *ante*.

(*c*) A disclaimer strikes out what has been disclaimed; it cannot be read to explain the remainder of the specification (*Tetley* v. *Easton* (1857), 2 C. B. (N. S.) 706; see *Ralston* v. *Smith* (1865), 11 H. L. Cas. 223, *per* Lord WESTBURY, at pp. 242, 243; *Re Ryland's Patent* (1888), 5 R. P. C. 665, following *Seed* v. *Higgins* (1860), 8 H. L. Cas. 550). A disclaimer, the construction of which is not to be affected by any prefatory remark (*Cannington* v. *Nuttall* (1871), L. R. 5 H. L. 205), may be made after a judgment adverse to the validity of the patent has been pronounced (*Derosne* v. *Fairie* (1835), 1 Web. Pat. Cas. 158, 166; *Morgan* v. *Seaward* (1838), 2 Carp. Pat. Cas. 96, 104); but a disclaimer is only allowed to correct parts of the specification which are neither material nor substantial (*R.* v. *Mill* (1851), 14 Beav. 312, *per* ROMILLY, M.R., at p. 315). The power to amend by disclaimer ought to be exercised with great care and discretion (*R.* v. *Mill*, *supra*), but in cases of doubt the amendment should be allowed (*Re Bateman* v. *Moore's Disclaimer* (1854), Macr. 116; *Re Lake's Patent* (1887), Griffin, Patent Cases, 1888, 16). A disclaimer operates from the date of the patent and not from the date of the granting of the application to amend (*R.* v. *Mill*, *supra*, questioning *Perry* v. *Skinner* (1837), 2 M. & W. 471; *Re Lucas' Disclaimer* (1854), Macr. 235; Patents Designs Act, 1907 (7 Edw. 7, c. 29), s. 21 (7); see *Andrew & Co.* v.

or explanation (*d*), stating the nature of, and the reasons for, the proposed amendment (*e*).

The request must be accompanied by a duly certified copy of the original specification and drawings, showing in red ink the proposed amendment in such a way as to indicate clearly the alteration desired, and must be advertised (*f*) by publication of the request and the nature of the proposed amendment in the Illustrated Office Journal (Patents), and in such other manner, if any, as the Comptroller may direct (*g*).

Documents accompanying request.

357. At any time within one month from the first advertisement any person may give notice at the Patent Office of opposition to the amendment (*h*). Such notice must be on the prescribed form and must be accompanied by an unstamped copy, which is transmitted by the Comptroller to the person making the request as notice of the opposition (*i*).

Notice of opposition to amendment.

Within fourteen days after the expiration of one month from the first advertisement of the request for leave to amend, the opponent may leave at the Patent Office statutory declarations in support of his opposition, and, on doing so, must deliver to the applicant copies thereof (*k*). If the opponent does not leave statutory declarations, the applicant may, if he wishes, within two months from the date of the first advertisement of his request, leave at the Patent

Declarations in support of opposition.

Declarations in support of amendment.

Crossley Brothers (1892), 9 R. P. C. 165, C. A.; *Stepney Spare Motor Wheel Co., Ltd.* v. *Hall*, [1911] 1 Ch. 514). As to amendment by disclaimer in infringement actions, see pp. 173, 216, *post*.

(*d*) *Re Morgan's Patent* (1886), Griffin, Patent Cases, 1888, 17. The function of an explanation is to explain more clearly the meaning of the patentee at the time he patented the invention (*Re Ashworth's Patent* (1886), Griffin, Patent Cases, 1888, 6). It is not intended that the patentee should include subsequently obtained knowledge (*Re Beck and Justice's Patent* (1886), Griffin, Patent Cases, 1888, 10; see *Re Johnson's Patent* (1896), 13 R. P. C. 660). Clerical errors may be corrected by amendment (*Re Rubery's Patent* (1837), 1 Web. Pat. Cas. 649, n.; *Re Dismore* (1853), 18 Beav. 538; *Re Redmund's Patent* (1828), 1 Web. Pat. Cas. 649, n.; *Re Nickels' Patent* (1841), 1 Web. Pat. Cas. 650; *Abel's Patent* (1876), Johnson's Patentees' Manual, 169, 178, 2081; *Re Gare's Patent* (1884), 26 Ch. D. 105), but the authority of the Master of the Rolls is not now necessary (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 70).

(*e*) *Ibid.*, s. 21 (1). This provision does not apply when an action for infringement or proceeding before the court for the revocation of a patent is pending (*ibid.*, s. 21 (8); compare *ibid.*, s. 22, and *Gillette Safety Razor Co., Ltd.* v. *Gamage, Ltd.* (1909), 26 R. P. C. 745; and see p. 208, *post*). As to such proceedings, see pp. 210 *et seq.*, *post*. But the subsequent commencement of proceedings does not deprive the Comptroller of jurisdiction to allow the amendment (*Woolfe* v. *Automatic Picture Gallery, Ltd.*, [1903] 1 Ch. 18, C. A.). A request for leave to amend (save under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 8 (2), and Patents Rules, 1908, r. 33) must be made on Patents Form No. 17 (Patents Rules, 1908, r. 60); see Encyclopædia of Forms and Precedents, Vol. X., p. 89. Sufficient reasons must be given; see *Re Morgan's Patent* (1886), Griffin, Patent Cases, 1888, 17; *Nordenfeldt's Patent* (1887), Griffin. Patent Cases, 1888, 18.

(*f*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 21 (2). An amendment not in accordance with the advertisement is not allowed (*R.* v. *A.-G.* (1888), 4 T. L. R. 488).

(*g*) Patents Rules, 1908, rr. 3, 60.

(*h*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 21 (2).

(*i*) *Ibid.*, s. 21 (3); Patents Rules, 1908, r. 61 (fee 10*s.*).

(*k*) *Ibid.*, r. 62.

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Office statutory declarations in support of his application, and, on doing so, must deliver to the opponent copies thereof (*l*).

Declarations in answer.

The giving in of evidence by the parties, in answer to the declarations above referred to, and the subsequent hearing by the Comptroller are subject to the same rules as apply to the procedure on opposition to the grant of a patent (*m*).

Decision on application.

358. Where notice of opposition is given, the Comptroller hears and decides the case (*n*). Where no notice is given, or the person so giving notice fails to appear, the Comptroller determines whether and subject to what conditions, if any, the amendment ought to be allowed (*o*). The decision of the Comptroller in either case is subject to an appeal to the law officer (*p*), who, if required, hears the parties and may make an order determining whether and subject to what conditions, if any, the amendment ought to be allowed (*q*).

Amendments which cannot be allowed.

359. No amendment can be allowed by the Comptroller which

(*l*) Patents Rules, 1908, r. 64.

(*m*) *Ibid.*, rr. 63, 65; see *ibid.*, rr. 43, 45, 46, 47; and as to opposition to the grant, see p. 175, *post*.

(*n*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 21 (3).

(*o*) *Ibid.*, s. 21 (4).

(*p*) See pp. 169, 178, *ante*.

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 21 (5). Conditions are usually inserted unless there are exceptional circumstances (*Re Hearson's Patent* (1884), Griffin, Patent Cases, 1884-6, 309; *Re Davies and Davies' Patent* (1910), 28 R. P. C. 50). The law officer may impose conditions that the applicant must pay the costs of the application in any event (*Re Klaber and Steinberg's Patent*, [1908] 1 Ch. 847; *Re Chatwood's Patent* (1899), 16 R. P. C. 370; *Singer & Co.* v. *Stassen & Son* (1884), 1 R. P. C. 121, C. A.; *Re Westinghouse's Patent* (1885), Griffin, Patent Cases, 1884-6, 315); or compel a patentee in an action of infringement who desires to amend to pay all the costs up to the time of leave to amend being given (*Winter* v. *Baybut. Madeley & Co.* (1884), 1 R. P. C. 76; *Re Gaulard and Gibb's Patent*, [1887] W. N. 211; *Fusee Vesta Co.* v. *Bryant and May* (1887), 4 R. P. C. 71; 34 Ch. D. 458; *Lang* v. *Whitecross Co.* (1889), 6 T. L. R. 16, 57, C. A.); and, as a general rule, impose a condition that the amended specification is not to be receivable in evidence in any pending action (*Re Codd's Patent, Codd* v. *Bratby* (1884), 1 R. P. C. 209; *Allen* v. *Doulton & Co.* (1887), 4 R. P. C. 377, C. A.; *Bray* v. *Gardner* (1887), 34 Ch. D. 668, C. A.; *Singer & Co* v. *Stassen & Son, supra*); and a patentee who seeks leave to amend may be ordered not to bring any action for infringement either against particular persons (*Re Harrison's Patent* (1853), Macr. 32), or during the continuance of the patent (*Medlock's Patent* (1865), 22 Newton's London Journal (N. S.), 69), or prior either to a specified date (*Re Westinghouse's Patent, supra*; *Re Cheesbrough's Patent* (1884), Griffin, Patent Cases, 1884-6, 303), or for infringement prior to the date of the disclaimer (*Gaulard* v. *Lindsay* (1888), 38 Ch. D. 38, C. A.; *Lang* v. *Whitecross Co., supra*; *Fusee Vesta Co.* v. *Bryant and May, supra*; *Re Smith's Patent* (1855), Macr. 232; *Haslam Foundry and Engineering Co.* v. *Goodfellow* (1887), 5 R. P. C. 28; 37 Ch. D. 118; *Deeley* v. *Perkes*, [1896] A. C. 496; *Corrigall* v. *Armstrong, Whitworth & Co.* (1903), 20 R. P. C. 523; *Jandus Arc Lamp and Electric Co.* v. *Arc Lamp Co.* (1903), 21 R. P. C. 115, following *Ludington Cigarette Machine Co.* v. *Baron Cigarette Machine Co.* (1900), 17 R. P. C. 25, 214, C. A.; [1900] 1 Ch. 508; *Re Allison's Patent* (1900), 17 R. P. C. 298, 513, C. A.; *Re Alsop's Patent* (1905), 23 R. P. C. 65, 78, C. A.; *Gillette Safety Razor Co.* v. *Lune Safety Razor Co.*, [1910] 2 Ch. 373, C. A.), or may be ordered to submit to a dissolution of a prior injunction for infringement (*Re Kenrick and Jefferson, Ltd.'s, Patent* (1912), 29 R. P. C. 25, applying *Dudgeon* v. *Thomson* (1877), 3 App. Cas. 34).

would make the specification, as amended, claim an invention substantially larger than or different from the invention claimed by the specification as it stood before the amendment (*q*).

Requirements on leave being granted.

360. Where leave to amend is given, the applicant must, if the Comptroller so requires, and within a time to be limited by him, leave at the office a new specification and drawings as amended, to be prepared according to the Rules (*r*).

The amendment must be advertised forthwith by the Comptroller in the Illustrated Office Journal (Patents), and is deemed to form part of the specification (*s*).

Leave to amend conclusive as to right.

361. Leave to amend is conclusive as to the right of the party to make the amendment allowed, except in case of fraud (*t*).

(iii.) *Under Order of Court.*

Amendment by leave of court.

362. In an action for infringement (*a*) or in proceedings before the court for revocation of a patent (*b*), the court may make an order

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 21 (6). The amendment claimed should not be too extensive (*Re Nairn's Patent* (1891), 8 R. P. C. 444; *Re Garnett's Application for a Patent* (1899), 16 R. P. C. 154; *Re Crist's Application for a Patent* (1903), 20 R. P. C. 475); and see *Foxwell* v. *Bostock* (1864), 10 L. T. 144; *Re Nordenfeldt's Patent* (1887), Griffin, Patent Cases, 1888, 18; *Re Walker's Patent* (1887), Griffin, Patent Cases, 1888, 22; *Re Serrell's Patent* (1888), 6 R. P. C. 101, 103; *Ralston* v. *Smith* (1865), 11 H. L. Cas. 223, 254; *Re Lucas' Disclaimer* (1854), Macr. 234; *Re Gaulard and Gibbs' Patent* (1889) 6 R. P. C. 218, C. A.; *Heath* v. *Frost's Patent* (1886), Griffin, Patent Cases, 1888, 310; *Re Parkinson's Patent* (1896), 13 R. P. C. 509; *Re Johnson's Patent* (1896), 13 R. P. C. 659; *Re Vidal's Patent* (1898), 15 R. P. C. 721. Such an amendment is void (*Ex parte Simon* (1888), 4 T. L. R. 754, C. A.), but it would seem that if such an amendment is made and allowed the decision of the Attorney-General, in the absence of fraud, is final and cannot be reviewed (*Moser* v. *Marsden* (1895) 13 R. P. C. 24, H. L.); and see note (*l*), p. 169, *ante*.

(*r*) Patents Rules 1908, rr. 6, 19—25, 66.

(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 21 (7). *I.e.*, the amended specification takes the place of the original specification for all purposes, and the patentee may recover damages for infringements committed before the date of the amendment, provided that he proves to the satisfaction of the court that his original claim was framed in good faith and with reasonable skill and knowledge (*ibid.*, s. 23; *Wenham & Co.* v. *Carpenter, Todd & Co.* (1887), 5 R. P. C. 68; *Hopkinson* v. *St. James' and Pall Mall Electric Light Co.* (1893), 10 R. P. C. 62; *British United Shoe Machinery Co.* v. *Fussel & Sons* (1908), 25 R. P. C. 368). Similarly where it is sought to re-amend an already amended specification, only the specification as amended, not the original specification, is considered, as in *Hattersley and Jackson's Patent* (1904), 21 R. P. C. 233.

(*t*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 21 (7). But it is no guarantee that the specification, even when amended, will not still invalidate the patent (*Re Deeley's Patent* (1894), 12 R. P. C. 65, 192, C. A.); and disconformity between an amended complete specification and the provisional specification is fatal to the validity of the patent, except as provided by Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 42 (*Re Gaulard and Gibbs' Patent* (1890), 7 R. P. C. 367, H. L.; *Lane-Fox* v. *Kensington and Knightsbridge Electric Lighting Co.* (1892), 13 R. P. C. 221, 413, C. A.; [1892] 3 Ch. 424; compare *Moser* v. *Marsden, supra*; see p. 159, *ante*.

(*a*) See pp. 210, *et seq.*, *post*.

(*b*) "Action . . . or proceedings" means action or proceedings before judgment (*Cropper & Co.* v. *Smith* (1884), 1 R. P. C. 254; 28 Ch. D. 148; *Lawrence* v. *Perry & Co.* (1885), 2 R. P. C. 179; *Haslam & Co.* v.

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allowing the patentee to amend his specification by way of disclaimer in such manner and subject to such terms as the court thinks fit (*c*), but no such amendment may claim an invention substantially larger than or different from the invention claimed in the unamended specification (*d*). Notice of such proceedings must be given to the Comptroller, who has the right, and may be directed, to appear and be heard (*d*).

Where an order has been made by the court the patentee must forthwith leave at the office an office copy of such order, together with the prescribed form, whereupon his specification is amended as directed by the order (*e*).

SUB-SECT. 9.—*Acceptance of Specification.*

Time for acceptance.

363. Unless a complete specification is accepted within twelve months from the date of the application, the application, except where an appeal has been lodged, becomes void; but where an application is made for an extension of time for the acceptance of a complete specification, the Comptroller must, on payment of the prescribed fee (*f*), grant an extension of time to the extent applied for, but not exceeding three months (*g*).

Extension.

Notice and advertisement of acceptance.

364. On the acceptance of a provisional or complete specification, the Comptroller gives notice thereof to the applicant (*h*). He must advertise the acceptance of every complete specification in the Illustrated Office Journal (Patents) (*i*); and, upon such acceptance of a complete specification, the application and specification or specifications, with the drawings, if any, may be inspected at the Patent Office (*k*).

Effect of acceptance.

365. After his complete specification has been accepted and until the patent is finally sealed, or the time for its sealing has expired, the applicant has the same privileges and rights as if the patent had been sealed on the date of the acceptance of the complete specification, but he may not institute any proceeding for infringement until a patent has been granted to him (*l*).

Hall (1887), 5 R. P. C. 1, 24); and for the meaning of "action pending," see *Brooks & Co.* v. *Lycett's Saddle and Motor Accessories Co.* (1904), 21 R. P. C. 651; [1904] 1 Ch. 512.

(*c*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 22; R. S. C., Ord. 53A, r. 23; see *Re Geipel's Patent*, [1903] 2 Ch. 715; *Re Klaber and Steinberg's Patent*, [1908] 1 Ch. 847; and see, further, pp. 210 *et seq.*, 216, *post*.

(*d*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 22.

(*e*) Patents Rules, 1908, r. 113.

(*f*) £2 for each month or part of a month. The application should be made in Patents Form No. 7 (Patents Rules, 1908, r. 37); see Encyclopædia of Forms and Precedents, Vol. X., p. 88; and see *ibid.*, Vol. XVI., pp. 492, 493.

(*g*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 6 (5).

(*h*) Patents Rules, 1908, r. 38.

(*i*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 9; Patents Rules, 1908, r. 38.

(*k*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 9; there is a fee of 1*s*. (Patents Rules, 1908, r. 39, and Sched. I.).

(*l*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 10.

SECT. 3.—*Grant of a Patent.*

SUB-SECT. 1.—*Opposition to Grant.*

(i.) *Who may Oppose.*

Opponent to grant.

366. Any person (*m*) may, within two months from the date of the advertisement of the acceptance of a complete specification, give notice at the Patent Office of opposition to the grant of the patent on one of four prescribed grounds (*n*).

Notice of opposition.

The notice must be on the prescribed form (*o*), and must state the grounds of opposition. It must be signed by the opponent, and accompanied by a copy which the Comptroller must send to the applicant. But, if the opponent does not desire that the patent should be refused, but merely that the specification should be amended by disclaimer, or limitation, he should send, either with, or soon after, his notice of opposition, a written statement to that effect, indicating the general nature of the amendments required and any portions of the earlier specifications which he relies upon as necessitating the amendments (*p*).

(ii.) *Grounds of Opposition.*

Four grounds available.

367. Opposition to the grant of a patent can only be founded on one of the following grounds:—

(1) That the applicant obtained (*a*) the invention from the opponent (*b*), or from a person of whom he is the legal represen-

(*m*) *R.* v. *Comptroller-General of Patents, Ex parte Tomlinson* (1899), 16 R. P. C. 233, C. A.; [1899] 1 Q. B. 909.

(*n*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 11 (1). As to the grounds of opposition, see the text, *infra*.

(*o*) *I.e.*, Patents Form No. 8.

(*p*) Patents Rules, 1908, r. 40.

(*a*) The words "obtained from the opponent" in Patents Rules, 1908, r. 41 (1), do not necessarily imply fraud, and fraud is not necessary to the proof. It is not sufficient to show that the invention has been handed to B. from A. through numerous intermediate parties, if B. receives it in entire ignorance of the fact that it owes its origin to A. (Ruling by the Comptroller-General, reported in 27 R. P. C. Appendix; (1910A)).

(*b*) See Patents and Designs Act, 1907 (7 Edw. 7, c. 27), s. 11 (1); Patents Rules, 1908, r. 41 (1). This ground of opposition succeeded in *Lott's Application* (1853), Johnson's Reports, 168, cited Higgins and Jones, Digest of the Law of Patents, 2nd ed., p. 43; *Macfarlane's Application* (1883), Johnson's Reports, 168; *Re Marshall's Application* (1888), 5 R. P. C. 661; *Re Griffin's Application for Patents* (1888), 6 R. P. C. 296; *Re Stuart's Application for a Patent* (1892), 9 R. P. C. 452; *Re Paterson's Patents, Re Dundon's Patent* (1886), Griffin, Patent Cases, 1884–6, 295. Where this ground of opposition is taken the application may be allowed, but subject to terms, either granting the patent to the applicant and opponent jointly (*Re Luke's Patent* (1886), Griffin, Patent Cases, 1884–6, 294), or granting the patent as an improvement of the invention of the opponent (*Re Hoskins' Patent* (1884), Griffin, Patent Cases, 1884–6, 291; *Re Newman's Patent* (No. 2) (1888), 5 R. P. C. 279), or granting the patent to trustees for the applicant and opponent, *e.g.*, in the case of master and servant (*Russell's Patent* (1857), 2 De G. & J. 130; *Re David and Woodley* (1886), Griffin, Patent Cases, 1888, 26), or on terms that the applicant shall assign a half-share to the opponent (*Re Evans and Otway's Patent* (1884), Griffin, Patent Cases, 1884-6, 279; *Garthwaite's Patent* (1886), Griffin, Patent Cases, 1884-6, 284). The words of this "ground" do not apply to communications from abroad, and the source of such communication is immaterial and cannot be investigated by the law officer (*Re Edmunds' Patent* (1886), Griffin, Patent Cases, 1884-6, 281, decided on the words

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tative (*c*); and, in this case, statutory declarations in support of the allegation must be left at the office within fourteen days after the expiration of two months from the date of the advertisement of the acceptance of the complete specification, or such further time as the Comptroller may allow (*d*):

(2) That the invention has been claimed (*e*) in a complete specification which is, or will be, of prior date to the patent the grant of which is opposed, other than a specification deposited pursuant to an application made more than fifty years before the date of application for the patent (*f*):

(3) That the nature of the invention or the manner in which it is to be performed is not sufficiently or fairly described and ascertained in the complete specification (*g*); and, in this case, the notice of

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" on the ground of the applicant having obtained the invention from him " in the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 11, followed in *Re Lake's Patent* (1888), 5 R. P. C. 415; and see *Re Meurs-Gerkin's Application* (1910), 27 R. P. C. 565.

(*c*) An assignee is not the legal representative and cannot be heard in opposition (*Re Spiel's Patent* (1888), 5 R. P. C. 281), nor is the holder of a power of attorney (*Re Edmunds' Patent* (1886), Griffin, Patent Cases, 1884-6, 281).

(*d*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 11 (1) (a); Patents Rules, 1908, rr. 41 (1), 42. If evidence is not so left, the opposition is deemed to be abandoned (*ibid.*, r. 41 (1)).

(*e*) It is not enough if the invention is only described, it must be claimed in a prior specification (*Re Von Buch's Application* (1888), Griffin, Patent Cases, 1888, 40; compare *Re Wadham's Application for a Patent* (1909), 27 R. P. C. 172).

(*f*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 11 (1) (b); see 27 R. P. C. Appendix (1910C), (1910D). For the ruling of the Comptroller where the two applications are concurrent, see *ibid.*, 1910G. The prior invention must be substantially the same as that of the applicant (*Re Todd's Application for a Patent* (1892), 9 R. P. C. 487; *Re Thwaite's Application for a Patent* (1892), 9 R. P. C. 515; *Re Daniels' Application* (1888), 5 R. P. C. 413; *Re Aire and Calder's Glass Bottle Works and Walker* (1888), 5 R. P. C. 345; *Re Wallis* v. *Ratcliff's Application* (1888), 5 R. P. C. 347; *Re Webster's Patent* (1888), 6 R. P. C. 163; *Bailey's Patent* (1886), Griffin, Patent Cases, 1884-6, 269; *Re Boult's Application for a Patent* (1893), 10 R. P. C. 275; *Re Bridge's Application for a Patent* (1901), 18 R. P. C. 257; and see *Re Krupp Actiengesellschaft Germainawerft Application* (1908), 25 R. P. C. 809). An unimportant difference is insufficient (*Re Haythornthwaite's Application for a Patent* (1889), 7 R. P. C. 70; *Re Hedges' Application for a Patent* (1895), 12 R. P. C. 136; *Re Van Wye's Application for a Patent* (1909), 26 R. P. C. 490; and the law officers will not interfere in cases of controversy and difficulty (*Re Lake's Patent* (1889), 6 R. P. C. 584). The law officers will insert a disclaimer clause if it is clear that there will be a repetition of a claim and if the public is likely to be misled (*Re Stell's Patent* (1891), 8 R. P. C. 236; *Re Cooper* v. *Ford's Patent* (1886), Griffin, Patent Cases, 1888, 275; *Re Anderson and McKinnel's Application* (1887), Griffin, Patent Cases, 1888, 23, 25; *Re Lorrain's Patents* (1888), 5 R. P. C. 142; *Re Gozney's Application* (1888), 5 R. P. C. 597; *Re Hill's Application* (1888), 5 R. P. C. 599). A disclaimer protects both the former inventor and the new inventor by limiting his claim (*Re Hoffman's Patent* (1890), 7 R. P. C. 92), and may be either general or special, but the law officers do not encourage the latter (*Re Stell's Patent, supra; Re Southwell and Head's Patent* (1899), 16 R. P. C. 362; *Re Anderson and McKinnel's Application, supra; Re Sielaff's Application* (1888), 5 R. P. C. 484; *Re Marsden's Patent*, No. 2 (1896), 14 R. P. C. 174; *Re Brockie's Application* (1908), 25 R. P. C. 113).

(*g*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 11 (1) (c); *Re Francis' Application for a Patent* (1909), 27 R. P. C. 86; *Re Wadham's Application for a Patent, supra.*

opposition should be accompanied by a written statement indicating in what respects the invention is alleged to be insufficiently or unfairly described or ascertained (*h*):

(4) That there is disconformity between the invention claimed in the complete specification and that described in the provisional specification, and that the invention thus claimed in the complete specification forms the subject of an application made by the opponent in the interval between the leaving of the provisional specification and the leaving of the complete specification (*i*).

(iii.) *Procedure, and Powers of Comptroller.*

Evidence in support of opposition or application and evidence in reply.

368. The opponent may (*k*), in any case, leave statutory declarations in support of his claim within fourteen days after the expiration of the two months from the date of the advertisement of the acceptance of the complete specification (*l*). The applicant may within fourteen days leave declarations in answer, and the opponent may reply in the same way, provided that his declarations are confined to matters strictly in reply (*m*). Where the opponent does not exercise his right of leaving such declarations, the applicant may leave statutory declarations in support of his application within three months from the date of the advertisement of the acceptance of his complete specification (*n*). Thereupon, and within fourteen days, the opponent may leave declarations in answer, and the applicant in this case has the right of reply within fourteen days, provided that his declarations are likewise confined to matters strictly in reply (*a*).

Where a party leaves statutory declarations under the rules, he must deliver copies to the other party (*b*).

No further evidence may be left except by leave or requisition of the Comptroller (*c*).

Hearing.

369. On the completion of the evidence, or whenever he sees fit, the Comptroller appoints a time for the hearing of the case, giving the parties at least ten days' notice (*d*).

(*h*) Patents Rules, 1908, r. 41 (2).

(*i*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 11 (1) (d); see 27 R. P. C., Appendix (1910A); *Re Wilsons' Application for a Patent* (1892), 9 R. P. C. 512, n.; *Re Hudson's Application for a Patent* (1904), 22 R. P. C. 218. To succeed on this ground there must be disconformity; the mere development of what is claimed in the provisional specification does not vitiate the patent (*Re Birt's Application for a Patent* (1892), 9 R. P. C. 489; *Re Edwards' Patent* (1894), 11 R. P. C. 461; *Re Millar and Miller's Application for a Patent* (1898), 15 R. P. C. 718).

(*k*) If the opposition is on the first "ground" referred to at pp. 175, 176, *ante*, statutory declarations must be left by the opponent (Patents Rules, 1908, r. 42).

(*l*) *Ibid.*

(*m*) *Ibid.*, r. 43.

(*n*) *Ibid.*, r. 44.

(*a*) *Ibid.*, r. 45.

(*b*) *Ibid.*, rr. 42—45. The statutory declarations are left at the Patent Office (*ibid.*).

(*c*) *Ibid.*, r. 46.

(*d*) *Ibid.*, r. 47. If they do not desire to be heard they must as soon as possible notify the Comptroller to that effect. If they desire to be heard,

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After hearing the party or parties desirous of being heard, or, if neither party desires to be heard, then without a hearing, the Comptroller decides the case (*e*) and notifies his decision to the parties (*f*).

(iv.) *Appeal to Law Officer.*

Appeal to law officer.

370. The decision of the Comptroller is subject to appeal to the law officer, who, if required, hears the parties, if the opponent is in his opinion a person entitled to be heard in opposition to the grant of the patent (*g*), and decides the case (*h*).

SUB-SECT. 2.—*Making the Grant.*

Time for sealing.

371. If there is no opposition, or if, upon opposition, the case has been determined in favour of the applicant, and if he has left at the Patent Office the prescribed form, duly stamped, requesting that his patent may be sealed (*i*), the Comptroller causes the patent to be sealed as soon as may be with the seal of the Office (*k*). A patent cannot, however, be sealed after the expiration of fifteen months from the date of application, except in the following cases :—

Exceptions to general rule.

(1) Where the Comptroller has allowed an extension of time within which a complete specification may be left or accepted, a further extension of four months after the fifteen months is allowed for the sealing of the patent (*l*).

(2) Where the sealing is delayed by an appeal to the law officer

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they must leave Patents Form No. 9 at the Patent Office ; and, if either party intends to refer to any publication (other than the specification) which has not been mentioned in the statutory declarations, he must give five days' notice and supply details of the publication both to the Comptroller and to the other party (Patent Rules, 1908, r. 47).

(*e*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 11 (2). The Comptroller may take any prior specification into consideration, although it is not raised as a ground of opposition (*Re Hughes and Kennaugh's Application for a Patent* (1910), 27 R. P. C. 281).

(*f*) Patents Rules, 1908, r. 47. The Comptroller may award costs (*Re Anderton's Patent* (1885), Griffin, Patent Cases, 1888, 25).

(*g*) It is not everyone who can of right oppose the grant of a patent; it is a matter in every case for the law officer to decide, but he allows anyone who either directly as owner or assignee or otherwise is interested in showing that the grant would include an earlier patent (*Re Meyer's Application for a Patent* (1899), 16 R. P. C. 526 ; *R.* v. *Comptroller-General of Patents, Ex parte Tomlinson* (1899), 16 R. P. C. 233, C. A. ; [1899] 1 Q. B. 909 ; compare *Re Bairstow's Patent* (1888), 5 R. P. C. 286 ; *Re Macevoy's Patent* (1888), 5 R. P. C. 285 ; *Re Hookham's Patent* (1888), Griffin, Patent Cases, 1888, 32). A patent agent is not so interested (*Re Heath and Frost's Patent* (1886), Griffin, Patent Cases, 1884–6, 288 ; *Re Lake's Patent* (1888), Griffin, Patent Cases, 1888, 35 ; *Re Hookham's Patent, supra*). As to patent agents, see pp. 230 *et seq., post.*

(*h*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 11 (3). The law officer may obtain the assistance of an expert (*ibid.*). As to procedure, see Law Officers' Rules, Patents Rules, 1908, pp. 77, 78 ; and see p. 177, *ante.*

(*i*) Patents Rules, 1908, r. 48 ; fee £1. The form of application is Patents Form No. 10 ; see Encyclopædia of Forms and Precedents, Vol. X., p. 166.

(*k*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 12 (1), (2). For the form of grant, see Encyclopædia of Forms and Precedents, Vol. X., p. 167 ; and see *ibid.*, Vol. XVI., p. 494; and for form of grant of patent of addition, see *ibid.*, p. 499.

(*l*) Patents and Designs Act 1907 (7 Edw. 7, c. 29), s. 12 (2) (a),

or by opposition to the grant of the patent, it rests with the law officer to direct the time at which the patent may be sealed (*m*).

(3) Where the patent is granted to the legal representative of an applicant who has died before the expiration of the time which would otherwise be allowed for sealing the patent, the patent may be sealed at any time within twelve months from the date of his death (*n*).

(4) Where, in consequence of the neglect or failure of the applicant to pay any fee, a patent cannot be sealed within the period allowed, the applicant may apply to the Comptroller (*o*), who may grant an extension, not exceeding three months (*p*).

(5) Where a patent is lost or destroyed, or its non-production is accounted for, the Comptroller may seal a duplicate (*q*).

Date of patent.

372. Except as otherwise expressly provided, a patent must be dated and sealed as of the date of the application; but no proceedings can be taken in respect of an infringement committed before the complete specification was published (*r*).

Validity of grant.

373. A patent sealed with the seal of the Patent Office has the same effect as if it were sealed with the Great Seal of the United Kingdom, and has effect throughout the United Kingdom and the Isle of Man (*s*).

A patent is to be granted for one invention only, but when once it has been granted no one can in any legal proceeding raise the objection that it has been granted for more than one invention (*t*).

A patent granted to the true and first inventor cannot be invalidated by an application in fraud of him or by provisional protection obtained thereon (*u*).

SECT. 4.—*Register of Patents.*

SUB-SECT. 1.—*Matters Entered in Register.*

Entries on register.

374. A book called the Register of Patents is kept at the Patent Office (*a*), and in it are entered—

(1) The names (*a*), addresses (*a*), and callings (*b*) of grantees of patents;

(*m*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 12 (2) (b). The opposition must be the cause of the delay. Where there is opposition, but the cause of delay is the applicant's carelessness, the law officer may refuse to seal the patent (*Re A. and B.'s Application for a Patent* (1896), 13 R. P. C. 63; *Re A. B.'s Application for a Patent* (1902), 19 R. P. C. 556).

(*n*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 12 (2) (c).

(*o*) Patents Rules, 1908, r. 48. The application should be made on Patents Rules, 1908, Form No. 11, and the fee is £2 for each month or part of a month applied for.

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 12 (2) (d).

(*q*) *Ibid.*, s. 44.

(*r*) *Ibid.*, s. 13; and see p. 216, *post*. A Convention application (see p. 229, *post*) is entered on the Register as dated of the date on which the first foreign application was made (Patents Rules, 1908, r. 83). As to the Register, see the text, *infra*.

(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 14 (1). As to grants under the Great Seal, see title CONSTITUTIONAL LAW, Vol. VI., pp. 476 *et seq.*

(*t*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 14 (2).

(*u*) *Ibid.*, s. 15 (1); and see p. 159, *ante*.

(*a*) *Ibid.*, s. 28 (1), (2).

(*b*) Patents Rules, 1908, r. 82.

SECT. 4. Register of Patents.

(2) The title of the invention (*c*);
(3) The date of the patent (*c*);
(4) The date of the grant (*c*);
(5) The address for service of the grantee (*c*);
(6) Notifications of assignments and of transmissions of patents (*d*), of licences under patents (*e*), and of amendments, extensions and revocations of patents (*f*);
(7) Other matters affecting the validity or proprietorship of patents, for example, subsequent proprietorship, notice of interest, notification of documents of title (*g*);
(8) The date of the payment of renewal fees (*h*); and
(9) Notifications of failure to pay fees (*i*).

No notice of any trust, expressed, implied, or constructive, can be entered in the Register (*j*).

SUB-SECT. 2.—*Correction and Rectification.*

Alteration of address.

375. If the patentee has altered his address or his address for service, he should notify the Comptroller on the prescribed form. The Comptroller must then cause the Register to be altered accordingly, but he may require that the altered address be in the United Kingdom (*k*).

Correction of clerical error.

The Comptroller may on a request in writing accompanied by the prescribed fee correct any clerical error in the Register (*l*).

Rectification by order of court.

376. Any person who considers himself aggrieved (*m*) by the non-insertion in, or omission from, the Register of any entry, or by any entry made without sufficient cause, or by any entry wrongly remaining on the Register, or by any error or defect in any entry, may apply to the court in the prescribed manner (*n*), and the court may make an order for making, expunging, or varying the entry complained of (*o*), and may decide any question that it may be expedient to decide in connection with such rectification of the Register. Four days' notice of such application must be given to

(*c*) Patents Rules, 1908, r. 82.
(*d*) See p. 186, *post*.
(*e*) See p. 192, *post*.
(*f*) Patents Rules, 1908, r. 91; and see the text, *infra*, and see pp. 199, 206 *et seq.*, *post*. A special form (Patents Form No. 29; fee 10*s*.; see Encyclopædia of Forms and Precedents, Vol. X., p. 171; and see *ibid.*, Vol. XVI., p. 494) is provided for the use of those who wish to enter a notification of any document affecting the proprietorship of a patent.
(*g*) Patents Rules, 1908, r. 91; see Patents Form No. 28; Encyclopædia of Forms and Precedents, Vol. XVI., p. 499 (application to register notice of interest).
(*h*) Patents Rules, 1908, r. 92.
(*i*) *Ibid.*, r. 93.
(*j*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 66. But any document affecting the proprietorship of a patent may be registered (*Stewart* v. *Casey* (1891), 9 R. P. C. 9, C. A.; [1902] 1 Ch. 104); see the text, *supra*; and, as to assignment of patents, see pp. 183 *et seq.*, *post*.
(*k*) Patents Rules, 1908, r. 84.
(*l*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 70 (c).
(*m*) A person aggrieved may be the purchaser of a share of a patent another share of which has been entered on an assignment by a bankrupt (*Re Manning's Patent* (1902), 20 R. P. C. 74).
(*n*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 72 (1).
(*o*) *Ibid.*, s. 72 (1), (2).

the Comptroller, who has the right and may be directed to appear (*p*). The order must direct that notice of the rectification shall be served on the Comptroller in the prescribed manner, who must then rectify the Register accordingly (*q*).

SUB-SECT. 3.—*Inspection and Copies.*

Inspection.

377. The Register is open to the inspection of the public whenever the office is open to the public (*r*), unless it is required for official use (*s*).

Copies.

Certified copies, sealed with the seal of the Patent Office, of any entry in the register must be given to any person requiring the same on payment of the prescribed fee (*t*).

SUB-SECT. 4.—*Register as Evidence.*

Register as evidence.

378. The Register is *primâ facie* evidence of any matters directed or authorised to be inserted therein (*a*), and printed or written copies of any entry, certified by the Comptroller and sealed with the seal of the Patent Office (*b*), are admitted in evidence in all courts in His Majesty's dominions, and in all proceedings, without further proof or production of the original (*c*).

SECT. 5.—*Maintenance of a Patent.*

SUB-SECT. 1.—*Payment of Fees.*

Renewal fees.

379. A patent provides that it shall determine if the patentee does not pay all his fees by law required, and, after the fourth year from its inception, the payment of annual renewal fees is required (*d*).

Mode of and time for payment.

Such payments are made by means of the prescribed form (*e*),

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 72 (3); Patents Rules, 1908, r. 113.

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 72 (4); Patents Rules, 1908, r. 113. An appeal lies from any order made by the court for the rectification of the register (*Re Morgan's Patent* (1876), 24 W. R. 245; *Re Myer's Patent*, [1882] W. N. 53, 76).

(*r*) Patents Rules, 1908, r. 110.

(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 67; Patents Rules, 1908, r. 94.

(*t*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 67. The fee is 1*s.* for each certified copy (Patents Rules, 1908, Sched. I.).

(*a*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 28 (3); see title EVIDENCE, Vol. XIII., p. 474, note (*c*).

(*b*) Such copies may be had from the Comptroller by written request on Patents Form No. 31 (fee 5*s.*).

(*c*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 79; see title EVIDENCE, Vol. XIII., p. 539.

(*d*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 17 (1), (2), and Patents Rules, 1908, Sched. III. The scale is as follows:—Before the expiration of the fourth year from the date of the patent and in respect of the fifth year, £5; before the expiration of the fifth year and in respect of the sixth year, £6; and so on, the fee rising annually by £1 until the final payment—before the expiration of the thirteenth year and in respect of the fourteenth year, £14 (Patents Rules, 1908, r. 52, and Sched. I.).

(*e*) Patents Rules, 1908, r. 52; Patents Form No. 13; see Encyclopædia of Forms and Precedents, Vol. XVI., p. 497.

SECT. 5. Maintenance of a Patent.

and all or any of them may be paid in advance (*f*). The Comptroller must notify the patentee of the date when such fee will become due and of the consequences of non-payment thereof, giving him at least one month's notice (*g*). If the patentee fails to pay the fees in the prescribed times, the patent ceases, unless he applies (*h*) for an enlargement of time for payment, in which case the Comptroller must give him the time required, not exceeding three months (*i*).

SUB-SECT. 2.—*Restoration of Lapsed Patent.*

Application for restoration.

380. Where a patent has become void owing to the failure of the patentee to pay any prescribed fee within the prescribed time, the patentee may apply to the Comptroller for an order for the restoration of the patent (*k*). Such application must contain a statement on the prescribed form (*l*) of the circumstances which have led to the omission of the payment (*m*), and must be accompanied by one or more statutory declarations verifying the statement (*n*). If it then appears that the omission was unintentional (*o*) and that no undue delay has occurred in the making of the application, the Comptroller advertises the application in the Illustrated Office Journal (Patents) and in such other way as he thinks desirable (*p*).

Notice of opposition.

At any time within two months from the first of such advertisements in the Journal any person may give notice of opposition at the Patent Office on the prescribed form (*q*), and the Comptroller sends a copy of such notice to the applicant (*r*).

Order on application.

Having heard the parties, the Comptroller issues an order either

(*f*) Patents Rules, 1908, r. 52.

(*g*) *Ibid.*, r. 54.

(*h*) *Ibid.*, r. 52; Patents Form No. 14; see Encyclopædia of Forms and Precedents, Vol. XVI., p. 498. An additional fee is charged for this extension of time, namely, £1 for the first month (or any part thereof), £2 for two, and £3 for three, months (Patents Rules, 1908, Sched. I.).

(*i*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 17 (2).

(*k*) *Ibid.*, s. 20 (1).

(*l*) Patents Form No. 15, which prescribes a fee of £20 (Patents Rules, 1908, r. 55); see Encyclopædia of Forms and Precedents, Vol. XVI., p. 498.

(*m*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 20 (2).

(*n*) Patents Rules, 1908, r. 55.

(*o*) If the omission is intentional, under a mistake as to the law or practice, the patentee is not protected (*Re Land's Patent* (1910), 27 R. P. C. 481; [1910] 2 Ch. 236).

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 20 (3); Patents Rules, 1908, r. 55.

(*q*) *Ibid.*, r. 55; Patents Form No. 16.

(*r*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 20 (4). The opponent must, within 14 days after leaving his notice, leave one or more statutory declarations verifying the evidence on which he relies, and must deliver copies to the applicant (Patents Rules, 1908, r. 56). The applicant may, within 14 days from such delivery, leave declarations in reply; if he does so, the opponent has the right to answer them in the same way; and no further evidence may be left except by the leave or requisition of the Comptroller, the procedure being similar to that in the case of opposition to the grant of a patent (*ibid.*, r. 57; and see *ibid.*, rr. 43, 46, 47; p. 177, *ante*).

restoring the patent or dismissing the application. This order is subject to an appeal to the court (*s*).

In every such order, prescribed provisions must be inserted for the protection of persons who may have availed themselves of the subject-matter of the patent after the patent has been announced as void in the Journal (*t*); and the Board of Trade may compensate any person for money, time, or labour expended by him in the belief that such patent had become void (*u*).

SECT. 5. Maintenance of a Patent.

Protection afforded by order in respect of use of subject-matter.

SECT. 6.—*Assignment and Devolution of Patents.*

SUB-SECT. 1.—*What may be Assigned.*

381. Every person to whom a patent has been granted may assign (*a*) either the whole of, or a share in, the right granted (*b*), and he may include in the assignment all future patent rights of a like nature to the patent which he may acquire (*c*). He may

Assignment may be limited in effect or otherwise.

(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 20 (5). As to the practice on such an appeal, see note (*b*), p. 208, *post*.

(*t*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 20 (5). The provisions are prescribed by Patents Rules, 1908, r. 58.

(*u*) *Ibid.*, r. 59.

(*a*) The power to assign a patent can only be given by the Crown (*Duvergier* v. *Fellows* (1830), 10 B. & C. 826, *per* LITTLEDALE, J., at p. 829). The power is now given by the grant of letters patent; see Patents Rules, 1908, Form A; Encyclopædia of Forms and Precedents, Vol. X., p. 167; and see *ibid.*, Vol. XVI., p. 494. As to assignments of choses in action, generally, see title CHOSES IN ACTION, Vol. IV., pp. 365 *et seq.*

(*b*) For examples of assignment of a share in a patent, see *Dunnicliff* v. *Mallet* (1859), 7 C. B. (N. S.) 209; *Walton* v. *Lavater* (1860), 8 C. B. (N. S.) 162. An assignment of a share in the profits of a patent may create a partnership (see title PARTNERSHIP, pp. 8 *et seq.*, *ante*), but this can be avoided by granting a licence instead of making an assignment (1 Web. Pat. Cas. 417, n.). As to licences, see pp. 190 *et seq.*, *post*. An assignment of a patent not yet granted may be good, and may be entered on the Register if the document leaves no doubt whatever as to the proposed patent referred to in it (*Re Parnell's Patent* (1888), 5 R. P. C. 126, *per* NORTH, J., at p. 128; and see 27 R. P. C. Appendix (1910E).

(*c*) *Printing and Numerical Registering Co.* v. *Sampson* (1875), L. R. 19 Eq. 462. There is no "public policy prohibiting such contracts. On the contrary, public policy is the other way" (*ibid.*, *per* JESSEL, M.R., at p. 466); and an action will lie for breach of such an agreement (*London and Leicester Hosiery Co.* v. *Griswold* (1886), 3 R. P. C. 251). Considerable care should be taken in drafting covenants to assign future improvements. An improvement of a machine "includes any machine which while retaining the essential or characteristic parts, or some of the essential and characteristic parts of the machine, yet by addition to or omission of or alteration made in those parts or some of them, achieves more quickly or more cheaply or in some better way the same result as, or achieves a better result than is achieved by the patented machine for the purpose for which it was contrived" (*Linotype and Machinery, Ltd.* v. *Hopkins* (1908), 25 R. P. C. 665, C. A., *per* BUCKLEY, L.J., at p. 670; compare *Wilson* v. *Barbour and Combe* (1888), 5 R. P. C. 245, *per* PORTER, M.R., at p. 254; see also *Valveless Gas Engine Syndicate* v. *Day* (1899), 16 R. P. C. 97 (engine worked by petroleum held to be an improvement on an engine worked by gas); *Davies* v. *Curtis and Harvey, Ltd.* (1902), 19 R. P. C. 580; affirmed (1903), 20 R. P. C. 561, C. A. (manufacture of a powder without an ingredient which was the essence of the patent held not to be an improvement); and see *Davies* v. *Davies' Patent Boiler, Ltd.* (1908), 25 R. P. C. 823). A covenant by a patentee to assign all improvements of a patent does not cover patents acquired in which the patentee has a beneficial interest with other

SECT. 6. Assignment and Devolution of Patents.

assign his patent for any part of or any place in the United Kingdom or the Isle of Man (*d*), and, where a patent contains two or more inventions severable in their nature, he may assign the separate parts to different persons (*e*).

SUB-SECT. 2.—*Mode of Assignment.*

Form of assignment.

382. A legal assignment (*f*) of a patent must be made by deed (*g*), but an assignment in writing not under seal may create an interest in a patent and operate as a valid equitable assignment (*h*). An assignment may be made to any number of persons (*i*) in any form of words (*j*), and may be created by way of mortgage (*k*) or in certain cases by the grant of a licence (*l*).

Effect of various clauses and covenants.

383. Unless the assignor warrants the validity of the patent assigned (*m*), the assignee cannot in the absence of fraud repudiate

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persons; it extends only to patents of which the patentee has sole control either as true inventor or as a person to whom an invention has been communicated (*Pneumatic Tyre Co.* v. *Dunlop* (1896), 13 R. P. C. 553, C. A.).

(*d*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 14 (1). For an example of a local assignment, see *Actien Gesellschaft fur Cartonnagen Industrie* v. *Temler and Seeman* (1900), 18 R. P. C. 6, *per* STIRLING, J., at p. 14.

(*e*) Although a patent must only be granted for one invention, the specification may contain more than one claim, and it is no objection to a patent that it has been granted for more than one invention (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 14 (2); and see p. 179, *ante*).

(*f*) The assignment of a patent must be stamped as though it were an actual conveyance on sale of "property" within the meaning of the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59 (1) (*Smelting Co. of Australia* v. *Inland Revenue Commissioners*, [1897] 1 Q. B. 175, C. A.); see titles REVENUE; SALE OF LAND. For forms of agreement for sale, see Encyclopædia of Forms and Precedents, Vol. IV., p. 217; Vol. X., pp. 104 *et seq.*, 121: and for forms of assignment, see *ibid.*, pp. 121 *et seq*

(*g*) An agent authorised to make a legal assignment of a patent must be authorised by deed (*Hazlehurst* v. *Rylands* (1891), 9 R. P. C. 1, C. A., *per* FRY, L.J., at p. 7); and see title AGENCY, Vol. I., p. 154.

(*h*) *Re Casey's Patents, Stewart* v. *Casey*, [1892] 1 Ch. 104, C. A.; and see titles CHOSES IN ACTION, Vol. IV., p. 396; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 364, 422.

(*i*) Formerly the number of persons to whom a patent could be assigned was limited by proviso in the letters patent (*Bloxam* v. *Elsee* (1827), 6 B. & C. 169; *Hesse* v. *Stevenson* (1803), 3 Bos. & P. 565; *Duvergier* v. *Fellows* (1830), 10 B. & C. 826).

(*j*) *Cartwright* v. *Amatt* (1799), 2 Bos. & P. 43 (where an agreement by deed to assign a patent on the determination of a future event was held to pass the legal interest in the patent without assignment on the event happening); and see note (*u*), p. 186, *post*.

(*k*) See title MORTGAGE, Vol. XXI., pp. 130 *et seq.*; Encyclopædia of Forms and Precedents, Vol. VIII., p. 685. In an assignment by way of mortgage, it is usual for the mortgagee to covenant that he will not seek leave to amend the specification or drawings without the written consent of the mortgagor.

(*l*) As to a licence amounting to an assignment, see note (*k*), p. 191, *post*.

(*m*) The assignor usually covenants that he is the true and first inventor, and that the patent is valid, and this estops him from denying the validity of the patent in any action for infringement brought subsequently by the assignee (*Walton* v. *Lavater* (1860), 8 C. B. (N. S.) 162; see *Hocking & Co.* v. *Hocking* (1887), 4 R. P. C. 255, 434, C. A.; reversed (1888), 6 R. P. C. 69, H. L.; see also title ESTOPPEL, Vol. XIII., p. 413), but he is not thus estopped either from denying a particular construction of the specification

the agreement on the ground that the patent is wholly worthless (*n*).

Where the consideration is a royalty reserved to the assignor, there is no obligation on the assignee to pay the fees necessary to maintain the patent, unless he covenants that he will do so (*o*).

An assignor may insert a covenant to protect himself from competition by the trade of the assignee, provided such covenant is not void as being to an unnecessary extent in restraint of trade, nor injurious to the public interests of the state (*p*), or he may reserve to himself the right to use the invention (*q*).

It is usual, in an assignment for a district, for the assignor to covenant to pay the renewal fees within the prescribed times, to give due notice of every such payment when made, and to repay on demand any sum paid by his co-owner (*r*), and until repayment to charge them, together with interest, on his share of the patent.

384. An assignee, who takes from a prior assignee with notice

Assignee with notice.

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which is consistent with the validity of the patent (*Oldham* v. *Langmead* (1789), cited in *Hayne* v. *Maltby* (1789), 3 Term Rep. 438, 441), or from giving evidence, though he may thereby assist a defendant to an action for infringement (*London and Leicester Hosiery Co.* v. *Griswold* (1886), 3 R. P. C. 251). The estoppel may be contained in the recital (*Bowman* v. *Taylor* (1834), 2 Ad. & El. 278, 293), but, if it contains no assertion of right except as assignee, the assignee may deny the validity of the patent in an action brought against him by the assignor (*Hayne* v. *Maltby* (1789), 3 Term Rep. 438); and see note (*l*), p. 194, *post*. In an action for misrepresentation in a company prospectus containing statements that a patent is valuable, the plaintiff must show, not that the patent is invalid, but that it was invalid at the date of the prospectus (*Stavert* v. *Passburg Grains Syndicate, Ltd.* (1891), 8 R. P. C. 400).

(*n*) *Hall* v. *Conder* (1857), 2 C. B. (N. S.) 22, 53. A covenant for warranty of validity should show clearly (1) whether the question of validity is to be determined by the grantee warranting the validity of the patent in fact, or by the opinion of the assignee (*Hazlehurst* v. *Rylands* (1891), 9 R. P. C. 1, C. A.); (2) whether the guarantee is in the nature of a condition giving the assignee the right of repudiation on breach of the contract, or a mere warranty the remedy for breach of which is only damages (*Nadel* v. *Martin* (1902), 20 R. P. C. 723, C. A.; affirmed (1905), 23 R. P. C. 41, H. L.; and see *Berchem* v. *Wren* (1904), 21 R. P. C. 683; *Henderson* v. *Shiels* (1906), 24 R. P. C. 108). There is no implied warranty, in the sale of a patented article, that the purchaser will be able to use the machine without interruption from a prior patentee (*Monforts* v. *Marsden* (1895), 12 R. P. C. 266).

(*o*) *Re Railway and Electric Appliances Co.* (1888), 38 Ch. D. 597 (where the assignee's covenant was to pay a royalty on articles manufactured or sold by the assignee under the patent "while subsisting," but there was no express covenant by the assignee to manufacture or sell).

(*p*) *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535.

(*q*) *Howard and Bullough* v. *Tweedales and Smalley* (1895), 12 R. P. C. 519. The agents of an assignor who reserves to himself the right to use the invention may be restrained by the assignee from manufacturing and selling on the assignor's behalf articles made under the patent, if they are not merely the agents of, but the contractors for, the assignor (*ibid.*).

(*r*) With reference to the payment of renewal fees, see also p. 188, *post*. As to such fees, see p. 181, *ante*.

SECT. 6. Assignment and Devolution of Patents.

of the terms upon which the patent was held by the prior assignee, holds the patent subject to such terms (*s*).

SUB-SECT. 3.—*Registration of Assignments.*

Rights of legal and equitable assignees.

385. A legal assignment entitles the assignee, on request and on proof of title, to be registered as the proprietor of the patent in the Register (*t*), but an equitable assignment can only be entered in the Register as a document affecting the proprietorship of the patent (*u*). An assignee of a patent by way of mortgage is not the proprietor of the patent, and must be registered as mortgagee (*a*).

Every assignee should register the assignment as soon as possible (*b*), otherwise he may lose his title (*c*), and may be unable to sue persons other than those who have notice of the assignment (*d*).

(*s*) *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell*, [1908] 2 Ch. 127, following *Werderman* v. *Société Générale d'Electricité* (1881), 19 Ch. D. 246, C. A., as explained in *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146, C. A.

(*t*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 71. The assignment must be produced to the Comptroller, and the request for entry of the assignment in the Register must state the particulars of assignment (Patents Rules, 1908, rr. 87, 88). As registered proprietor in law, the assignee has absolute power to assign, grant licences, or otherwise deal with the patent (Patents and Designs Act, 1907 (7 Edw. 7, c 29), s. 71(3)); and, as a necessary incident to his proprietary rights, to sue for infringement; see *Duncan* v. *Lockerbie and Wilkinson (Birmingham), Ltd.* (1912), 133 L. T. Jo. 57. But any equities may be enforced in like manner as in respect of any other personal property (*ibid.*; *New Ixion Tyre and Cycle Co.* v. *Spilsbury* (1898), 15 R. P. C. 567, C. A.; [1898] 2 Ch. 484. As to the Register, see p. 179, *ante*.

(*u*) *Re Casey's Patents, Stewart* v. *Casey*, [1892] 1 Ch. 104, C. A., *per* BOWEN, L.J., at p. 116. The document must be complete in itself and capable of specific performance (*Re Fletcher's Patent* (1893), 10 R. P. C. 252; 62 L. J. (CH.) 938; *Re Hutchinson's Patent, Haslett* v. *Hutchinson* (1891), 8 R. P. C. 457, C. A.). As to specific performance generally, see title SPECIFIC PERFORMANCE.

(*a*) *Van Gelder, Apsimon & Co.* v. *Sowerby Bridge Flour Society* (1890), 7 R. P. C. 208, 211, C. A.; 44 Ch. D. 374. Every person entitled to an interest in a patent, either as mortgagee, licensee, or otherwise, may have notice of his interest entered in the Register (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 71 (2)); and see p. 180, *ante*.

(*b*) A title derived by an assignment granted by the executors of the grantee is good even though probate is not registered until after the date of assignment (*Elwood* v. *Christy* (1864), 17 C. B. (N. S.) 754); but *quære* if the assignee has commenced his action before the registration of the probate (*ibid.*).

(*c*) *New Ixion Tyre and Cycle Co.* v. *Spilsbury*, *supra*.

(*d*) *Chollet* v. *Hoffman* (1857), 7 E. & B. 686; *Hassall* v. *Wright* (1870), L. R. 10 Eq. 509. It would appear from these authorities, both of which were decisions under the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), s. 35, that the registration of an assignment is a condition precedent to the assignee suing a third person without knowledge of the assignment. Under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 71 (3), the registered proprietor of a patent has absolute power to assign, grant licences, or otherwise deal with the patent, but an assignee does not become the registered proprietor except on request and on proof of title (*ibid.*, s. 71 (1)). Since the powers of a registered proprietor only vest in an assignee on registration of the assignment, he should register the assignment before suing, otherwise a defendant would "be liable to be sued at the same time for the same infringement by the grantee and by the assignee of the letters patent" (*Chollet* v. *Hoffmann*, *supra*, *per* Lord CAMPBELL,

SUB-SECT. 4.—*Rights of Assignees.*

SECT. 6. Assignment and Devolution of Patents.

Rights of assignee as to protection of patent.

386. Every registered assignee (*e*) has the right to maintain an action for infringement alone (*f*), to restrain the assignor and his subsequent licensees from using the invention without his licence (*g*), to seek leave to amend the specification or drawings of the patent (*h*), and to petition for the prolongation of the patent (*i*).

Co-ownership.

387. A co-owner of a patent may use the patent without the consent of the other co-owners (*k*), and, in the absence of agreement, is not bound to account to the other co-owners for any share of the profits so made (*l*).

C.J., at p. 694). The case is different where the persons sued are the assignor and subsequent licensees from the assignor with notice of the assignment, although the principle to be applied is the same (*per* MALINS, V.-C., in *Hassall* v. *Wright* (1870), L. R. 10 Eq. 509, at p. 513). It would seem that the registration of an assignment relates back to the date of the assignment (*Hassall* v. *Wright, supra*); but in an action for the infringement of a patent, where an account is ordered to be taken, in the case of an assignee, the account is only taken from the date of the registration of the assignment (*Elwood* v. *Christy* (1865), 18 C. B. (N. S.) 494).

(*e*) An equitable assignee cannot sue without bringing the legal owner before the court (*Bowden's Patents Syndicate* v. *Smith & Co.* (1904), 21 R. P. C. 438; [1904] 2 Ch. 86; and see *Duncan* v. *Lockerbie and Wilkinson (Birmingham), Ltd.* (1912), 133 L. T. Jo. 57). Where an assignee sues for infringement, he must show that the assignment was complete before the issue of the writ, otherwise he must join the assignor as a party to the suit (*Bowden's Patents Syndicate* v. *Smith & Co., supra; Spennymoor Foundry* v. *Catherall and Geldard* (1909), 26 R. P. C. 822).

(*f*) See notes (*t*), (*d*), p. 186, *ante*. The assignee of a share in a patent has the same right as the assignee of the whole patent, and he can sue alone without joining the owner of the other share (*Dunnicliff* v. *Mallet* (1859), 7 C. B. (N. S.) 209).

(*g*) *Hassall* v. *Wright* (1870), L. R. 10 Eq. 509. The assignor may, however, expressly reserve the right to use the invention; see p. 185, *ante*.

(*h*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 21, 71 (3), 93. In the case of an assignment by way of mortgage, the mortgagor should be made a party to the application (*Van Gelder, Apsimon & Co.* v. *Sowerby Bridge Flour Society* (1890), 7 R. P. C. 41; 59 L. J. (CH.) 492).

(*i*) *Russell* v. *Ledsam* (1845), 14 M. & W. 574, 588. An extension may be granted to an assignee where the patentee has ceased to have any connection with the working of the patent (*Re Napier's Patent* (1861), 13 Moo. P. C. C. 543), or where the assignee has sustained loss by helping the patentee in developing the patent (*Re Bodmer's Patent* (1849), 6 Moo. P. C. C. 468; *Re Normand's Patent* (1870), L. R. 3 P. C. 193). An assignee does not, however, stand in the same favourable position as the inventor (*Re Norton's Patent* (1863), 1 Moo. P. C. C. (N. S.) 339), and the application may be granted subject to conditions (*Re Pitman's Patent* (1871), L. R. 4 P. C. 84, 87; *Re Herbert's Patent* (1867), L. R. 1 P. C. 399; *Re Markwick's Patent* (1860), 13 Moo. P. C. C. 310), or, in the case of a joint application, to the patentee alone (*Re Bovill's Patent* (1863), 1 Moo. P. C. C. (N. S.) 348); and see note (*o*), pp. 204, 205, *post*. An assignee has no *locus standi* to apply for the revocation of a patent under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 11 (1) (a), 26 (*Re Gascoine's Patent* (1909), 27 R. P. C. 78).

(*k*) But he cannot dispose of the interests of the other co-owners by assigning the whole patent to a third party (*Re Horsley and Knighton's Patent* (1869), L. R. 8 Eq. 475). As to revocation, see pp. 206 *et seq., post*.

(*l*) *Mathers* v. *Green* (1865), 35 L. J. (CH.) 1; see Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 37. This applies even where he is co-owner of one moiety and also mortgagee of the other moiety (*Steers* v. *Rogers* (1892), 9 R. P. C. 177, C. A.; [1892] 2 Ch. 13; affirmed (1893), 10

SECT. 6. Assignment and Devolution of Patents.

Hence it is usual, in an assignment of a share in a patent, to insert covenants binding the parties and all future owners to account to each other for the profits made by them respectively, and to grant, or to concur with the other owners in granting, licences (*m*). It is also usual for the assignee to covenant that he will perform and observe any stipulations which bind the assignor and to indemnify him from future breaches; and for each owner to pay his proper share of renewal fees and to charge his share in the patent with the repayment of any moneys which may be paid by any other owner on his behalf in this respect (*n*).

Usual clauses in assignment of share of patent.

Where a patent is worked solely by one co-owner, it is usual for the other co-owners to reserve to themselves the right to use the assigned share on agreed conditions and to enter a notification of such right on the register (*o*).

Effect of partnership.

388. Where a partnership in a patent is created (*p*), each partner may use the patent as an asset of the partnership, both during and after the termination of the partnership, and may restrain an assignee of any other partner who has taken an assignment with notice of the partnership (*q*).

SUB-SECT. 5.—*Assignment to Secretary for War or the Admiralty.*

Assignment of invention for improvement in instruments or munitions of war.

389. The Secretary of State for War (*r*) or the Admiralty (*s*) may acquire by assignment, either for or without valuable consideration, all the benefit of an invention and of any patent obtained or to be obtained for an invention of any improvement in instruments or munitions of war (*t*).

R. P. C. 245, H. L.; [1893] A. C. 232). A co-owner can sue alone either for an injunction or for an account (*Sheehan* v. *Great Eastern Rail. Co.* (1880), 16 Ch. D. 59, 62); and see *Smith* v. *London and North Western Rail. Co.* (1853), 2 E. & B. 69; compare *Bergmann* v. *Macmillan* (1881), 17 Ch. D. 423 (where it was held that when an assignment is made of a share of profits, arising from the working of a patent under licences, any account taken must be taken in the presence of all the parties interested).

(*m*) It is usual for the co-owners to covenant that they will grant licences jointly and will share all benefits arising therefrom in proportion to their shares.

(*n*) Compare the covenant usually inserted in assignments for a district; see p. 185, *ante*.

(*o*) As to the Register, see p. 179, *ante*.

(*p*) A partnership in a patent may be created by the assignment of a share in the profits arising from the working of a patent; see p. 183, *ante*.

(*q*) *Kenny's Patent Buttonholeing Co.* v. *Somervell and Lutwyche* (1878), 26 W. R. 786. This applies even where the patent is taken out by and registered in the name of one partner only, and it is that partner who assigns the patent (*ibid.*); and see title PARTNERSHIP, pp. 53, 57, *ante*.

(*r*) See title CONSTITUTIONAL LAW, Vol. VII., pp. 92 *et seq.*

(*s*) See *ibid.*, pp. 88 *et seq.*

(*t*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 30 (1), (2). Such assignment effectually vests the benefit of the invention and patent in the Secretary of State or the Admiralty on behalf of His Majesty, and all covenants and agreements therein contained for keeping the invention secret and otherwise are valid and effectual and may be enforced by them (*ibid.*, s. 30 (2)). Communication of any such invention to the Secretary of State or the Admiralty, or to any person authorised by them to investigate it, is not deemed "use or publication" so as to prejudice the grant or validity of a patent for it (*ibid.*, s. 30 (12)).

SECT. 6. Assignment and Devolution of Patents.

If the Secretary of State for War or the Admiralty certifies that, in the interest of the public service, the particulars of the invention and of the manner in which it is to be performed should be kept secret (*u*), the application and specifications, drawings, and any amendment of the complete specification and any copies of such documents and drawings must be placed in a sealed packet (*a*), which is kept by the Comptroller until the expiration of the term of the patent (*b*), unless the Secretary of State or the Admiralty authorises the packet to be delivered to some other person (*c*); and neither the documents contained in the sealed packet, nor any copy thereof, are open to the inspection of the public (*d*).

Certificate as to secrecy.

The Secretary of State or the Admiralty may consent to waive the benefit of the above provisions, in which case the specifications, drawings and documents are thenceforth kept and dealt with in the ordinary way (*e*).

Waiver of special provisions.

Unless and until such invention is reassigned to the inventor by the Secretary of State or the Admiralty, various special rules apply (*f*).

Reassignment.

SUB-SECT. 6.—*Devolution on Bankruptcy or Death of Patentee.*

390. On a patentee being declared bankrupt the patent vests in the trustee in bankruptcy (*g*), and the trustee may sue for and

Effect of bankruptcy of patentee.

(*u*) The Secretary of State or the Admiralty must certify to the effect mentioned in the text, *supra*, before the publication of the complete specification (*ibid.*, s. 30 (3)).

(*a*) If the assignment takes place before application for a patent has been made, the packet is sealed by authority of the Secretary of State or the Admiralty and delivered to the Comptroller (*ibid.*, s. 30 (4)). But where the Secretary of State or the Admiralty certifies under *ibid.*, s. 30 (3) (see note (*u*), *supra*), after application for a patent has been made, it is the duty of the Comptroller forthwith to place the necessary documents in a packet sealed by his authority (*ibid.*, s. 30 (8)). In this case the provisions of Patents Rules, 1908, r. 97, apply as far as practicable; see the text, *infra*. On an application (made on Patents Form No. 1D) for a secret patent, the Comptroller may not communicate the application or any documents relating thereto to any member of his staff except to a deputy or special examiner to make the necessary investigations and report (Patents Rules, 1908, r. 97); nor is the application, or the acceptance of any specification relating to the invention, advertised, nor is the grant open to opposition under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 11 (see p. 175, *ante*; Patents Rules, 1908, r. 97 (2)). The patent must be sealed as soon as possible after acceptance of the complete specification, and is registered in a Confidential Register at the Patent Office, no entry being made in the ordinary Register (*ibid.*, rr. 97 (31), 98)

(*b*) Such patent remains in force for fourteen years from its date, and no fees are payable in respect of it (Patents Rules, 1908, r. 97 (4)).

(*c*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 30 (5), (6). On the expiration of the term of the patent the packet must be delivered to the Secretary of State or the Admiralty (*ibid.*, s. 30 (7)).

(*d*) *Ibid.*, s. 30 (10); Patents Rules, 1908, r. 97 (1).

(*e*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 30 (11).

(*f*) See Patents Rules, 1908, r. 97 (1)—(4). On such reassignment the patent is removed from the Confidential Register and thereafter the same fees are payable, and the patent is subject to the same terms and conditions as if it had not been a secret patent (Patents Rules, 1908, r. 99).

(*g*) *Hesse* v. *Stevenson* (1808), 3 Bos. & P. 565; *Bloxam* v. *Elsee* (1827),

SECT. 6. Assignment and Devolution of Patents.

recover in respect of infringements, whether committed before or after the act of bankruptcy (*h*).

Devolution on death.

391. On the death of a patentee the patent vests in his personal representative, and the executor or administrator, as the case may be, may sue for and recover in respect of infringements committed during the lifetime of the deceased, provided the probate of the will or grant of letters of administration has been entered on the Register (*i*).

SUB-SECT. 7.—*Vesting Order.*

Vesting order.

392. A patent being a chose in action (*k*), the court has jurisdiction (*l*) to make an order vesting the patent rights in such person as it may appoint (*m*).

SUB-SECT. 8.—*Surrender of Patent to Crown.*

Intestacy of patentee or dissolution of company.

393. On the death of a patentee who dies intestate and without next of kin, or on the dissolution of a company which is the registered owner of a patent, the patent vests in the Crown (*n*).

SECT. 7.—*Licences.*

SUB-SECT. 1.—*Voluntary Licence.*

(i.) *Nature.*

Who may be licensors.

394. A licence to work and use a patent (*o*) may be granted by

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6 B. & C. 169; *M'Alpine* v. *Mangnall* (1846), 3 C. B. 496; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 161. A patent granted to a bankrupt before his discharge vests in the trustee (*Hesse* v. *Stevenson* (1808), 3 Bos. & P. 565).

(*h*) *Bloxam* v. *Elsee* (1827), 6 B. & C. 169. In an action for infringement and for an account of profits against a bankrupt the trustee may be made a defendant under R. S. C., Ord. 17, r. 4, and the amount of profits therein found due is a provable debt in the bankruptcy (*Watson* v. *Holliday* (1882), 20 Ch. D. 780; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 136).

(*i*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 37, 71. As to the death of a person possessed of an invention without having made application for a patent, see *ibid.*, s. 43; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 227, 228.

(*k*) See *Steers* v. *Rogers*, [1893] A. C. 232.

(*l*) Under the Trustee Act, 1893 (56 & 57 Vict. 53), s. 35; see title TRUSTS AND TRUSTEES.

(*m*) *Re Heath's Patent* (1912), 29 R. P. C. 389; 56 Sol. Jo. 538, *per* SWINFEN EADY, J. (where the grantee of the patent had gone abroad and could not be found); compare *Re Taylor's Agreement Trusts*, [1904] 2 Ch. 737.

(*n*) Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18); Intestates Estates Act, 1884 (47 & 48 Vict. c. 71); and see titles CONSTITUTIONAL LAW, Vol. VII., p. 158; DESCENT AND DISTRIBUTION, Vol. XI., p. 30. A purchaser of a patent from the liquidators of a company which is the registered owner of a patent should be careful to obtain the execution of the assignment before dissolution of the company (*Re Taylor's Agreement Trusts*, *supra*). It would appear that a patent merges as soon as the legal interest vests in the Crown (*ibid.*, *per* BUCKLEY, J., at p. 742; compare *Re Higginson and Dean, Ex parte A.-G.*, [1899] 1 Q. B. 325).

(*o*) As to the meaning of "patent," see p. 127, *ante*. The licence may be in respect of an invention for which a patent has been applied for, but which has not yet been granted (*Otto* v. *Singer* (1889), 7 R. P. C. 7; 6 T. L. R. 52).

the patentee (*a*), or by one of several co-owners (*b*), or by the mortgagee of a patent (*c*).

Nature of licences.

395. A licence may be express or implied, revocable or irrevocable (*d*), assignable or not assignable (*e*), or general, limited, or exclusive.

A licence is implied from an unconditional sale of a patented article which gives the purchaser the right to use it in any way he chooses (*f*).

A licence may be limited either as to time or place (*g*), or as to the manufacture or use alone of an article (*h*), or as to the use in a particular manner (*i*).

An exclusive licence is a licence whereby the patentee covenants to grant no licences other than to the licensee during the term of the licence (*k*); and it may be limited as to time or place.

(*a*) The power to grant licences is given by the grant of the letters patent (Patents Rules, 1908, rr. 49,50, Form A; Encyclopædia of Forms and Precedents, Vol. X., p. 167; and see *ibid.*, Vol. XVI., p. 494. For forms of agreement for licences, see *ibid.*, Vol. X., pp. 115 *et seq.*, and for forms of licence, see *ibid.*, pp. 139 *et seq.*

(*b*) The power of a co-owner to grant a licence without the consent of the other co-owners depends in each case on the words in the patent (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 37: compare *Mathers* v. *Green* (1865), 1 Ch. App. 29; *Powell* v. *Head* (1879), 12 Ch. D. 686). It would seem that a co-owner must account for the profits made by granting a licence (*Mathers* v. *Green*, *supra*); and see p. 187, *ante*.

(*c*) In an action for redemption, a mortgagee is liable to account for royalties made by granting a licence as being profits made by him as mortgagee in possession (*Steers* v. *Rogers* (1892), 9 R. P. C. 177, C. A.; [1892] 2 Ch. 13; affirmed (1893), 10 R. P. C. 245, H. L.; [1893] A. C. 232); and see title MORTGAGE, Vol. XXI., p. 199, note (*u*).

(*d*) See p. 195, *post*.

(*e*) See note (*g*), p. 195, *post*.

(*f*) *National Phonograph Co. of Australia, Ltd.* v. *Menck*, [1911] A. C. 336, P. C., following *Betts* v. *Willmott* (1871), 6 Ch. App. 239; *Incandescent Gas Light Co.* v. *Cantelo* (1895), 12 R. P. C. 262; 11 T. L. R. 381. In order to bind a purchaser, any restrictions must be brought to his mind at the time of the sale (*Incandescent Gas Light Co.* v. *Cantelo*, *supra*); and, as to estoppel, see title ESTOPPEL, Vol. XIII., p. 413.

(*g*) *Société Anonyme des Manufactures de Glaces* v. *Tilghman's Patent Sand Blast Co.* (1883), 25 Ch. D. 1, C. A.

(*h*) *Basset* v. *Graydon* (1897), 14 R. P. C. 701, H. L. A full licence to use and exercise gives the purchaser a general licence, as if the words "make, use, exercise and vend" had been included (*Dunlop Pneumatic Tyre Co.* v. *North British Rubber Co.* (1904), 21 R. P. C. 161, C. A., *per* STIRLING, L.J., at p. 183). Under a licence to manufacture and sell, a licensee is entitled to manufacture by his agent, who may be either an English or a foreign agent (*ibid.*).

(*i*) *Société Anonyme pour la Fabrication d'Appareils d'Eclairage* v. *Midland Lighting Co. and Altendorf and Wright* (1897), 14 R. P. C. 419.

(*k*) An exclusive licence may be an assignment if it is irrevocable and imposes obligations both on the grantor and grantee, and if there is no clause reserving to the grantor the right to sue for infringements (*Guyot* v. *Thomson* (1894), 11 R. P. C. 541, C. A., *per* LINDLEY, L.J., at p. 554; [1894] 3 Ch. 388; compare *Heap* v. *Hartley* (1888), 5 R. P. C. 603, *per* BRISTOWE, V.-C., at p. 608; affirmed (1889), 6 R. P. C. 495, C. A.; 42 Ch. D. 461). As to the incidents of a licence coupled with an interest, see and compare titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 362; LANDLORD AND TENANT, Vol. XVIII., pp. 338, 339; MINES, MINERALS, AND QUARRIES, Vol. XX., p. 568; REAL PROPERTY AND CHATTELS REAL.

SECT. 7. Licences.

Crown in same position as licensee.

396. The Crown has power to use any invention on such terms as may be settled by the Treasury, either by agreement or after hearing the parties, and is in the same position as an ordinary licensee (*l*).

(ii.) *Formalities.*

Form.

397. A licence should be granted by deed (*m*), but may be granted by an agreement either in writing not under seal (*n*) or by word of mouth (*o*). It may be entered in the Register (*p*), and must be stamped (*q*).

Usual provisions.

398. It is usual for the licensor to covenant that the patent is valid so far as his acts or omissions are concerned (*r*), that he has power to grant the licence, and that if he grants licences to other persons on more favourable terms the licensee shall have the benefit of such

(*l*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 29. The Crown may act by any Government department, their agents, contractors or others (*ibid.*); but contractors who manufacture and supply a patented article without a licence, in answer to a tender by a Government department, are not Government contractors unless they act under a contract with a Government department (*Dixon* v. *London Small Arms Co.* (1876), 1 App. Cas. 632). The patentee's remedy is by petition of right (*Feather* v. *R.* (1865), 6 B. & S. 257); see title CROWN PRACTICE, Vol. X., pp. 26 *et seq.*

(*m*) The grant of letters patent provides that no person shall use the invention without the licence of the patentee under his hand and seal, but this must be read with the proviso that nothing in the patent shall prevent the granting of licences in such manner and for such considerations as they may by law be granted (Patents Form A; see *Chanter* v. *Dewhurst* (1844), 12 M. & W. 823).

(*n*) The court will uphold an agreement in writing if the licensee has received benefit from it and has worked or used the patented article under the agreement (*Chanter* v. *Dewhurst, supra*; *Post Card Automatic Supply Co.* v. *Samuel* (1889), 6 R. P. C. 560). In the case of an executory agreement made subject to the execution of a formal deed, the parties to the agreement, when they have altered their position, are in equity in the same position as if the deed had been executed (*Post Card Automatic Supply Co.* v. *Samuel, supra*; *Tweedale* v. *Howard and Bullough, Ltd.* (1896), 13 R. P. C. 522); and see title SPECIFIC PERFORMANCE.

(*o*) The court will likewise uphold a parol agreement under which the licensee has received benefit or has worked or used the patented article (*Crossley* v. *Dixon* (1863), 10 H. L. Cas. 293; *Coppin* v. *Lloyd, Coppin* v. *Palmer* (1898), 15 R. P. C. 373).

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 28, 71 (2); Patents Rules, 1908, rr. 85—91; see p. 180, *ante*. Registration does not give a title to a licensee as against a prior assignee, who registers his assignment subsequent to the grant of the licence, if the licensee had notice of the assignment (*New Ixion Tyre and Cycle Co.* v. *Spilsbury*, [1898] 2 Ch. 137, 484, C. A.).

(*q*) *Smelting Co. of Australia* v. *Inland Revenue Commissioners*, [1897] 1 Q. B. 175, C. A. (if by deed, as a deed; see title REVENUE). An agreement in writing must be stamped before it can be received in evidence (*Wilson* v. *Union Oil Mills Co.* (1891), 9 R. P. C. 57, 62; compare *Chanter* v. *Johnson* (1845), 14 M. & W. 408; and see title REVENUE).

(*r*) It is usually provided in a licence that the licence shall cease and determine if the invention is declared invalid; see *Cheetham* v. *Nuttall* (1893), 10 R. P. C. 321. But if the judgment of the court declaring the invention to be invalid is subsequently reversed (by consent or otherwise) the licence is not terminated (*ibid.*).

terms (*a*); and for the licensee to covenant that he will pay the royalties as they become due (*b*), render accounts, and if necessary allow the licensor to inspect the premises and machinery (*c*).

(iii.) *Prohibited Conditions.*

Prohibited conditions as to use of patented articles.

399. It is unlawful to insert in a contract for the sale or lease of, or licence to use or work any article or process protected by, a patent (*d*), a condition which prohibits a purchaser, lessee or licensee from using (*e*) any article, whether patented or not, or any patented process, supplied or owned by any person other than the seller, lessor, or licensor, or his nominees (*f*), or which requires the purchaser, lessee, or licensee to acquire from the seller, lessor, or licensor, or his nominees, any other article not protected by the patent (*g*). But this prohibitive provision does not apply if the seller, lessor, or licensor proves that, at the time the contract was entered into, the purchaser, lessee, or licensee had the option of purchasing the article or of obtaining a lease or licence on reasonable terms without such conditions, and the contract entitles the purchaser, lessee, or licensee to relieve himself of his liability to observe any such condition by giving three months' notice in writing to the other party (*h*). Such a contract may, in any case, be determined by three months' notice in writing at any time after the expiration of the patent under which the article was protected at the date of the contract (*i*).

(*a*) *Cheetham* v. *Nuttall* (1893), 10 R. P. C. 321.

(*b*) The licence usually contains a proviso to the effect that default in payment by the licensee shall determine the licence.

(*c*) As to conditions prohibited by statute, see the text, *infra*.

(*d*) Every contract made after the 28th August, 1907, is subject to Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 38 (*ibid.*, s. 38 (1)); and every contract made before the 28th August, 1907, for the lease of or licence to use or work any patented article or process which, had the contract been made after the 28th August, 1907, would, by *ibid.*, s. 38, have been null and void, may be determined by three months' notice in writing, subject to the party giving notice paying such compensation as may be either agreed upon or awarded by an arbitrator appointed by the Board of Trade (*ibid.*, s. 38 (3)). As to contracts in restraint of trade, see title TRADE AND TRADE UNIONS.

(*e*) But a condition is not void because a person is prohibited from selling any goods other than those of a particular person (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 38 (5) (a)).

(*f*) A lessor or licensor may reserve to himself or his nominees the right to supply new parts in order to put or keep the article in repair (*ibid.*, s. 38 (5) (d)). As to repairs amounting to infringement, see p. 212, *post*.

(*g*) *Ibid.*, s. 38 (1) (a), (b).

(*h*) The person giving notice must pay such compensation as may be either agreed upon or awarded (*ibid.*, s. 38 (1) (ii.)).

(*i*) *Ibid.*, s. 38 (2). This applies to every contract made either before or after the 28th August, 1907; but, in the case of a contract made before the 28th August, 1907, the party giving notice is liable to pay compensation (*ibid.*). The insertion in a contract made after the 28th August, 1907, of a void condition is a good defence to an action for infringement (*ibid.*, s. 38 (4)). Nothing in *ibid.*, s. 38, is to affect any independent right of determining a contract (*ibid.*, s. 38 (5) (c)).

SECT. 7. Licences.

(iv.) *Rights and Obligations of Licensee.*

Right to sue. Estoppel.

400. A licensee suing for infringement must join the licensor as a party to the proceedings (*j*).

A licensee by deed cannot during the term of the licence (*k*) dispute the validity of the patent (*l*) unless the licensor has expressly warranted validity (*m*); but he may do so if the agreement is not under seal and he has not actually used the invention (*n*), or if he is the equitable assignee of an exclusive licence (*o*); and he is in any case entitled to dispute the ambit of the licensor's invention,

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(*j*) *Heap* v. *Hartley* (1889), 42 Ch. D. 461, C. A., *per* FRY, L.J., at p. 470. As to the right of an exclusive licensee to sue alone, see *Renard* v. *Levinstein* (1865), 2 Hem. & M. 628; *Cochrane & Co.* v. *Martins (Birmingham), Ltd.* (1911), 28 R. P. C. 284; and see p. 191, *ante*. In *Heap* v. *Hartley, supra*, PAGE WOOD, V.-C., held that where the owners and licensees of a patent were co-plaintiffs, and the owners assigned their interest, the licensees were not prevented from obtaining the relief to which they were entitled and maintaining the suit alone. But it should be noted that the new owners were added to the suit as defendants. In *Cochrane & Co.* v. *Martins (Birmingham), Ltd., supra*, it was held that under an exclusive licence the patentee's title is given to the licensee for the purpose of action. The defendant, however, had withdrawn his plea that the licensee was not entitled to sue. A licence coupled with a grant is different, since it conveys an interest in property.

(*k*) *Crossley* v. *Dixon* (1863), 10 H. L. C. 293; *Rodgers* v. *Mullinor* (1893), 10 R. P. C. 21. The licensee may, however, covenant not to dispute the validity of the patent even after termination of the licence, in which case his only defence in an action by the licensor is non-infringement (*Watts* v. *Everett Press Manufacturing Co.* (1910), 27 R. P. C. 400, 718, C. A.). Subject to such a condition a licensee on the determination of the licence is as much at liberty to dispute the validity of the patent as the rest of His Majesty's subjects (*Axmann* v. *Lund* (1874), L. R. 18 Eq. 330; see title ESTOPPEL, Vol. XIII., p. 413, note (*b*)).

(*l*) *Hall* v. *Conder* (1857), 2 C. B. (N. S.) 22; *Smith* v. *Scott* (1859), 6 C. B. (N.S.) 771; *Clark* v. *Adie* (No. 2) (1877), 2 App. Cas. 423; *Ashworth* v. *Law* (1890), 7 R. P. C. 231. The grant of a licence does not warrant the validity of the patent (*Hall* v. *Conder, supra*), nor the fitness of the articles sold under it, for the purposes of such sale (*Chanter* v. *Hopkins* (1838), 4 M. & W. 399; and see *Monforts* v. *Marsden* (1895), 12 R. P. C. 266). As to sale of goods generally, see title SALE OF GOODS. A licensee may be estopped from denying the validity of the patent by way of recital (*Cutler* v. *Bower* (1848), 11 Q. B. 973; *Bowman* v. *Taylor* (1834), 2 Ad. & El. 278; compare *Hayne* v. *Maltby* (1789) 3 Term Rep. 438), or by implied covenant (*Baird* v. *Neilson* (1842), 8 Cl. & Fin. 726, H. L.; *Hills* v. *Laming* (1853), 9 Exch. 256; *Noton* v. *Brooks* (1861), 7 H. & N. 499; *Hall* v. *Conder, supra*, at p. 53; *Trotman* v. *Wood* (1864), 16 C. B. (N. S.) 479; *Liardet* v. *Hammond Electric Light and Power Supply Co.*, [1883] W. N. 96), or by user under the licence *Lawes* v. *Purser* (1856), 6 E. & B. 930; *Besseman* v. *Wright* (1858), 6 W. R. 719; *Crossley* v. *Dixon* (1863), 10 H. L. Cas. 293 (user under a licence granted verbally)); and see title ESTOPPEL, Vol. XIII., pp. 366, *et seq.* 413. Where an agreement to grant a licence guarantees the validity of the patent, and the person to whom the licence is to be granted commences to manufacture before the actual grant of the licence, he is not estopped from denying the validity of the patent (*Henderson* v. *Shiels* (1906), 24 R. P. C. 108). But it would seem that if the licence had actually been granted the doctrine of estoppel would apply (*Henderson* v. *Shiels, supra, per* PARKER, J., at pp. 115, 116).

(*m*) *Wilson* v. *Union Oil Mills Co., Ltd.* (1892), 9 R. P. C. 57.

(*n*) *Chanter* v. *Leese* (1838), 4 M. & W. 295.

(*o*) *Pidding* v. *Franks* (1849), 1 Mac. & G. 56.

and to show that what he has done is outside the limit covered by the patent (*p*).

(v.) *Assignment.*

Assignment of licence.

401. A licence may be assigned (*q*), and where a patentee accepts royalties from the assignee he may be estopped from denying the validity of the assignment (*r*).

(vi.) *Revocation.*

By express terms.

402. The terms of a licence may make it revocable (*a*), but, in the absence of such terms, and where it is clear that the intention of the parties to the agreement is that the licence should be irrevocable, neither party can terminate the licence without the other party's consent (*b*).

By implication.

A mere licence is determinable at pleasure (*c*), but a licence imposing obligations on both parties (*d*), or coupled with an interest, is not revocable at will (*e*).

(*p*) *Crossley* v. *Dixon* (1863), 10 H. L. Cas. 293; *Clark* v. *Adie* (No. 2) (1877), 2 App. Cas. 423: *Couchman* v. *Greener* (1884), 1 R. P. C. 197, H. L.; *Useful Patents Co.* v. *Rylands* (1885), 2 R. P. C. 255; *Siemens* v. *Taylor* (1892), 9 R. P. C. 393. A licensee may likewise contest the existence of the invention (*Muirhead* v. *Commercial Cable Co.* (1894), 11 R. P. C. 317; 12 R. P. C. 39). Inspection may be ordered against a licensee where the machine, the subject-matter of the dispute, is being worked either by the licensor or licensee, unless the licensee objects; the court has no control over a licensee who is not a party to the suit (*Germ Milling Co.* v. *Robinson* (1885), 3 R. P. C. 11, *per* KAY, J., at p. 14).

(*q*) A licence is not really assignable (*Bower* v. *Hodges* (1853), 22 L. J. (C. P.) 194, *per* JERVIS, C.J., at p. 198, cited with approval in *Lawson* v. *Macpherson* (*Donald*) *& Co., Ltd.* (1897), 14 R. P. C. 696), but a licence granted to A. and his assigns shows an intention not to limit the licence to the licensee exclusively, and acts as an estoppel, giving an assignee a good defence against the original licensor (*Bower* v. *Hodges*, *supra*; *Lawson* v. *Macpherson* (*Donald*) *& Co., Ltd.*, *supra*). A licensee may convert his business (including the benefit of the licence) into a limited company (*Bown* v. *Humber & Co.* (1888), 6 R. P. C. 9), and to that extent a licence may also be said to be assignable (*Lawson* v. *Macpherson* (*Donald*) *& Co., Ltd.*, *supra*). For a form of mortgage of a licence, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 693.

(*r*) *Lawson* v. *Macpherson* (*Donald*) *& Co., Ltd.*, *supra*. As to assignment of a patent, see pp. 183 *et seq.*, *ante*; and as to estoppel, see notes (*k*), (*l*), p. 194, *ante*. As to royalties, see p. 196, *post*.

(*a*) A clause giving a power of revocation to one party only does not give the other party power to determine the licence (*Guyot* v. *Thomson* (1894), 11 R. P. C. 541, C. A.; [1894] 3 Ch. 388; *Cutlan* v. *Dawson* (1897), 14 R. P. C. 249). For a form of notice of revocation, see Encyclopædia of Forms and Precedents, Vol. X., pp. 165, 166. As to the effect of a clause that the licence shall determine if the patent is declared invalid, see note (*r*), p. 192, *ante*.

(*b*) *Kenny's Patent Buttonholeing Co.* v. *Somervell* (1878), 26 W. R. 787.

(*c*) *Wood* v. *Leadbitter* (1845), 13 M. & W. 838; *Crossley* v. *Dixon* (1863), 10 H. L. Cas. 293; followed in *Redges* v. *Mulliner* (1892), 10 R. P. C. 21; *Coppin* v. *Lloyd*, *Coppin* v. *Palmer* (1898), 15 R. P. C. 373; but, where a licence revocable at will has been revoked by one of the parties, the circumstances may give the other party a cause of action for breach of contract (*Kerrison* v. *Smith*, [1897] 2 Q. B. 445).

(*d*) *Guyot* v. *Thomson*, [1894] 3 Ch. 388, C. A. A licence to use a patent coupled with obligations on the grantor and grantees is not necessarily a licence coupled with an interest (*ibid.*, *per* LINDLEY, L.J., at pp. 397, 398).

(*e*) *Wood* v. *Leadbitter*, *supra*; *Ward* v. *Livesey* (1887), 5 R. P. C. 102.

SECT. 7. Licences.

(vii.) *Royalties.*

Effect of failure to pay royalties.

403. A licensee who fails to pay the royalties reserved by the licence is liable to an action by the licensor for their recovery (*f*), and it is no defence that the patent has been declared void unless there was a covenant by the licensor to the effect that he had power to grant the licence and that the patent was valid (*g*). The only defence open to the licensee is that he was induced to take the licence by fraud or misrepresentation (*h*).

A licensee may be entitled to recover royalties he has paid after and in ignorance of a breach of covenant by the licensor (*a*).

A licence coupled with an interest is liable to forfeiture if the conditions are broken (*Ward* v. *Livesey* (1887), 5 R. P. C. 102), in which case the claim to take the benefit of the forfeiture and to assert the termination of the licence need only be in writing, although the licence is under seal (*Ward* v. *Livesey, supra*; and see note (*k*), p. 191, *ante*). It would appear that a revocation of a licence under seal, other than by forfeiture, must be by deed (*Ward* v. *Livesey, supra*); and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 362.

(*f*) A licensor, who is successful in such an action, may obtain an account against the licensee, but an account is not granted unless there are profits to account for, and unless all the parties interested are before the court (*Bergmann* v. *Macmillan* (1881), 17 Ch. D. 423). Interest may be payable by the licensee if the royalties in arrear are a sum certain, payable at a certain time fixed definitely by the instrument itself (*Muirhead* v. *Commercial Cable Co.* (1894), 11 R. P. C. 317, *per* KENNEDY, J., at p. 347, following *Merchant Shipping Co.* v. *Armitage* (1873), L.R. 9 Q. B. 99, Ex. Ch.; *Duncombe* v. *Brighton Club Co.* (1875), L. R. 10 Q. B. 371, *per* BLACKBURN, J., at p. 373); and see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 38, 39.

(*g*) *Grover and Baker Sewing Machine Co.* v. *Millard* (1862), 8 Jur. (N. S.) 713. A licensee under a licence without such a clause, and for a certain term, is bound to pay royalties until the term expires, although the patent has been declared void (*African Gold Recovery Co.* v. *Sheba Gold Mining Co.* (1897), 14 R. P. C. 660). In the absence of express covenant to maintain the patent, there is no obligation on a licensee to pay the fees necessary for that purpose (*Re Railway and Electric Appliances Co.* (1888), 38 Ch. D. 597; and see note (*o*), p. 185, *ante*).

(*h*) *Jandus Arc Lamp and Electric Co.* v. *Johnson* (1900), 17 R. P. C. 361; and see *Hall* v. *Conder* (1857), 2 C. B. (N. S.) 22; *Lawes* v. *Purser* (1856), 6 E. & B. 930; title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 653 *et seq.* A licensee cannot seek to dispute the validity of the patent under a plea of misrepresentation (*Jandus Arc Lamp and Electric Co.* v. *Johnson, supra, per* FARWELL, J., at p. 373); but where a licence is granted subject to an inquiry as to the validity of the patent the licensee can, in an action for royalties, dispute the validity of the patent (*Wilson* v. *Union Oil Mills Co.* (1891), 9 R. P. C. 57).

(*a*) The licensee's right to recover is a question of construction as to what is the meaning of the parties at the time in the particular case (*Mills* v. *Carson* (1892), 10 R. P. C. 9, C. A., *per* Lord ESHER, M.R., at p. 15; *Lines* v. *Usher* (1897), 14 R. P. C. 206, C. A., *per* Lord ESHER, M.R., at p. 209, affirming the judgment of CHARLES, J., S. C. (1896), 13 R. P. C. 685). In *Lines* v. *Usher, supra*, the licensor undertook to protect and defend his patent during the continuance of the agreement from infringements. The court held that to mean that the licensor would do all that was necessary to maintain and keep the patent alive, and that a failure to pay renewal fees was a breach of this agreement, and that the result was, not damages, but forfeiture of the royalties payable under it (S. C., 14 R. P. C., *per* LOPES, L.J., at p. 210). In *Mills* v. *Carson, supra* (distinguished in *Lines* v. *Usher*, 13 R. P. C., *supra, per* CHARLES, J., at p. 689), it was held that although the failure to pay renewal fees was a breach of the covenant for

SUB-SECT. 2.—*Compulsory Licence.* SECT. 7. Licences.

(i.) *Petition to Board of Trade.*

404. Any person interested may present a petition to the Board of Trade alleging that the reasonable requirements of the public with respect to a patented invention have not been satisfied, and praying for the grant of a compulsory licence, or, in the alternative, for the revocation of the patent (*b*). Allegation in petition.

The reasonable requirements of the public are not deemed to have been satisfied if— Grounds upon which allegation based.

(1) By reason of the default of the patentee to manufacture, to an adequate extent and to supply on reasonable terms, the patented article, or any parts thereof which are necessary for its efficient working, or to carry on the patented process to an adequate extent, or to grant licences on reasonable terms, any existing trade or industry, or the establishment of any new trade or industry, in the United Kingdom is unfairly prejudiced, or the demand for the patented article or the article produced by the patented process is not reasonably met; or

(2) Any trade or industry in the United Kingdom is unfairly prejudiced by the conditions attached by the patentee to the purchase, hire, or use of the patented article or to the using or working of the patented process (*c*).

(ii.) *Proceedings before Board of Trade.*

405. The petition and an examined copy of it must be left at the Patent Office with a request on the prescribed form, and must be accompanied by affidavits or statutory declarations in proof of the allegations contained in the petition, together with any other documentary evidence in support (*d*). Copies of all these documents must be delivered to the patentee and to any other person who is alleged to have made default (*d*). These persons may give notice of opposition to the petition, by leaving the prescribed form at the Patent Office, and may, within fourteen days after being invited to do so by the Board, leave their affidavits or declarations in answer, delivering copies to the petitioner, who may reply to them in the same way within fourteen days, confining himself to matters strictly in Evidence in support of petition.

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quiet enjoyment, yet on the construction of the agreement the covenant for quiet enjoyment and the covenant to pay royalties were not sufficiently co-extensive to make the one condition precedent to the other; and, further, where there are express conditions on which payment is to cease, the court does not infer other conditions not in the agreement (*Mills* v. *Carson* (1892), 10 R. P. C. 9, C. A., *per* Lord ESHER, M.R., at p. 15).

(*b*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 24 (1).

(*c*) *Ibid.*, s. 24 (5). Such a petition, which must be made on Patents Form No. 20, must show clearly the nature of the petitioner's interest and the grounds upon which he claims to be entitled to relief, and must state in detail the circumstances of the case, the terms upon which he asks that an order may be made and the purport of such order, and the name and address of the patentee and of any other person who is alleged in the petition to have made default (Patents Rules, 1908, r. 68). For a form of notice to the patentee of intention to present such a petition, see Encyclopædia of Forms and Precedents, Vol. X., p. 165.

(*d*) Patents Rules, 1908, r. 69. The request is made on Patents Form No. 19 (fee £1).

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reply (*e*). No further evidence may be left except by the leave or requisition of the Board (*f*).

Powers of the Board of Trade.

406. The Board of Trade, if not satisfied that a *primâ facie* case has been made out for proceeding further with the petition, has power to dismiss it (*g*). If so satisfied, the Board may first attempt to bring about an agreement between the parties (*h*), failing which agreement it must refer the petition to the court (*i*), with all documentary evidence, and with certified copies of all entries in the Register relating to the patent in question and any other information which it appears to the Board may be of service to the court in ascertaining what persons should be made parties to the proceedings. The Board must give notice to the parties that the petition has been referred to the court (*j*).

Reference to the court.

(iii.) *Powers of the Court.*

Hearing.

407. The court hears the petition so referred (*k*), and, at the hearing, the patentee and any other person claiming an interest in the patent as exclusive licensee or otherwise are made parties to the proceeding, and the law officer, or counsel representing him, is entitled to appear and be heard (*l*).

Order of the court.

408. If it is proved to the satisfaction of the court that the reasonable requirements of the public have not been satisfied, the patentee may be ordered to grant licences on such terms as the court may think just; or, if the court is of opinion that the reasonable requirements of the public will not be satisfied by the grant of licences, the patent may be revoked by order of the court, but such order is not to be made before the expiration of three years from the date of the patent, or if the patentee gives satisfactory reasons for his default (*m*).

Effect of order.

409. An order of the court directing the grant of a licence, without prejudice to any other method of enforcement, operates as if it were embodied in a deed granting a licence and made between the parties to the proceedings (*n*).

SECT. 8.—*Term of Patent.*

SUB-SECT. 1.—*Duration of Original Grant.*

Term of patent.

410. The term limited in every patent for the duration thereof is, unless otherwise expressly provided, fourteen years from its date (*o*).

(*e*) Patents Rules, 1908, r. 70. The Board may alter the times prescribed for the hearing of evidence upon terms and upon notice to the parties interested (*ibid.*).

(*f*) *Ibid.*, r. 71.

(*g*) *Ibid.*, r. 72.

(*h*) *Ibid.*, r. 73.

(*i*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 24 (2).

(*j*) Patents Rules, 1908, r. 74.

(*k*) See the text, *supra*. As to setting down and the hearing of the petition, see R. S. C., Ord. 53A, r. 7 (c), (d).

(*l*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 24 (4); and see R. S. C., Ord. 53A, r. 7 (b). No evidence may be given upon any issues other than those raised upon the original petition (*ibid.*, r. 7 (a)).

(*m*) Patents and Designs Act, 1907 (7 Edw 7, c. 29), s. 24 (3).

(*n*) *Ibid.*, s. 24 (6). As to the operation of such a deed, see pp. 194, 195, *ante*.

(*o*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 17 (1).

SUB-SECT. 2.—*Extension of Term.*

SECT. 8. Term of Patent.

411. A patentee may (*p*), after advertising, in manner provided (*q*) by Rules of the Supreme Court (*r*), his intention to do so,

Application by petition to the court.

As to the maintenance of a patent during these years, see pp. 181 *et seq.*, *ante*.

(*p*) The petitioner may be the administratrix of the patentee (*Re Downton's Patent* (1839), 1 Web. Pat. Cas. 565, P. C.; *Re Heath's Patent* (1853), 8 Moo. P. C. C. 217), or his executor (*Re Bodmer's Patent* (1849), 6 Moo. P. C. C. 468; *Re Davies's Patent* (1893), 11 R. P. C. 27, P. C.), or an assignee (*Re Morgan's Patent* (1843), 1 Web. Pat. Cas. 737, P. C.; *Ledsam* v. *Russell* (1848), 1 H. L. Cas. 687; *Re Hardy's Patent* (1849), 6 Moo. P. C. C. 441; *Re Pitman's Patent* (1871), 8 Moo. P. C. C. (N. S.) 293, 297), a company (*Re Napier's Patent* (1861), 13 Moo. P. C. C. 543), or its trustees (*Re Pettit Smith's Patent* (1850), 7 Moo. P. C. C. 133), the agent for a foreign inventor (*Re Newton's Patent* (1861), 14 Moo. P. C. C. 156), the importer of a foreign invention (*Re Claridge's Patent* (1851), 7 Moo. P. C. C. 394), a mortgagee applying with the patentee (*Re Bovill's Patent* (1863), 1 Moo. P. C. C. (N. S.) 348; *Re Church's Patents* (1886), 3 R. P. C. 95, 100, P. C.), or an exclusive licensee (*Re Shone's Patent* (1892), 9 R. P. C. 438, 440, P. C.). For definition of "patentee," see Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 93. The application of a company formed for taking over the invention as a speculative undertaking will, however, be refused (*Re Sillar's Patent* (1882), 1 Goodeve's Patent Cases, 581; *Re Duncan* v. *Wilson's Patent* (1884), 1 R. P. C. 257, P. C.; *Re Norton's Patent* (1863), 1 Moo. P. C. C. (N. S.) 339; *Re Hopkinson's Patent* (1896), 14 R. P. C. 5, P. C.; *Re Clark's Patent* (1899), 16 R. P. C. 431, P. C.).

(*q*) The court may excuse non-compliance with any of the rules, and may give such directions as may be just and expedient (R. S. C., Ord. 53A, r. 3 (8)). For cases in which rules have been relaxed, see note (*r*), *infra*. Non-compliance with any provision of the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), cannot be excused; see *Re Adam's Patent* (1898), 16 R. P. C. 1, P. C.

(*r*) R. S. C., Ord. 53A, r. 3, commented on in *Re Johnson's Patent*, [1908] 2 Ch. 487. A party intending to apply by petition must give public notice by advertising three times in the *London Gazette* and once at least in a London daily newspaper the price of which is not less than one penny (R. S. C., Ord. 53A, r. 3 (a)); and if his principal place of business is situated in the United Kingdom, fifteen miles or more from Charing Cross, he must also advertise once at least in a local newspaper circulating in the district where such place of business is situated. If he has no such place of business, then if he carries on the manufacture of anything made under his specification in the United Kingdom, fifteen miles or more from Charing Cross, he must advertise once at least in a local newspaper circulating in the district where he carries on such manufacture. If he has no such place of business and carries on no such manufacture, then if he resides in the United Kingdom, fifty miles or more from Charing Cross, he must advertise once at least in a newspaper circulating in the district where he resides; see *ibid.*, r. 3 (b); *Re Lindon's Patent* (1897), 14 R. P. C. 643, P. C.; *Re Poyser's Patent* (1907), 24 R. P. C. 157, P. C. (where petitions were allowed to be presented before they had been advertised, on terms). In the case of a patentee residing abroad the advertisements should be inserted in newspapers circulating in the place of actual manufacture (*Re Derosne's Patent* (1844), 2 Web. Pat. Cas. 1, 2, P. C.). The applicant must in his advertisements state the object of his petition and give notice of the day (*i.e.*, an ordinary petition day not less than four weeks from the date of publication of the last of the advertisements in the *London Gazette*) on which he intends to apply to the court for a day to be fixed (hereinafter called "the appointed day" (see note (*d*), p. 201, *post*)), before which the petition shall not be in the paper for hearing. Every advertisement must also state an address in the United Kingdom for service and give notice that notices of objection (see note (*f*), p. 201, *post*) must be duly lodged

SECT. 8. Term of Patent.

present a petition (*s*) to the court (*t*) praying that his patent may be extended for a further term, but such petition must be presented at least six months before the time limited for the expiration of the patent (*a*).

before the day named in the advertisements. A copy of such advertisements must be forwarded by the applicant to the solicitor to the Board of Trade when the first advertisement is sent to the *London Gazette*, and the Board of Trade thereupon causes such advertisement to be inserted in the three following issues of the Illustrated Official Journal (Patents) (R. S. C., Ord. 53A, r. 3 (b), (c)).

(*s*) The petition must state fully everything with reference to the patent and the history of the matter, or it will be refused (*Re Pitman's Patent* (1871), L. R. 4 P. C. 84; *Re Johnson's Patent* (*Willcox and Gibbs*) (1871), L. R. 4 P. C. 75, 83; *Re Ferranti's Patent* (1901), 18 R. P. C. 518, P. C.; *Re Standfield's Patent* (1897), 15 R. P. C. 17, P. C.); it must refer, where necessary, to prior or foreign patents (*Re Livet's Patent* (1892), 9 R. P. C. 327, P. C.; *Re Henderson's Patent* (1901), 18 R. P. C. 449, 453, 454, P. C.; *Re Pitman's Patent, supra*; *Re Adair's Patent* (1881), 6 App. Cas. 176, P. C.; *Re Clark's Patent* (1870), 7 Moo. P. C. C. (N. S.) 255; *Re Johnson's Patent* (1908), 25 R. P. C. 709, 728; 77 L. J. (CH.) 737). *Uberrima fides* must be observed (*Re Horsey's Patent* (1884), 1 R. P. C. 225, 226. P. C.). In special circumstances an amendment may be allowed (*Re Hutchinson's Patent* (1861), 14 Moo. P. C. C. 364). The petition must be accompanied by an affidavit as to publication of the advertisements referred to in note (*r*), p. 199, *ante*. The statements contained in such affidavit may be disputed at the hearing of the petition (R. S. C., Ord. 53A, r. 3 (e)). The advertisements must be proved before the petition is tried (*Re Perkins' Patent* (1845), 2 Web. Pat. Cas. 6, 8, P. C.).

(*t*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 18. *I.e.*, a judge of the High Court selected by the Lord Chancellor for the purpose (*ibid.*, s. 92 (2); see R. S. C., Ord. 53A, r. 1; Yearly Practice of the Supreme Court, 1912, p. 754).

(*a*) But it should not be presented prematurely; for the profits accruing at the close of the life of the patent may materially affect the question of extension (*Re Macintosh's Patent* (1837), 1 Web. Pat. Cas. 739, n., where, the petition having been presented eighteen months before the expiry of the patent, the application was ordered to stand over). Failure to present the petition before the six months commences is fatal (*Re Adam's Patent* (1898), 16 R. P. C. 1, P. C.; *Re Jablochkoff's Patent* (1891), 8 R. P. C. 281, P. C.; but see *Russell* v. *Ledsam* (1848), 1 H. L. Cas. 687). A petition must be presented within one week from the publication of the last of the advertisements in the *London Gazette*, and a copy of the petition must within the same time be furnished to the solicitor to the Board of Trade. The petition is made returnable for the day named in the advertisements (R. S. C., Ord. 53A, r. 3 (d)). In *Re Hutchison's Patent, supra*, this rule was relaxed. In *Reece's Patent* (1881), Eng. Rep. Jan.—Mar. 1881, xiv., a supplementary statement was allowed to be delivered before the hearing to correct mistakes in the petition. Presentation is effected by the original petition and a copy thereof being taken to Room 138, Chancery Registrar's Department. The original must be stamped £1. Two printed copies of the specification of the patent must be lodged with a copy of the petition (R. S. C., Ord. 53A, r. 3 (h)); documents and copies are lodged at the chambers of the judge (*ibid.*, r. 3 (r)); as to service of documents, see *ibid.*, r. 3 (x). The petitioner must also lodge, not less than three weeks before the appointed day, two copies of the balance sheet of expenditure and receipts relating to the patent in question which must be proved on oath at the hearing (as to the accounts, see note (*n*), p. 203, *post*). He must also at the same time furnish three copies of the specification and of the accounts to the solicitor to the Board of Trade, and on receiving two days' notice must give the solicitor to the Board of Trade reasonable facilities for inspecting and taking extracts from the books by reference to which he proposes to verify the balance sheet or from which

Notice may be given to the Court of objection to the extension (*b*).

Notice of objection.

412. Upon the day named in the advertisements (*c*) the petition appears in the court list, and the petitioner applies to the Court to fix the appointed day (*d*).

Day for hearing.

413. The patentee (*e*) and any person who has given notice of objection (*f*) must be made parties to the proceeding (*g*), and the

Parties to the proceedings.

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the materials for the balance sheet have been derived (R. S. C., Ord. 53A, r. 3 (i)). Persons who have delivered particulars of objections are entitled to copies of the accounts at their own expense (*ibid.*, r. 3 (q)).

(*b*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 18 (1), (2). As to procedure on such notice being given, see note (*f*), *infra*, and note (*g*), p. 202, *post*. Objection may be taken on the ground of the patentee's neglect to bring an action for infringement (*Re Simister's Patent* (1842), 1 Web. Pat. Cas. 721, 724, P. C.; *Re Pinkus' Patent* (1848), 12 Jur. 234, P. C.), or on the ground of non-introduction of the patent (*Re Patterson's Patent* (1849), 6 Moo. P. C. C. 469; *Re Norton's Patent* (1863), 1 Moo. P. C. C. (N. S.) 339). Extension may be refused where an invention only succeeds on subsequent improvements (*Re Woodcroft's Patent* (1841), 3 Moo. P. C. C. 171; *Re Bell's Patent* (1846), 10 Jur. 363, P. C.), or where a patentee has granted an exclusive licence which is contrary to public policy (*Re Cardwell's Patent* (1856), 10 Moo. P. C. C. 488), or on the ground that extension would be contrary to the interests of the public (*Re McInnes' Patent* (1868), 5 Moo. P. C. C. (N. S.) 72). A *primâ facie* case as to the validity of the patent must be made out to justify a grant of extension (*Re Erard's Patent* (1835), 1 Web. Pat. Cas. 557, P. C.; *Re Johnson's Patent* (1908), 25 R. P. C. 709; 77 L. J. (CH.) 737; *Re Kay's Patent* (1839), 3 Moo. P. C. C. 24), for a patent which is clearly bad will not be extended (*Re Pinkus' Patent, supra; Re Betts' Patent* (1862), 1 Moo. P. C. C. (N. S.) 49; *Re Hills' Patent* (1863), 1 Moo. P. C. C. (N. S.) 258, 262; *Re Burlingham, Innes, and Lee's Patent* (1898), 15 R. P. C. 195, P. C.; *Re Stewart's Patent* (1885), 2 R. P. C. 7); but in cases of doubt extension may be allowed (*Re Woodcroft's Patent* (1846), 2 Web. Pat. Cas. 18, 30, P. C.; *Re Betts' Patent, supra; Re Hills' Patent, supra; Re Cocking's Patent* (1885), 2 R. P. C. 151, P. C.; *Re Stewart's (Duncan) Patent* (1885), 3 R. P. C. 7, P. C.; *Re Lyon's Patent* (1894), 11 R. P. C. 537, P. C.). The fact that an action with reference to the validity of the patent is pending is no objection to an extension being granted (*Re Kay's Patent, supra; Re Heath's Patent* (1853), 8 Moo. P. C. C. 217; *Re Lane Fox's Patent* (1892), 9 R. P. C. 411, P. C.).

(*c*) See note (*r*), p. 199, *ante*.

(*d*) R. S. C., Ord. 53A, r. 3 (f). As to the meaning of "appointed day," see note (*r*), p. 199, *ante*. The petitioner must, on the appointed day being fixed, give public notice of the same by advertising once at least in the *London Gazette* (R. S. C., Ord. 53A, r. 3 (g)).

(*e*) The patentee must come to the court prepared to show that he has done his utmost to push the invention and get it launched on the market (*Re Stoney's Patent* (1888), 5 R. P. C. 518, 523, P. C.; *Re Henderson's Patent* (1901), 18 R. P. C. 449, P. C.; *Re Johnson's Patent* (No. 2), [1909] 1 Ch. 114, *per* PARKER, J., at p. 125).

(*f*) Any person desirous of opposing the petition must lodge a notice to that effect, giving an address in the United Kingdom for service. He must also serve upon the petitioner a copy of such notice (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 18 (2)). Such notices must be lodged and served before the day named in the advertisements as that on which he, the petitioner, intends to apply for the appointed day to be fixed (see note (*r*), p. 199, *ante*) (R. S. C., Ord. 53A, r. 3 (j)). The petitioner must serve a copy of his petition upon each person giving such notice (*ibid.*, r. 3 (k)); and each such person must within

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(*g*) For note (*g*) see next page.

SECT. 8. Term of Patent.

Comptroller has the right, and may be directed by the court, to appear (*h*) and be heard (*i*).

The Comptroller is not required to give notice of the grounds of any objection he may think fit to place before the court (*j*).

Considerations for the court.

414. The court, in considering (*k*) its decision (*l*), has regard to the

three weeks after such service lodge two copies and serve upon the petitioner one copy, and lodge with the solicitor to the Board of Trade three copies in writing of particulars of the objections upon which he intends to rely against the granting of the prayer of the petition (*ibid.*, r. 3 (l)). This Rule gives to the court considerable latitude as to the particulars that must be given, and the considerations that apply are those applicable to pleadings generally (*Re Johnson's Patent*, [1908] 2 Ch. 487); see title PLEADING, pp. 417 *et seq.*, *post*. Failure to lodge and serve such particulars of objections is deemed to be abandonment of opposition; and no person who has delivered such particulars of objections shall be entitled to oppose the granting of the prayer of the petition on any grounds not stated in such particulars (R. S. C., Ord. 53A, r. 3 (m), (n)).

(*g*) Any person who has lodged notice of opposition is entitled to be heard on the application to fix the appointed day, and every person who has lodged and served particulars of objection must be served by the petitioner with notice of the appointed day (R. S. C., Ord. 53A, r. 3 (o)).

(*h*) Whether the petition is opposed or not the Attorney-General should, it seems, appear to watch the progress of the case made for the petitioner (*Re Erard's Patent* (1835), 1 Web. Pat. Cas. 557, n.).

(*i*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 18 (3). The petition must not be entered in the list for trial until the expiration of the time limited for the lodging and service of the particulars of objections, and shall only be entered for trial on the lodging of an affidavit on behalf of the petitioner that all persons who have served him with notice of intention to oppose the prayer of his petition have been served with copies of the petition. The petition is entered for trial in Room 136, Chancery Registrar's Department. The petition, subject to any direction of the court to the contrary, is set down in the same manner as if it had been an assigned witness action, and shall be marked in the witness list not before the of 190 , being the appointed day (R. S. C., Ord. 53A, r. 3 (p)). As to the meaning of "appointed day," see note (*r*), p. 199, *ante*.

(*j*) R. S. C., Ord. 53A, r. 3 (t).

(*k*) The court does not on the hearing determine the validity or invalidity of the patent (*Re Stewart's (Duncan) Patent* (1885), 3 R. P. C. 7, 9, 10, P. C.; *Re Stoney's Patent* (1888), 5 R. P. C. 518, 521, 522, P. C.); nor will it consider whether the patent has lapsed (*Re Dolbear's Patent* (1896), 13 R. P. C. 205). As to the admission of evidence at the hearing, see R. S C., Ord. 53A, r. 21.

(*l*) The petitioner, in order to succeed, must make out a strong case both of hardship and upon the utility of the invention (*Re Erard's Patent* (1835), 1 Web. Pat. Cas. 557, P. C.). A very special case showing the novelty, utility, and merit must be proved and that the remuneration due to the applicant has either failed altogether or has been very disproportionate to the merits of the invention (*Re Honiball's Patent* (1855), 9 Moo. P. C. C. 378, 393; *Re Downton's Patent* (1839), 1 Web. Pat. Cas. 565, P. C.; *Re Jones's Patent* (1840), 1 Web. Pat. Cas. 577, P. C.; *Re Morgan's Patent* (1843), 1 Web. Pat. Cas. 737, P. C.; *Re Derosne's Patent* (1844), 2 Web. Pat. Cas. 1, P. C.; *Re Pinkus' Patent* (1848), 12 Jur. 234, P. C.; *Re Norton's Patent* (1863), 1 Moo. P. C. C. (N. S.) 339, 343; *Re McDougal's Patent* (1867), 5 Moo. P. C. C. (N. S.) 1; *Re Pitman's Patent* (1871), L. R. 4 P. C. 84), and this applies even when the application is not opposed (*Re Perkins' Patent* (1845), 2 Web. Pat. Cas. 6, 18; *Re Cardwell's Patent* (1856), 10 Moo. P. C. C. 488, 490). Extension will be granted if the patentee has sustained considerable loss either in connection with working the patent (*Re Swaine's Patent* (1837), 1 Web. Pat. Cas. 559, P. C.; *Re Southworth's Patent* (1837), 1 Web. Pat. Cas. 486, P. C.; *Re Derosne's Patent, supra*, or from litigation with reference to the patent

nature and merits (*m*) of the invention in relation to the public, to the profits (*n*) made by the patentee as such, and to all the circumstances of the case (*o*).

(*Re Pettit Smith's Patent* (1850), 7 Moo. P. C. C. 133; *Re Heath's Patent* (1853), 8 Moo. P. C. C. 217), or from the opposition of existing interests (*Re Stafford's Patent* (1838), 1 Web. Pat. Cas. 563, P. C.; *Re Roberts's Patent* (1839), 1 Web. Pat. Cas. 573, P. C.; and see note (*n*), *infra*), or from want of influence (*Payne's Patent* (1854), cited in Coryton's Laws of Letters Patent, p. 220), or from the derangement of the labour market (*Re Napier's Patent* (1861), 13 Moo. P. C. C. 543). The grant of an extended term is anything but a matter of course (*Re Honiball's Patent* (1855), 9 Moo. P. C. C. 378, 393; *Re Jones's Patent* (1840), 1 Web. Pat. Cas. 577, P. C.).

(*m*) There must be special merit (*Re Stoney's Patent* (1888), 5 R. P. C. 518, P. C.); the merits must be great (*Re Beanland's Patent* (1887), 4 R. P. C. 489, 491), and must be proved (*Re Kelly's Patent* (1900), 17 R. P. C. 476, P. C.), and merit differs in the circumstances, inasmuch as the inventor may have spent years of long and patient labour and of great and unaided ingenuity, or made his discovery by a happy accident or fortunate guess, or led up to it by earlier incomplete experiments (*Re Hills' Patent* (1863), 1 Moo. P. C. C. (N. S.) 258, 265). The necessary merit is not the ingenuity in giving the idea of the possibility of doing a thing, but the utility in the practical working of the invention (*Re Betts' Patent* (1862), 1 Moo. P. C. C. (N. S.) 49). The simplicity of an invention is a factor to be considered (*Re Muntz's Patent* (1846), 2 Web. Pat. Cas. 113, 119, P. C.; *Re Hazeland's Patent* (1894), 11 R. P. C. 467, 470, P. C.); but the merit of an importer is smaller than that of an inventor (*Re Soames's Patent* (1843), 1 Web. Pat. Cas. 729, 733), while that of a company which merely buys a patent for commercial purposes is none at all (*Electric Telegraph Co.'s Patent* (undated), cited 1 Moo. P. C. C. (N. S.) 346, P. C.; *Re Sillar's Patent* (1882), 1 Goodeve's Patent Cases, 581). Where parts of an invention have merit, extension may be allowed as to those particular parts (*Re Bodmer's Patent* (1853), 8 Moo. P. C. C. 282; *Re Lee's Patent* (1856), 10 Moo. P. C. C. 226; *Re Napier's Patent* (1881), 6 App. Cas. 174, P. C.; *Re Church's Patents* (1886), 3 R. P. C. 95, P. C.; *Re Burlingham, Innes and Lee's Patent* (1898), 15 R. P. C. 195, P. C.; *Re Lodge's Patent*, [1911] 2 Ch. 46, 365); but where there is no merit at all the application fails (*Re Kelly's Patent* (1900), 17 R. P. C. 476, P. C.). Inutility is a bar to the application being granted, strong evidence of which is that the invention has not been put into practical use (*Re Simister's Patent* (1842), 4 Moo. P. C. C. 164; *Re Woodcroft's Patent* (1846), 2 Web. Pat. Cas. 18, 29, P. C.; *Re Bakewell's Patent* (1862), 15 Moo. P. C. C. 385; *Re Allan's Patent* (1867), 4 Moo. P. C. C. (N. S.) 443; *Re McDougal's Patent* (1867), 5 Moo. P. C. C. (N. S.) 1; *Re Herbert's Patent* (1867), 4 Moo. P. C. C. (N. S.) 300), but that fact may be rebutted by showing that it was due to the patentee being in pecuniary difficulties (*Re Wright's Patent* (1839), 1 Web. Pat. Cas. 575, P. C.), or that there was only a limited market in view of the valuable nature of the patent (*Re Herbert's Patent, supra; Re Thompson's Patent* (1902), 19 R. P. C. 565, 568, P. C.), or that the invention by its nature did not at once come into use (*Re Jones's Patent, supra; Re Currie and Timmis' Patent* (1897), 15 R. P. C. 63, P. C.; *Re Board's Patent* (1908), 25 R. P. C. 537, P. C.), or that it was used abroad (*Re Hughes' Patent* (1879), 4 App. Cas. 174).

(*n*) Failure to keep account may be a ground for dismissing the petition (*Re Lawrence and Kennedy's Patent* (1910), 27 R. P. C. 252). In estimating the profits, the patentee may deduct expenses caused by litigation (*Re Roberts's Patent, supra*, at p. 575; *Re Kay's Patent* (1839), 1 Web. Pat. Cas. 568, 572, P. C.; *Re Galloway's Patent* (1843), 1 Web. Pat. Cas. 724, 729, P. C.; *Re Betts' Patent, supra;* and see note (*l*), p. 202, *ante*); but the costs of settled actions may be disallowed (*Re Hills' Patent, supra*). He may deduct expenses caused by experiments (*Re Bate's Patent* (1836), 1 Web. Pat. Cas.

(*o*) For note (*o*) see next page.

SECT. 8. **Term of Patent.**

Nature of order.

If it appears that the patentee has been inadequately remunerated by his patent, the court may by order extend the term of the patent for a further term not exceeding seven, or, in exceptional cases, fourteen years, or may order the grant of a new patent for such term as may be specified in the order, with any restriction, conditions, and provisions the court may think fit (*p*).

739, n.; *Re Kay's Patent*, (1839), 1 Web. Pat. Cas. 568, P. C.); the expenses of bringing the invention into use (*Re Galloway's Patent* (1843), 1 Web. Pat Cas. 724, P. C.; *Re Newton's Patent* (1861), 14 Moo. P. C. C. 156; *Re Carr's Patent* (1873), L. R. 4 P. C. 539); expenses caused by payments to patent agents (*Re Poole's Patent* (1867), 4 Moo. P. C. C. (N. S.) 452, 456); but a loss occasioned by the sale and repurchase by the patentee will not be allowed (*Re Wield's Patent* (1871), 8 Moo. P. C. C. (N. S.) 300). On the other hand, the patentee must add the profits arising from sale for exportation (*Re Hardy's Patent* (1849), 6 Moo. P. C. C. 441; *Re Johnson's Patent* (*Willcox and Gibbs*) (1871), 8 Moo. P. C. C. (N. S.) 282, 291; *Re Adair's Patent* (1881), 6 App. Cas. 176), and care must be taken to keep the accounts as patentee and as manufacturer distinct (*Re Betts' Patent* (1862), 1 Moo. P. C. C. (N. S.) 49; *Re Hills' Patent* (1863), 1 Moo. P. C. C. (N. S.) 258; *Re Saxby's Patent* (1870), 7 Moo. P. C. C. (N. S.) 82, 86; *Re Trotman's Patent* (1866), 3 Moo. P. C. C. (N. S.) 488). Items foreign to the patent must not be included in the accounts (*Re Clarke's Patent* (1899), 16 R. P. C. 433). Expenditure in the patent business must be kept distinct from expenditure in a general business (*Re Duncan and Wilson's Patent* (1884), 1 R. P. C. 257; *Re Willacy's Patent* (1888), 5 R. P. C. 690); and receipts in respect of the patented article must be distinguished from receipts in respect of other articles (*Re Yates' Patent* (1887), 4 R. P. C. 151, 152; *Re Willan and Robinson's Patent* (1896), 13 R. P. C. 550). Profits made in respect of foreign patents for the same invention must be disclosed (*Re Newton's Patent* (1884), 1 R. P. C. 177; *Re Barff and Bower's Patent* (1895), 12 R. P. C. 385, 386; *Re Peach's Patent* (1901), 19 R. P. C. 65, P. C.); and, where the patentee has granted licences to manufacture in consideratioin of royalties, the profits of the licensees, as well as the royalties received, should be set out (*Re Trotman's Patent, supra*; *Re Shone's Patent* (1892), 9 R. P. C. 438; compare *Re Thomas's Patents* (1892), 9 R. P. C. 367). Where the patent rights have been transferred to a company, it is essential to deposit not only the patentee's accounts of his profits, but accounts also of the profits of the company (*Re Deacon's Patents* (1887), 4 R. P. C. 122); and what dealings have taken place in the shares of the company should appear (*Re Lane-Fox's Patent* (1892), 9 R. P. C. 411; see *Re Parsons' Patent* (1898), 15 R. P. C. 394; *Re Duncan and Wilson's Patent, supra*). The profits of each year should be kept distinct (*Re Perkins' Patent* (1845), 2 Web. Pat. Cas. 16; *Re Yates' Patent* (1887), 4 R. P. C. 151, 152), as well as the expenditure (*Re Yates' Patent, supra*). Where no profits have been made, such strict proof of accounts as is required where profits have been made is not necessary (*Re Thompson's Patent* (1902), 19 R. P. C. 565). The accounts of the petitioner must be clear and precise and must leave no doubt as to what the applicant's remuneration has been (*Re Betts' Patent, supra*; *Re Hills' Patent, supra*; *Re Trotman's Patent, supra*; *Re Saxby's Patent, supra*; *Re Clark's Patent* (1870), 7 Moo. P. C. C. (N. S.) 255); *Re Henderson's Patent* (1901), 18 R. P. C. 449; *Re Wuterick's Patent* (1903), 20 R. P. C. 285; [1903] A. C. 206; compare *Re Darley's Patent* (1891), 8 R. P. C. 384; *Re Lake's Patent* (1891), 8 R. P. C. 230; [1901] A. C. 240), and are considered before the merits of the invention (*Re Wield's Patent* (1871), 8 Moo. P. C. C. (N. S.) 300; *Re Houghton's Patent* (1871), 7 Moo. P. C. C. (N. S.) 309, commenting on *Re Saxby's Patent, supra*, and *Re Clark's Patent, supra*). Destruction of the patentee's books is no excuse for not supplying proper accounts (*Re Yates and Kellett's Patent* (1887), 4 R. P. C. 150, P. C.; 12 App. Cas. 147; compare *Re Markwick's Patent* (1860), 13 Moo. P. C. C. 310).

(*o*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 18 (4).

(*p*) *Ibid.*, s. 18 (5). But the court has not power to award a second period

The court has power to extend the patent as to one or more of its claiming clauses without extending it as to all of them (*q*). Partial extension.

415. In the case of opposition to the petition for extension, the court may award costs in favour of or against the opponents (*r*). Costs.

416. The decision of the court is final (*s*). No appeal.

SUB-SECT. 3.—*Patents of Addition.*

417. A patent of addition is a patent which is granted in respect of any improvement in or modification of an invention for which a patent has either been granted or applied for, but which is granted only for the same term as that of the original patent or for so much of that term as is unexpired, so that the patent of addition will not remain in force after the expiration of the original patent (*t*). Definition.

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of extension after the first has elapsed (*Re Thompson's Patent*, [1909] 2 Ch. 447, confirming the rule laid down in *Re Goucher's Patent* (1865), 2 Moo. P. C. C. (N. S.) 532). It is only where the value of the disclosure largely exceeds the benefit derived by the patentee that he can be said to have been inadequately remunerated (*Re Johnson's Patent* (No. 2), [1909] 1 Ch. 114, *per* PARKER, J.). Where the petitioner is an assignee, a condition may be imposed securing either an annuity (*Re Whitehouse's Patent* (1838), 1 Web. Pat. Cas. 473, P. C.; *Russell* v. *Ledsam* (1848), 1 H. L. Cas. 687; *Re Markwick's Patent* (1860), 13 Moo. P. C. C. 310; *Re Herbert's Patent* (1867), 4 Moo. P. C. C. (N. S.) 300; *Re Pitman's Patent* (1871), L. R. 4 P. C. 84, 87), or a share of the profits to the inventor (*Re Hardy's Patent* (1849), 6 Moo. P. C. C. 441: *Re McCulloch's Patent* (1908), 25 R. P. C. 684); and such conditions may be imposed where the inventor has made nothing by the invention (*Re Bodmer's Patent* (1849), 6 Moo. P. C. C. 468). Conditions may also be imposed either that the article is to be sold to the public at a fixed price (*Re Hardy's Patent, supra; Re Hart's Patent* (1908), 25 R. P. C. 299), or securing the invention to the Crown for the public service (*Re Pettit Smith's Patent* (1850), 7 Moo. P. C. C. 133; *Re Napier's Patent* (1881), 6 App. Cas. 174, P. C.; compare *Re Schlumberger* (1853), 9 Moo. P. C. C. 1; *Re Lancaster's Patent* (1864), 2 Moo. P. C. C. (N. S.) 189).

(*q*) *Re Lodge's Patent*, [1911] 2 Ch. 46, *per* PARKER, J., at p. 57.

(*r*) R. S. C., Ord. 53A, r. 3 (u). A successful opponent is usually awarded costs (see *Westrupp and Gibbins' Patent* (1836), 1 Web. Pat. Cas. 554, 556). But if much expense has been occasioned by relying upon patents which are not anticipations, and unsatisfactory witnesses have been called, the opponent's costs may be refused (*Re Honiball's Patent* (1855), 9 Moo. P. C. C. 378, 394). If the petition is abandoned, the opponent is allowed his costs (*Re Brown's Patents* (1886), 3 R. P. C. 212, P. C.; *Re Macintosh's Patent* (1837), 1 Web. Pat. Cas. 739, n.). If there is no ground for the opposition, costs are given to the petitioner (*Re Downton's Patent* (1839), 1 Web. Pat. Cas. 567; and see *Re Church's Patents* (1886), 3 R. P. C. 95, P. C.). Where there have been two or more opponents a lump sum has been divided between them (*Re Jones's Patent* (1854), 9 Moo. P. C. C. 41; *Re Hopkinson's Patent* (1896), 14 R. P. C. 10; *Re Ferranti's Patent* (1901), 18 R. P. C. 518, P. C.). If the petition fails the court may not except in special circumstances give more than one set of costs amongst all the opponents (R. S. C., Ord. 53A, r. 3 (v); see *Re Imray's Patent* (1908), 26 R. P. C. 11). The Comptroller and the Board of Trade are not entitled to any costs in relation to their appearance on or opposition to the petition (R. S. C., Ord. 53A, r. 3 (w)). Except as above expressly provided, the costs of all proceedings are in the discretion of the court (*ibid.*, r. 9). As to other proceedings, see Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 24, and p. 197, *ante*; as to petitions for revocation, see p. 206, *post*; and as to infringement proceedings, see pp. 210 *et seq.*, *post*.

(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 92 (2).

(*t*) *Ibid.*, s. 19 (1), (2), (3). A patent of addition upon a patent of

SECT. 8. Term of Patent.

The applicant or patentee, as the case may be, must apply for a patent of addition, and must leave specifications, drawings and documents in the same way as if he were applying for an ordinary patent (*u*). After the patent of addition has been granted, no additional fees are payable for its maintenance (*a*).

Procedure on application.

Effect of grant.

The grant of a patent of addition is conclusive evidence that the invention is a proper subject for such a patent, and the validity of the patent cannot be questioned on the ground that the invention ought to have been the subject of an independent patent (*b*).

SECT. 9.—*Revocation of Patents.*

SUB-SECT. 1.—*By the Court.*

By whom petition presented.

418. A petition (*c*) for the revocation of a patent may be presented—

(1) By the Attorney-General, or any person authorised by him (*d*).

(2) By any person (*e*) alleging (*f*)—

(i.) That the patent was obtained in fraud of his rights or of the

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addition may be granted if the claims covered by the subsequent patent of addition, earlier patent of addition, and original patent can be included in one claim (*Re McFeely's Application* (1912), 29 R. P. C. 386).

(*u*) Patents Rules, 1908, r. 10.

(*a*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 19 (3).

(*b*) *Ibid.*, s. 19 (4).

(*c*) No proceeding lies for revocation of a patent granted for an invention in relation to which a certificate has been given by the Secretary of State or the Admiralty (*ibid.*, s. 30 (9)); and as to such inventions, see pp. 189 *et seq.*, *ante*. A defendant in an action for infringement (see pp. 225 *et seq.*, *post*) may, under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 32, counterclaim for revocation of the patent. If so, he must, with his counterclaim, deliver particulars of objections as in an infringement action; see R. S. C., Ord. 53A, r. 15; and as to particulars of objections, see p. 217, *post*. The costs of a petition of revocation, whether under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 25, or by way of counterclaim, are dealt with in the same way as in an action for infringement (R. S. C., Ord. 53A, r. 23; see pp. 225 *et seq.*, *post*).

(*d*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 25 (3) (a); see title CONSTITUTIONAL LAW, Vol. VII., p. 73.

(*e*) A person who has the right to petition on one of the above grounds may seek revocation on any of the other grounds (*Re Morgan's Patent* (1887), 5 R. P. C. 186. He may be refused a hearing if he has no *locus standi*, and in cases of doubt the fiat of the Attorney-General should be obtained (*Re Avery's Patent* (1887), 36 Ch. D. 307, 322, C. A.). A purchaser of a patent *pendente lite* has *locus standi* within the section (*Re Green's Application* (1910), 28 R. P. C. 28). The Attorney-General's fiat is not granted as of right, but in his discretion (*Shoe Machinery Co.* v. *Cutlan* (1895), 12 R. P. C. 530, 533, C. A.; and see titles CONSTITUTIONAL LAW, Vol. VII., p. 75; CROWN PRACTICE, Vol. X., p. 31), and the Attorney-General has power to grant his fiat *nunc pro tunc* (*Re Dege's Patent* (1895), 12 R. P. C. 448; *Re Jameson's Patent* (1902), 19 R. P. C. 246).

(*f*) Any person presenting such a petition must deliver therewith particulars of objections to the validity of the patent, and no evidence, except by leave of the court, can be admitted in proof of any objection of which particulars are not delivered (R. S. C., Ord. 53A, r. 11). As to particulars of objections, see pp. 225 *et seq.*, *post*. The respondent to the petition is entitled to begin and give evidence in support of the patent and, if the petitioner gives evidence impeaching the validity of the patent, the respondent is entitled to reply (R. S. C., Ord. 53A, r. 12). As to costs, see R. S. C., Ord. 53A, r. 22; and see note (*c*), *supra*.

rights of any person under or through whom he claims (*g*); or

(ii.) That he, or any other person under or through whom he claims, was the true inventor (*h*); or

(iii.) That he, or any other person under or through whom he claims an interest in any trade, business, or manufacture, had publicly manufactured, used, or sold within this realm, before the date of the patent, anything claimed by the patentee as his invention (*h*).

Grounds of revocation.

The grounds of revocation by the court include—

(1) Every ground on which a patent might have been repealed by *scire facias* immediately before the 1st January, 1884 (*i*).

(2) Every ground on which a patent may be revoked under the Patents and Designs Act, 1907 (*k*), either by the Comptroller, or as an alternative to the grant of a compulsory licence (*l*).

SUB-SECT. 2.—*By the Comptroller.*

(i.) *On Ground on which Grant might have been Opposed.*

Who may apply.

419. Any person who would have been entitled to oppose (*m*) the grant of a patent, or who is the successor in interest of a person who was so entitled, may, within two years from the date of the patent, apply to the Comptroller for an order revoking the patent on any one or more of the grounds on which the grant of the patent might have been opposed (*n*).

Mode of application.

The application must be made on the prescribed form, and must be accompanied by an unstamped copy of the form, which the Comptroller transmits to the patentee (*o*). The applicant may leave statutory declarations (delivering copies to the patentee) in every case; and he must do so if the ground of his application is that the invention was obtained from him by the patentee (*o*). The furnishing of further evidence and the subsequent hearing of the case are governed by the same rules as those regulating the proceedings on opposition to the grant of a patent (*p*).

When such application cannot be made

An application under the above provision cannot be made when an action for infringement or proceedings for the revocation of a patent are pending in any court, except with the leave of the court (*q*).

(*g*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 25 (3) (b). Where a patent is revoked on the ground of fraud the comptroller may grant a patent to the true inventor in lieu thereof (*ibid.*, s. 15 (2)). Fraud is used in its ordinary meaning, and does not include a mistake made *bonâ fide* (*Re Avery's Patent* (1887), 36 Ch. D. 307, 322, C. A.; *Re Ralston's Patent* (1909), 26 R. P. C. 313, 331; 100 L. T. 386). Fraud must be strictly proved (*Re Jameson's Patent* (1902), 19 R. P. C. 246, 254; *Re Mark's Patent* (1908), 25 R. P. C. 553, 558).

(*h*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 25 (3) (b).

(*i*) *Ibid.*, s. 25 (2) (a).

(*k*) 7 Edw. 7, c. 29.

(*l*) *Ibid.*, s. 25 (2) (b). Every such ground as is referred to in *ibid.*, s. 25 (2) (a), (b), is available as a defence to an action for infringement (*ibid.*); see pp. 217 *et seq.*, *post.*

(*m*) As to opposition to the grant of a patent, see pp. 175 *et seq.*, *ante.*

(*n*) *Ibid.*, s. 26 (1).

(*o*) Patents Rules, 1908, r. 75.

(*p*) *Ibid.*, rr. 43—47, 76; 27 R. P. C. Appendix (1910F); see pp. 175 *et seq.*, *ante.*

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 26 (1).

SECT. 9. **Revocation of Patents.**

Nature of order.

420. The Comptroller, having given notice of the application to the patentee, and after hearing the parties, if desirous of being heard, may make an order (1) revoking the patent; or (2) requiring the specification to be amended by disclaimer, correction or explanation; or (3) dismissing the application (*r*). But the Comptroller cannot revoke the patent unless the circumstances are such as would have justified him in refusing to grant the patent had the proceedings been proceedings in opposition to the grant of a patent (*r*).

The Comptroller may also make an order for revocation after receiving an offer from the patentee to surrender it, and after giving notice of the offer and hearing the parties desiring to be heard (*a*).

Appeal.

421. The decision of the Comptroller is subject to an appeal to the court (*b*), and the decision of the court is also subject to appeal (*c*).

(ii.) *On Ground that Patent is Worked mainly Abroad.*

Who may apply.

422. Any person may, at any time not less than four years after the date of a patent, apply to the Comptroller for the revocation of the patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom (*d*).

Evidence in support of application.

The application must be made on the prescribed form (*e*) and accompanied by statutory declarations in support of the allegations, and copies must be delivered to the patentee or his agent.

(*r*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 26 (2).

(*a*) *Ibid.*, s. 26 (3).

(*b*) *Ibid.*, s. 26 (4). All appeals to the court from a decision of the Comptroller are brought by petition presented to the court within one calendar month of the decision of the Comptroller or within such further time as the court may under special circumstances allow (R. S. C., Ord. 53A, r. 4). Dilatoriness on the part of petitioner's agents is not a "special circumstance" (*Re Beldam's Patent*, [1911] 1 Ch. 60, 63). The period of the Long Vacation counts in computing the "calendar month" (*ibid.*). The petition must state the nature of the decision appealed against, whether the appeal is from the whole, or part only, and if so, what part, of such decision; and also the grounds of the appeal, and no grounds, other than those so stated, shall, except with the leave of the court, be allowed to be taken by the appellant at the hearing (R. S. C., Ord. 53A, r. 4). The appeal to the court, subject to any direction of the court to the contrary, is set down in the same manner as if it were an assigned witness action, and is heard and disposed of in due course (*ibid.*, r. 5). The appeal is set down in Room 136, Chancery Registrar's Department. In all proceedings before the court the evidence used must be the same as that used at the hearing before the Comptroller, and no further evidence may be given except by the leave of the court (*ibid.*, r. 6). As to evidence before the Comptroller, see pp. 177, 178, *ante*. It should be noted that the procedure above indicated is the same in appeals to the court in proceedings for restoration of lapsed patent (see Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 20; pp. 182, 183, *ante*), and in proceedings for revocation under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 27 (see the text, *infra*).

(*c*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 92 (2).

(*d*) *Ibid.*, s. 27 (1); *Re Hatschek's Patents, Ex parte Zerenner*, [1909] 2 Ch. 68; *Re Bremer's Patent, Ex parte Braulik, Re Högner's Patent, Ex parte Braulik*, [1909] 2 Ch. 217; *Re Fiat Motors, Ltd.'s Application*, [1911] 1 Ch. 66; *Re Green's Application*, [1911] 1 Ch. 754.

(*e*) Patents Form No. 24 (fee £2); Patents Rules, 1908, r. 78.

Within fourteen days, or such further time as the Comptroller may allow, the patentee must leave statutory declarations at the Patent Office declaring whether the allegations made by the applicant are correct or incorrect. If they are incorrect it must be declared to what extent and in what place the patent is worked in the United Kingdom; but if they are correct and the patent is not worked in the United Kingdom to an adequate extent, the declarations must set out the reasons why it is not so worked (*f*). Copies of these declarations must be sent to the applicant, and he in turn must within fourteen days leave statutory declarations in answer, supplying copies to the patentee.

Fixing the hearing.

The Comptroller then intimates whether he intends to hold a preliminary hearing or whether he will try the whole case at one hearing (of the date of which he must give ten days' notice, allowing extra time for the hearing of further evidence) (*g*). At the hearing he may take *viâ voce* evidence in lieu of or in addition to the evidence by declaration, and may require the attendance of any declarant or other person whose evidence he thinks desirable (*h*).

Nature of order.

423. The Comptroller thereupon, if satisfied (*i*) that the patent is not worked to an adequate extent in the United Kingdom, and if the patentee fails to give satisfactory reasons (*k*) why the patent is not so worked, may make an order—

(*f*) The patent will not be revoked if the patentee proves that he has done his best to establish an industry in this country in the article which is the subject of his patent (*Re Bremer's Patent, Ex parte Braulik, Re Hogner's Patent, Ex parte Braulik*, [1909] 2 Ch. 217, 224).

(*g*) Patents Rules, 1908, rr. 78—81, as amended and modified by an official notice issued by the Patent Office in 1909; see [1909] W. N., Part II., p. 198; 53 Sol. Jo. 487; and see *Re Ilgner's Patents* (1909), 26 R. P. C. 198. It appears still to be necessary that the applicant, when sending copies of his declarations or of other documents to the patentee, and *vice versâ*, should furnish the Comptroller with evidence of the delivery of such copies.

(*h*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 77; Patents Rules, 1908, r. 81. A patentee cannot be called upon to produce his witnesses either for cross-examination or for examination by the Comptroller-General until a *primâ facie* case is made out under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 27 (1) (*Re Lahl's Patent* (1909), 26 R. P. C. 443, following *Re Hatschek's Patents* (1909), 26 R. P. C. 228; [1909] 2 Ch. 68).

(*i*) In considering whether there is a proper case for revocation under this provision the Comptroller or the court should have regard primarily to the public interest, not, at least first of all, to that of individuals; see *Re Taylor's Patent*, [1912] 1 Ch. 635, 642, 643.

(*k*) See *Re Taylor's Patent, supra* (where, in the circumstances of that particular case, having regard to the threat of an infringement action, "satisfactory reason" was held to have been shown. "It can never . . . be sufficient for a patentee defending himself under the section [*i.e.*, Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 24] to prove that he cannot now start an industry with any chance of profit. The question really is, Could he have done so if he had used his monopoly fairly as between home and foreign trade, or if he had devoted the time and money which he has expended in developing a foreign industry to developing a home industry" (*Re Hatschek's Patents, Ex parte Zerenner*, [1909] 2 Ch. 68, *per* PARKER, J., at p. 89). It is not necessary to inquire whether what has been done in the United Kingdom is or is not in derogation of the rights of the patentee, or to exclude from the computation what has been done in derogation of such rights (*Re Fiat Motors, Ltd.'s Application*, [1911] 1 Ch. 66), or to determine whether at the precise moment when the petition was lodged there was a manufacture or

SECT. 9. Revocation of Patents.

(1) revoking the patent forthwith (*l*) or

(2) revoking the patent after a reasonable interval, specified in the order, unless in the meantime it is shown to his satisfaction that the patent is worked in the United Kingdom to an adequate extent (*m*). Where such interval has been allowed and the patent is not worked in the United Kingdom to an adequate extent, but the patentee gives satisfactory reasons why it is not so worked, the Comptroller has power to extend the period mentioned in the previous order for such period not exceeding twelve months as may be specified in the subsequent order (*n*).

Variation in order.

No order may be made which is at variance with any treaty, convention arrangement, or engagement with any foreign country or British possession (*o*).

Appeal.

424. Any such decision of the Comptroller is subject to appeal to the court, and on any such appeal the law officer or such other counsel as he may appoint is entitled to appear and be heard (*p*).

The decision of the court on such appeal is final (*q*).

SECT. 10.—*Legal Proceedings.*

SUB-SECT. 1.—*In respect of Infringement.*

(i.) *The Infringement.*

Infringement.

425. The grant of letters patent is the grant of an exclusive privilege to the patentee, that he "by himself, his agents and licensees, and no others may . . . make, use, exercise and vend the said invention" (*r*); and, in order that the patentee may have the sole use and enjoyment of his invention, the letters patent prohibit all subjects of the King within the United Kingdom and the Isle of Man from in any way using or imitating the invention during the term of fourteen years, without the patentee's consent (*r*).

What constitutes infringement.

426. A person commits an infringement of letters patent when, without the patentee's consent, he does some act prohibited by the letters patent (*s*). A patent may be infringed by (1) using the invention or any colourable imitation thereof in the manufacture of articles, or by putting the invention in practice in any other way;

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carrying on of a patented process (*Re Green's Application*, [1911] 1 Ch. 754). The substance of the matter must be looked at. Temporary suspension of manufacture because of over-manufacture in prior months will not exclude the jurisdiction of the court (*Re Green's Application, supra, per* PARKER, J. at p. 757). A misapprehension of the section is not a "satisfactory reason" within the section (*Re Worring and Kortenbach's Patent* (1909), 26 R. P. C. 163). As to proceedings under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 24, see pp. 197 *et seq.*, *ante*.

(*l*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 27 (2) (a).

(*m*) *Ibid.*, s. 27 (2) (b); see *Re Boult's Patent* (1909), 26 R. P. C. 383; *Re Kent's Patent* (1909), 26 R. P. C. 666; compare *Re Osborn's Patent* (1909), 26 R. P. C. 819.

(*n*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 27 (3).

(*o*) *Ibid.*, s. 27 (2).

(*p*) *Ibid.*, s. 27 (4); see *Re Bremer's Patent* (1909), 26 R. P. C. 449. For the procedure on such appeal, see R. S. C., Ord. 53A, rr. 4—6; see note (*b*), p. 208, *ante*.

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 92 (2). In all proceedings before the court the court has all the powers of the Comptroller; see R. S. C., Ord. 53A, r. 8.

(*r*) See p. 128, *ante*.

(*s*) *Walton* v. *Bateman* (1842), 1 Web. Pat. Cas. 613, 615.

(2) by using, or selling, or otherwise dealing in articles made in accordance with the invention; or (3) by making for use or sale, or by selling, articles which counterfeit or resemble, or which differ only colourably from, articles made in pursuance of the invention; but there can be no infringement of an invalid patent (*a*).

Intention of infringer.

The intention of an infringer is quite immaterial (*b*). It is also immaterial whether the infringer knew or not that he was in fact infringing a patent (*c*).

Importation.

427. Importation into this country, for use or sale, of infringing articles manufactured abroad, is an infringement (*d*). Importation into British waters for the mere purpose of transhipment may, by reason of continuing user, constitute an infringement (*e*), but persons acting only as Custom House agents for an importing firm are not infringers (*f*).

Crown rights.

The Crown, and its agents or servants, have the right to use any invention patented in this country, on such terms as may be agreed upon with the approval of the Treasury, or, in default of agreement, as may be settled by the Treasury, after hearing all parties interested (*g*).

Liability of parties using article.

If a defendant has in fact put an infringing article to the purpose for which it was intended whilst the article was in his possession, then such possession amounts to a user, and he is liable to have an injunction granted against him (*h*).

A user by way of *bonâ fide* experiment only, and not with the intention of selling or using for profit or advantage, is not necessarily an infringement (*i*); but the use of an infringing article to the advantage of the purchaser may be an infringement although it is purchased for the purpose of experiment or for instructing pupils (*k*). The use of an invention for a purpose other than that described by the patentee may amount to an infringement (*l*); and to

(*a*) *Challinder* v. *Royle* (1887), 36 Ch. D. 425, 435.

(*b*) *Stead* v. *Anderson* (1847), 2 Web. Pat. Cas. 151; *Young* v. *Rosenthal & Co.* (1884), 1 R. P. C. 29.

(*c*) *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (1881), 17 Ch. D. 721, C. A.; (1882) 8 App. Cas. 5; but see Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 33.

(*d*) *Walton* v. *Lavater* (1860), 8 C. B. (N. S.) 162; *Elmslie* v. *Boursier* (1869), L. R. 9 Eq. 217; *Von Heyden* v. *Neustadt* (1880), 14 Ch. D. 230, C. A.; *United Telephone Co.* v. *Sharples* (1885), 2 R. P. C. 28; 29 Ch. D. 164. As to the use for the purposes of navigation of a foreign vessel within the jurisdiction, see Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 48.

(*e*) *Nobel's Explosives Co.* v. *Jones, Scott & Co*, *supra*; *Neilson* v. *Betts* (1871), L. R. 5 H. L. 1.

(*f*) *Nobel's Explosives Co.* v. *Jones, Scott & Co.*, *supra*. As to the liability of agents generally, see p. 215, *post*.

(*g*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 29.

(*h*) *Adair* v. *Young* (1879), 12 Ch. D. 13, C. A.; *United Telephone Co.* v. *London and Globe Telephone and Maintenance Co.* (1884), 1 R. P. C. 117; 26 Ch. D. 766; *Dunlop Pneumatic Tyre Co.* v. *British and Colonial Motor Car Co.* (1901), 18 R. P. C. 315; compare *British United Shoe Machinery Co., Ltd.* v. *Collier (Simon), Ltd.* (1910), 27 R. P. C. 567, H. L., *per* Lord LOREBURN, L.C., at p. 571; 26 T. L. R. 587.

(*i*) *Frearson* v. *Loe* (1878), 9 Ch. D. 48, 66; *United Telephone Co.* v. *Sharples, supra*; *Proctor* v. *Bayley & Son* (1888), 6 R. P. C. 106.

(*k*) *United Telephone Co.* v. *Sharples, supra*; *British Motor Syndicate, Ltd.* v. *Taylor & Son*, [1900] 1 Ch. 577 (transport of infringing article for purpose of selling it abroad).

(*l*) *Cannington* v. *Nuttall* (1871), L. R. 5 H. L. 205; see also *Edison and*

SECT. 10. Legal Proceedings.

renew the parts essential to a patented combination is an infringement (*m*).

Vendor of patented article.

A person who sells a patented article without the consent of the patentee infringes the letters patent (*n*). The mere offering for sale of an infringing article in the possession of the vendor may constitute infringement (*o*), but the sale of component articles is not, in itself, an infringement, even though the vendor knows that they will be used by the buyer for the purpose of infringing a patent (*p*).

It is also an infringement to sell in this country articles manufactured abroad by a process patented here (*q*), but the plaintiff must in general prove that the articles sold were in fact manufactured by the patentee's process (*r*).

Purchaser of patented article.

A purchaser who buys a patented article from the patentee or his agents may resell it or use it however and wherever he pleases, unless his rights have been restricted at the time of the purchase (*s*).

Facts necessary to be proved.

428. In an action for infringement, it is necessary for a plaintiff to establish that the defendant, dealing with what he is doing as a matter of substance, is taking the invention claimed by the patent, not the invention which the patentee might have claimed if he had been well advised or bolder, but that which he has in fact and substance claimed on a fair construction of the specification (*a*). Another way of stating the same thing is that the plaintiff must show that the defendant has taken the pith and essence of his invention (*b*).

Novelty. Infringement of inventions for obtaining new objects.

429. When the invention is for a new way of attaining a new object the novelty of the object attained is itself a feature of the invention, and the disclosure of it is part of the consideration given in return for the monopoly conferred by the grant of letters patent. In cases involving patents for inventions of this nature a defendant will infringe if he attains the same result by adopting means the same as, or substantially the same as, those disclosed by the patentee. On the other hand, when a patentee has merely invented a new way of attaining an old result, the essence of his invention is the particular way of doing it that he has described and claimed, and there is no infringement unless a defendant has used that particular method (*c*).

Swan Electric Light Co. v. *Holland* (1888), 5 R. P. C. 459; *Higgs* v. *Goodwin* (1858), E. B. & E. 529.

(*m*) *Dunlop Pneumatic Tyre Co.* v. *Holborn Tyre Co.* (1901), 18 R. P. C. 226; *United Telephone Co.* v. *Nelson*, [1887] W. N. 193.

(*n*) See p. 210, *ante*.

(*o*) *Oxley* v. *Holden* (1860), 8 C. B. (N. S.) 666.

(*p*) *Townsend* v. *Haworth* (1875), 12 Ch. D. 831, n.; *Sykes* v. *Howarth* (1879), 12 Ch. D. 826, 833.

(*q*) *Wright* v. *Hitchcock* (1870), L. R. 5 Exch. 37, 47; *Elmslie* v. *Boursier* (1869), L. R. 9 Eq. 217; *Von Heyden* v. *Neustadt* (1880), 14 Ch. D. 230, C. A.

(*r*) On this point, see *Saccharin Corporation* v. *Dawson* (1902), 19 R. P. C. 169; *Saccharin Corporation* v. *Jackson* (1903), 20 R. P. C. 611.

(*s*) *Betts* v. *Willmott* (1871), 6 Ch. App. 239.

(*a*) *Nobel's Explosives Co.* v. *Anderson* (1894), 11 R. P. C. 115, *per* ROMER, J., at p. 127.

(*b*) *Wenham Gas Co.* v. *Champion Gas Lamp Co.* (1891), 9 R. P. C. 49, C. A.; *Incandescent Gas Light Co.* v. *De Mare Incandescent Gas Light System* (1896), 13 R. P. C. 301; *Collins & Sons* v. *Green and Cadbury, Ltd.* (1912), 29 R. P. C. 217; *Gramophone Co., Ltd.* v. *Ruhl* (1910), 28 R. P. C. 20, C. A.; *Hoffman Manufacturing Co., Ltd.* v. *Auto Machinery Co., Ltd.* (1911), 28 R. P. C. 141, C. A.

(*c*) *Martin and James* v. *Consett Iron Co., Ltd.* (1907), 25 R. P. C. 27,

Accordingly the first thing to be done is, by construing the specification, to ascertain what is the real scope of the invention claimed. In so doing regard must be had to the state of knowledge of the art at the date of the patent (*d*).

If a man has in fact used the essence of an invention he is still an infringer, even though he has improved upon it, and it is quite immaterial that he may have taken out a patent embodying his own improvements (*e*); although it may well be that such later patent is valid and protects the improvements.

Taking part of invention.

430. A patent may sometimes be infringed by taking a part only of the invention. This depends on whether what is taken is the substance of the patentee's invention; and in deciding the question of substance the court may look to the relative importance of the parts taken and the parts omitted (*f*). In many specifications, however, the patentee takes pains to state specifically what he considers to be the essential feature or features of his invention. When this has been done, the court adopts the patentee's own statement, and has regard to it in construing the specification.

No infringement without identity.

Effect of additions, subtractions or mechanical equivalents.

431. It is sometimes supposed that a patent may yet be infringed, though the invention has not been identically copied. This view is not strictly accurate. There can be no infringement without identity, but the identity may be hidden by additions or subtractions or by the use of mechanical equivalents. In inventions of the type which produce a new result by a new method the substitution of a contrivance, known to be an equivalent of the patentee's method, for producing the same result, is generally an infringement of the patent (*g*). Where, however, the patent is for a new way of attaining an old result, unless the actual means employed by the patentee have been taken, there is usually no infringement. The true question invariably is one of fact, namely, Has the patentee's claimed invention been substantially taken? (*h*)

C. A.; *Harrison Patents Co., Ltd.* v. *Nicholson & Sons, Ltd.* (1908), 25 R. P. C. 393, C. A.; *Foden* v. *Wallis and Stevens, Ltd.* (1908), 25 R. P. C. 783, C. A.; *Blackstone* v. *Bamford & Sons* (1909), 27 R. P. C. 125; *Nicholls* v. *Kershaw* (1910), 27 R. P. C. 237; *Riley* v. *Taylor* (1910), 27 R. P. C. 747, C. A.; *British, Foreign and Colonial Automatic Light Controlling Co., Ltd.* v. *Metropolitan Gas Meters, Ltd.* (1911), 29 R. P. C. 209.

(*d*) The way to approach the question of infringement was well set out *per* Lord ALVERSTONE, C.J., in *Presto Gear Case and Components Co.* v. *Orme, Evans & Co.* (1900), 18 R. P. C. 17, C. A., at p. 23; see *Vidal Dyes Syndicate, Ltd.* v. *Levinstein, Ltd.* (1912), 29 R. P. C. 245, C. A.; and see p. 146, *ante*.

(*e*) *Neilson* v. *Harford* (1841), 1 Web. Pat. Cas. 295, 310; *Thomson* v. *Moore* (1889), 6 R. P. C. 426, C. A.; *Pilkington (Peter), Ltd.* v. *Massey* (1904), 21 R. P. C. 421; and see *Lynch and Wilson & Co., Ltd.* v. *Phillips & Co.* (1908), 25 R. P. C. 694, 708.

(*f*) *Incandescent Gas Light Co.* v. *De Mare Incandescent Gas Light System* (1896), 13 R. P. C. 301, 330; *Lake and Elliot* v. *Rotax Motor Accessories, Ltd.* (1911), 28 R. P. C. 532, C. A., *per* COZENS-HARDY, M.R., at p. 540.

(*g*) *Sellers* v. *Dickinson* (1850), 5 Exch. 312; and see *Marconi* v. *British Radio Telegraph and Telephone Co., Ltd.* (1911), 28 R. P. C. 181, *per* PARKER, J., at p. 217; *Stone & Co., Ltd.* v. *Broadfoot & Sons, Ltd.* (1909), 26 R. P. C. 361, 380; *British Vacuum Co., Ltd.* v. *Exton Hotels Co., Ltd.* (1908), 25 R. P. C. 617.

(*h*) *Clark* v. *Adie* (1875), 10 Ch. App. 667; *Sellers* v. *Dickinson, supra.*

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Substitution of chemical equivalents.

432. The substitution of chemical equivalents is governed by the same principles as govern the use of mechanical equivalents. But it is quite lawful for any person to accomplish the result attained by the patentee by the use of a substance not known to be a chemical equivalent at the date of the patent (*i*); and it must be remembered that it is much more difficult to say that one chemical body is the equivalent of another than that one well-known mechanical device is the equivalent of another.

New combination of parts.

433. Some of the difficulties arising in connection with the substitution of equivalents are most frequently met with in patents for a new combination of parts. The patentee is, however, entitled to the same protection and on the same principles (*k*) as he would be for any other type of patent. There may be infringement by using so much of the combination as is material (*l*), but the patent does not afford protection against the separate use of integers embodied in the combination (*m*).

(ii.) *Parties.*

Plaintiff.

434. The plaintiff in an action for infringement may be the original grantee, provided he has not parted with the whole of his interest in the patent. Other persons who may be plaintiffs are (1) the owner of a distinct and several part of a patent (*n*); (2) one of several joint owners, without joining his co-owners, if the defendant does not object (*o*), and a defendant who intends to object must do so at once (*p*); (3) a married woman, if the patent is her separate property (*q*); (4) an assignee, even though the defendant is the original grantee (*r*); (5) the assignee for a district (*s*), but in this case the act of infringement must take place within the assignee's district; (6) the assignee of a portion of a patent (*t*).

Position of assignees and licensees.

435. The assignment of a patent should be registered, but registration is not essential to enable an assignee to sue (*u*). A trustee, a trustee in bankruptcy or his assignee (*a*), the executors or administrators of a deceased patentee, and a mortgagor may each sue in his own name. A mortgagee cannot sue infringers, and his interest in a patent is not such as to make him a necessary party in an action (*b*). Neither a general nor an exclusive licensee can

(*i*) *Heath* v. *Unwin* (1855), 5 H. L. Cas. 505; see also *Automatic Weighing Machine Co.* v. *Knight* (1889), 6 R. P. C. 113, 300, C. A.

(*k*) *Clark* v. *Adie* (1875), 10 Ch. App. 667, *per* JAMES, L.J., at p. 675.

(*l*) *Sellers* v. *Dickinson* (1850), 5 Exch. 312.

(*m*) *British United Shoe Machinery Co.* v. *Fussell & Sons* (1908), 25 R. P. C. 631, C. A.; and see pp. 138, 139, *ante*.

(*n*) *Dunnicliff* v. *Mallet* (1859), 7 C. B. (N. S.) 209.

(*o*) *Davenport* v. *Richard* (1860), 3 L. T. 503.

(*p*) *Sheehan* v. *Great Eastern Rail. Co.* (1880), 16 Ch. D. 59.

(*q*) *Westhead* v. *Keene* (1838), 1 Beav. 287; *Bergmann* v. *Macmillan* (1881), 17 Ch. D. 423.

(*r*) *Walton* v. *Lavater* (1860), 8 C. B. (N. S.) 162; *Boulton* v. *Bull* (1795), 2 Hy. Bl. 463; *Electric Telegraph Co. v. Brett* (1851), 10 C. B. 838.

(*s*) See pp. 183, 184, *ante*.

(*t*) *Dunnicliff* v. *Mallet*, *supra*.

(*u*) See note (*d*), p. 186, *ante*; *Stewart* v. *Casey* (1891), 8 R. P. C. 259; 65 L. T. 40.

(*a*) *Bloxam* v. *Elsee* (1827), 6 B. & C. 169; 9 Dow. & Ry. (K. B.) 215; *Anderson* v. *Patent Oxonite Co.* (1886), 3 R. P. C. 279.

(*b*) *Van Gelder Apsimon & Co.* v. *Sowerby Bridge Flour Co.* (1890), 7 R. P. C. 208, C. A.; 44 Ch. D. 374; and see p. 186, *ante*.

sue (*c*), nor can a mere agent for a foreign patentee maintain an action in his own name (*d*).

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436. Any person who infringes, whether he is a principal (*e*) or a servant or an agent, may be made a defendant (*f*). A company may be made a defendant, and the directors of a company may be made personally liable for acts of infringement by workmen of the company acting under their direction (*g*). Foreigners resident within the realm may be made defendants (*h*). Manufacturers of an infringing article need not necessarily be joined as defendants (*i*), but they and persons who have bought such articles may be joined as co-defendants or may be sued separately (*k*). Innocent carriers may be restrained from dealing with or handling infringing articles, and when the consignee can be discovered he should be joined as a co-defendant (*l*).

Defendants.

(iii.) *Pleadings.*

437. An action for infringement is commenced by writ issued out of the High Court of Justice, either in the King's Bench or Chancery Division. Patent actions may also be tried in the Chancery Court of the County Palatine of Lancaster (*n*). The ordinary rules as to service of the writ apply (*o*).

Commencement of proceedings. Courts having jurisdiction. Service.

(*c*) *Heap* v. *Hartley* (1889), 6 R. P. C. 495, C. A.; 42 Ch. D. 461; see note (*k*), p. 191, *ante*.

(*d*) *Adams* v. *North British Rail. Co.* (1873), 29 L. T. 367.

(*e*) *Sykes* v. *Haworth* (1879), 12 Ch. D. 826; *Gregory* v. *Piper* (1829), 9 B. & C. 591; *Lyons* v. *Martin* (1838), 8 Ad. & El. 512; *Sharrod* v. *London and North Western Rail. Co.* (1849), 4 Exch. 580, 587; *Gordon* v. *Rolt* (1849), 4 Exch. 365; *Whatman* v. *Pearson* (1868), L. R. 3 C. P. 422; *Betts* v. *De Vitre* (1868), 3 Ch. App. 429, 441; see also *Savage & Co.* v. *Brindle* (1896), 13 R. P. C. 266, as to the making of materials to be used in infringing, though the materials themselves are not infringements; and see title MASTER AND SERVANT, Vol. XX., pp. 256, 257.

(*f*) *Betts* v. *Neilson* (1865), 6 New Rep. 221; *Adair* v. *Young* (1879), 12 Ch. D. 13, 19, C. A.; *Betts* v. *De Vitre* (1864), 11 Jur. (N. S.) 9; *Day* v. *Davies* (1904), 22 R. P. C. 34.

(*g*) *Mathias* v. *Yetts* (1882), 46 L. T. 497, C. A.; *Betts* v. *De Vitre* (1864), 11 Jur. (N. S.) 9; *Betts* v. *De Vitre* (1868), 3 Ch. App. 429, 441; *Spencer* v. *Ancoats Vale Rubber Co.* (1888), 6 R. P. C. 46, C. A.; *Welsbach Incandescent Gas Light Co.* v. *Daylight Incandescent Mantle Co.* (1899), 16 R. P. C. 344; *Welsbach Incandescent Gas Light Co.* v. *New Incandescent (Sunlight Patent) Gas Lighting Co.* (1900), 17 R. P. C. 247; [1900] 1 Ch. 843; *A.-G.* v. *Bermondsey Vestry* (1883), 23 Ch. D. 60, C. A.

(*h*) *Caldwell* v. *Vanvlissengen* (1851), 9 Hare, 415; *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351, C. A.; *Toni Tyre, Ltd.* v. *Palmer Tyre, Ltd.* (1905), 22 R. P. C. 369.

(*i*) *Moser* v. *Marsden* (1892), 9 R. P. C. 214; [1892] 1 Ch. 847, C. A.

(*k*) *Penn* v. *Bibby, Penn* v. *Jack, Penn* v. *Fernie* (1866), L. R. 3 Eq. 308; *United Telephone Co.* v. *Walker and Oliver* (1886), 4 R. P. C. 63, 67; 56 L. T. 508; *Proctor* v. *Bennis* (1887), 4 R. P. C. 333, C. A.; 36 Ch. D. 740.

(*l*) *Washburn and Moen Manufacturing Co.* v. *Cunard Steamship Co.* (1889), 6 R. P. C. 398, 403. Plaintiffs desirous of obtaining an injunction against a person who, having made a contract of indemnity with the defendants, has been made a third party, should amend by joining him as a defendant (*Edison and Swan Electric Light Co.* v. *Holland* (1889), 6 R. P. C. 243, 286, C. A.).

(*n*) But a county court has no jurisdiction where the validity of a patient is in question; see *R.* v. *Halifax County Court Judge*, [1891] 2 Q. B. 263, C. A.; see titles COUNTY COURTS, Vol. VIII., p. 431; COURTS, Vol. IX., p. 121.

(*o*) See title PRACTICE AND PROCEDURE.

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Indorsement of writ.

In an action for infringement the writ is usually indorsed with a claim for (1) an injunction restraining the defendant, his agents and servants, from infringing the plaintiff's Letters Patent No. ——; (2) damages, or, at the plaintiff's option, an account of profits; (3) delivery up or destruction of all infringing articles within the defendant's possession or control; (4) costs.

Usual pleadings.

438. After service of the writ the usual pleadings (*p*) are (1) a statement of claim, which must be accompanied by particulars of breaches; (2) a defence, which must be accompanied by particulars of objections.

Statement of claim.

439. In the statement of claim the plaintiff should allege that he is the grantee or registered legal owner of the letters patent, or, if his title has devolved upon him by assignment, or by operation of law, the facts resulting in such devolution should be clearly stated. It is not necessary to allege the validity of the patent, or that the invention is new (*q*), or that the original patentee was the true and first inventor (*r*). Nor is it necessary to set out any part of the specification. If, however, the specification has been amended, this should be pleaded; and it should be asserted that the original specification was drawn in good faith and with reasonable skill and knowledge (*s*). Several patents may be sued on in one action, provided that no inconvenience or oppression will arise from the plurality of issues (*t*). The court may on motion (*u*) allow the patentee on terms (*v*) to amend his patent by way of disclaimer (*w*).

Particulars of breaches.

440. Particulars of breaches are particulars of the time, place, and manner in which the plaintiff alleges that his patent has been infringed by the defendant. The defendant is entitled to have adequate notice of the case to be made against him (*x*). When the defendant is a seller or user, and not a manufacturer of the infringing articles, greater particularity may be required (*y*). One instance at least of each type of infringement complained of must be given, and the plaintiff must specify which of the claims in his specification he alleges have been infringed (*a*), but he may allege that all the claims have been infringed, the reasonableness or otherwise of such an allegation being a matter to be considered in relation to the costs of the trial (*b*). Leave to amend particulars of breaches

(*p*) As to pleading generally, see title PLEADING, pp. 418 *et seq.*, *post*.
(*q*) *Amory* v. *Brown* (1869), L. R. 8 Eq. 663.
(*r*) See *Ward Brothers* v. *Hill & Son* (1901), 18 R. P. C. 491.
(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 23.
(*t*) *Saccharin Corporation* v. *Wild & Co.* (1903), 20 R. P. C. 243, C. A.; [1903] 1 Ch. 410; *Saccharin Corporation* v. *White & Sons* (1903), 20 R. P. C. 454, C. A.; 88 L. T. 850; *Saccharin Corporation* v. *Alliance Chemical Co.* (1905), 22 R. P. C. 175, C. A.
(*u*) R. S. C., Ord. 53A, r. 23.
(*v*) As to terms see *Gillette Safety Razor Co.* v. *Luna Safety Razor Co.*, [1910] 2 Ch. 373.
(*w*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 22; p. 173, *ante*.
(*x*) *Needham* v. *Oxley* (1863), 1 Hem. & M. 248; *Mandleberg* v. *Morley* (1893), 10 R. P. C. 256; *Batley* v. *Kynock* (No. 2) (1874), L. R. 19 Eq. 229, 231; *Henser and Guignard* v. *Hardie* (1894), 11 R. P. C. 421; see also R. S. C., Ord. 53A, rr. 13, 16, 19, 20, 21.
(*y*) *Mandleberg* v. *Morley* (1893), 10 R. P. C. 256.
(*a*) R. S. C., Ord. 53A, r. 16.
(*b*) *Haslam & Co.* v. *Hall* (1887), 4 R. P. C. 203, 206.

may be given by the court (*c*). Further particulars may be ordered and may be postponed till after discovery has been obtained (*d*). If the validity of the patent has been in question in a previous action, and a certificate of validity has been obtained, the certificate should be pleaded (*e*).

Defence.

441. It is necessary for the defendant in his defence to state all the grounds on which he intends to rely. The defences open to a defendant are as follows:—

He may (1) deny the plaintiff's title to the patent in suit; (2) deny that he has infringed as alleged or at all; (3) plead leave and licence; (4) allege that the letters patent are invalid (*f*); (5) allege that the patented article is produced exclusively, or mainly, outside the United Kingdom (*g*); (6) allege facts justifying revocation of the patent on the ground that the reasonable requirements of the public with respect to the invention have not been satisfied (*h*); (7) allege a contract embodying prohibited terms or conditions (*i*); (8) allege that at the time of the infringement he was not aware, nor had he reasonable means of making himself aware, of the existence of the patent, but this plea is available only as a defence to a claim for damages, not to a claim for an injunction (*j*).

Particulars of objections to validity.

442. In an action for infringement, a defendant who by his defence attacks the validity of the patent in suit, must, with his defence, deliver particulars of the objections to validity upon which he intends to rely at the trial (*k*). Leave to amend particulars of objections may be obtained from the court upon such terms as to the court shall seem just (*l*); but no objection to validity can be taken at the trial, unless the objection has been pleaded (*m*). Where there are two or more defendants representing the same interest it is not necessary for every defendant to deliver particulars of objections (*n*).

(*c*) R. S. C., Ord. 53A, r. 19; see also *Shoe Machinery Co.* v. *Cutlan* (1895), 12 R. P. C. 342.

(*d*) *Russell* v. *Hatfield* (1885), 2 R. P. C. 144.

(*e*) See pp. 224 *et seq.*, *post*.

(*f*) In the case of this plea, particulars of objections must be delivered; see the text, *infra*.

(*g*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 25 (2); *Re Hatschek's Patent* (1909), 26 R. P. C. 228.

(*h*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 4, 25 (2).

(*i*) See Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 38, and see p. 193, *ante*.

(*j*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 33.

(*k*) R. S. C., Ord. 53A, rr. 14, 15, 17, 18, 19, 20, 21, 22; *British, Foreign and Colonial Automatic Light Controlling Co., Ltd.* v. *Metropolitan Gas Meters, Ltd.*, [1912] 2 Ch. 82; see *Colman* v. *Cook & Co.* (1912), 29 R. P. C. 175, C. A.; and see note (*b*), p. 206, *ante*.

(*l*) R. S. C., Ord. 52A, r. 19. As to the terms on which leave is as a rule granted, see *Otto* v. *Sterne* (1885), 2 R. P. C. 139; *Parker* v. *Maignen's Filtre Rapide Co.* (1888), 5 R. P. C. 207; *Badische Anilin und Soda Fabrik* v. *La Société Chimique des Usines du Rhône* (1897), 14 R. P. C. 875, 881; *Edison Telephone* v. *India Rubber Co.* (1881), 17 Ch. D. 137; *Blakey & Co.* v. *Latham & Co.* (1888), 6 R. P. C. 29, 36; but the judge has an absolute discretion (*Pascall* v. *Toope* (1890), 7 R. P. C. 120; *Woolley* v. *Broad* (1892), 9 R. P. C. 429; *Wilson and Wilson Brothers Bobbin Co.* v. *Wilson & Co.* (1899), 16 R. P. C. 315, C. A.).

(*m*) *Re Andrews' Patent, Alsop Flour Process, Ltd.* v. *Flour Oxidising Co., Ltd.* (1908), 25 R. P. C. 477, H. L.; *British United Shoe Machinery Co.* v. *Fussell & Sons* (1908), 25 R. P. C. 631, 659, C. A.; and see R. S. C., Ord. 53A, r. 21.

(*n*) *Smith* v. *Cropper* (1885), 10 App. Cas. 249.

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Grounds of attack.

The validity of a patent may be attacked on any of the following grounds:—(1) That the patentee was not the true and first inventor (the defendant who pleads this should give the name of the person he alleges is the true and first inventor); (2) that the alleged invention is not new; (3) that the alleged invention is not proper subject-matter for letters patent; (4) that the alleged invention is not useful, which, as has been seen, is a compendious and inaccurate method of pleading want of subject-matter and insufficiency (*o*); (5) that the alleged invention is not sufficiently ascertained or described in the specification; (6) that there is disconformity between the provisional and complete specifications; (7) that the alleged invention has been the subject of a prior grant of letters patent.

Want of novelty.

443. The plea of want of novelty may be set up on account of either prior publication in some book, specification or other document, or of prior public user of the invention. Sufficient particulars must be given of the book or specification to enable the plaintiff to identify it. The pages of the books should be given, and when the specifications cited are of a bulky and complex nature the parts relied on should be specified; but a defendant may rely on the whole of the book or specification (*p*). In the case of prior public user (*q*) the defendant must give the most minute particulars, and also, where possible, obtain for the plaintiff inspection of the article so used (*r*).

Want of subject-matter.

The plea of want of subject-matter raises the point as to whether the invention is a new manufacture within the meaning of the Statute of Monopolies (*s*). It also raises the point whether, in view of the common general knowledge of the public at the date of the patent, any exercise of the inventive faculty was required on the part of the patentee to produce the alleged invention (*t*). In pleading common public knowledge, no individual instances need be given; specifications may not, however, be used as evidence of general knowledge, unless they have been specifically mentioned, either under the plea of want of novelty or the plea of common knowledge (*u*). Specifications may be shown to be part of the common public knowledge, but they are not necessarily a part of such knowledge (*a*).

(*o*) See p. 151, *ante*.

(*p*) *Holliday* v. *Heppenstall* (1889), 6 R. P. C. 320, C. A.; 41 Ch. D. 109: *Heathfield* v. *Greenway* (1893), 11 R. P. C. 17; *Siemens* v. *Karo, Barnett & Co.* (1891), 8 R. P. C. 376; *Sidebottom* v. *Fielden* (1891), 8 R. P. C. 266, 270; *Nettlefolds* v. *Reynolds* (1891), 8 R. P. C. 410, C. A.; *Edison-Bell Consolidated Phonograph Co.* v. *Columbia Phonograph Co.* (1900), 18 R. P. C. 4.

(*q*) *Crosthwaite Fire Bar Syndicate* v. *Senior* (1909), 26 R. P. C. 260; [1909] 1 Ch. 801; *Minerals Separation, Ltd.* v. *Ore Concentration Co.* (1905), *Ltd.* (1909), 26 R. P. C. 413; [1909] 1 Ch. 744, C. A.; *Re Brown's Patent* (1906), 23 R. P. C. 790, C. A.; *Carnegie Steel Co.* v. *Bell Brothers* (1907), 24 R. P. C. 82, C. A.

(*r*) R. S. C., Ord. 53A, r. 18.

(*s*) 21 Jac. 1, c. 3, s. 6; see p. 128, *ante*.

(*t*) *Re Max Müller's Patent* (1907), 24 R. P. C. 465, 479; and see pp. 146 *et seq.*, *ante*.

(*u*) *Solvo Laundry Supply Co.* v. *Mackie* (1893), 10 R. P. C. 68; *Automatic Weighing Machine Co.* v. *Knight* (1889), 6 R. P. C. 297, 302, C. A.; *English and American Machinery Co.* v. *Union Boot and Shoe Machine Co.* (1894), 11 R. P. C. 367, C. A.

(*a*) *Solvo Laundry Supply Co.* v. *Mackie*, *supra*.

Estoppel.

444. An assignor of a patent who is afterwards sued for infringing the patent he assigned is estopped by his deed from attacking the validity of the patent (*b*); and a partner who has assigned the whole of his interests in a patent by a deed of dissolution of partnership is estopped from attacking validity in an action for infringement brought against him by his former partner (*c*).

A licensee may be estopped from attacking the validity of the patent the subject of his licence (*d*).

A defendant who has had judgment given against him in a former action cannot attack the validity of the same patent in a subsequent action (*e*), even though he desires to do so on new grounds (*f*). Where, however, the defendant in the later action is different from the defendant in the former he may attack validity (*g*).

A plaintiff whose patent has been held to be invalid is estopped from recovering against the same defendant in a subsequent action, unless the invalidity has been removed by amendment of the specification (*h*).

Estoppel by deed or by record must be specially pleaded (*i*).

Counterclaim for revocation.

445. A defendant in an action for infringement of a patent, if entitled to present a petition to the court for the revocation of the patent, may, without presenting such petition, apply by way of counterclaim for the revocation of the patent (*k*).

(iv.) *Interlocutory Proceedings.*

Interlocutory injunction.

446. To obtain an interlocutory injunction the usual course is to proceed by way of motion in the Chancery Division. The plaintiff must establish a *primâ facie* case of the validity of his patent, and of infringement, and he must not have been guilty of laches (*l*).

Primâ facie case of validity

In establishing a *primâ facie* case of validity, there is a strong presumption in favour of validity if the patent has been worked and enjoyed undisturbed for a number of years (*m*). This requirement as to validity is satisfied if the plaintiff is able to show that in a previous action the patent had been upheld; and, if the defendant

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(*b*) *Chambers* v. *Crichley* (1864), 33 Beav. 374; *Bowman* v. *Taylor* (1834), 2 Ad. & El. 278; *Bowman* v. *Rostron* (1835), 2 Ad. & El. 295; *Wallon* v. *Lavater* (1860), 8 C. B. (N. S.) 162; and see title ESTOPPEL, Vol. XIII., pp. 365 *et seq.*; 413.

(*c*) *Chambers* v. *Crichley*, *supra*; *Gonville* v. *Hay* (1903), 21 R. P. C. 49; see also *Axmann* v. *Lund* (1874), L. R. 18 Eq. 330.

(*d*) See p. 194, *ante*.

(*e*) *Thomson* v. *Moore* (1889), 6 R. P. C. 426, C. A.; (1890), 7 R. P. C. 325, H. L.; 23 L. R. Ir. 599, 626; *Brown and Brown Brothers & Co.* v. *Hastie & Co.* (1906), 23 R. P. C. 361, H. L.

(*f*) *Shoe Machinery Co.* v. *Cutlan* (No. 2) (1896), 13 R. P. C. 141, 145.

(*g*) *Otto* v. *Steel* (1886), 3 R. P. C. 109, C. A.

(*h*) *Horrocks* v. *Stubbs* (1895), 12 R. P. C. 540; *Re Deeley's Patent* (1894), 11 R. P. C. 72.

(*i*) *Magrath* v. *Hardy* (1838), 4 Bing. (N. C.) 782; *Bowman* v. *Rostron* (1835), 2 Ad. & El. 295.

(*k*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 32. For conditions governing the right to present a petition for revocation, see pp. 206 *et seq.*, *ante*.

(*l*) See title INJUNCTION, Vol. XVII., p. 258.

(*m*) *Dudgeon* v. *Thomson* (1877), 30 L. T. 244; *Oxford and Cambridge Universities* v. *Richardson* (1802), 6 Ves. 689; *Bickford* v. *Skewes* (1837), 1 Web. Pat. Cas. 211; *Wheatstone* v. *Wilde* (1861), Griffin, Patent Cases, 1884—6, 247.

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admits validity (*n*) or is estopped from denying validity (*o*), the court deems this sufficient to warrant the grant of an injunction.

Unless some very strong evidence of validity in support of the motion is presented, the court seldom grants an interlocutory injunction in respect of an alleged infringement of a new patent (*p*).

Primâ facie case of infringement.

A *primâ facie* case must also be made out in respect of infringement (*a*); one clear case, however, of infringement will suffice (*b*).

The court may grant the injunction although the defendant offers to keep an account (*c*). It is, however, a very common practice for the court to order the motion to stand until the trial of the action on the defendant undertaking to keep an account.

The court will consider the probability of grave injury to one side or the other arising from the grant, or of the refusal to grant, the injunction sought. When an injunction is granted, the plaintiff is required to undertake to pay any damage resulting from the injunction should he subsequently prove to be wrong (*d*).

Delay in seeking an interim injunction, unless it can be satisfactorily explained (*e*), usually prevents the injunction being granted.

An *ex parte* injunction may be obtained after issue of writ, provided the plaintiff can show that he would suffer great injury by delay (*f*).

Evidence.

447. The evidence on the application for the injunction is given upon affidavit. The affidavit must state who is the patentee, and also that the invention is useful and novel, that a sufficient specification has been filed, and it should also clearly state wherein the alleged infringement consists. An affidavit made on "information and belief" should show the source from whence the information has been obtained (*g*).

Interrogatories and discovery.

448. The rules relating to the administration of interrogatories and the discovery of documents which apply in ordinary actions apply equally to patent cases (*h*).

Documents dealing with alleged prior users have been held to be privileged (*i*). Communications between a patentee and his patent agent made at the time of the preparation of the specification are not privileged (*j*). The fact that discovery might lead to the disclosure of trade secrets does not deter the court from

(*n*) *Dircks* v. *Mellor* (1845), 26 London Journal, 268.
(*o*) *Clarke* v. *Fergusson* (1859), 1 Gift. 184; see p. 219, *ante*.
(*p*) *Caldwell* v. *Vanvlissengen* (1851), 9 Hare, 415; *Lister* v. *Norton Brothers & Co.* (1884), 1 R. P. C. 114; *British Tanning Co.* v. *Groth* (1889), 7 R. P. C. 1.
(*a*) *Briggs & Co.* v. *Lardeur* (1884), 1 R. P. C. 126; *Anderson* v. *Patent Oxonite Co.* (1886), 3 R. P. C. 279.
(*b*) *United Telephone Co.* v. *Sharples* (1885), 29 Ch. D. 164.
(*c*) *Plimpton* v. *Spiller* (1876), 4 Ch. D. 286, C. A.
(*d*) *Munts* v. *Greenfell* (1842), 2 Web. Pat. Cas. 88, 91; *United Telephone Co.* v. *Tasker* (1888), 5 R. P. C. 628, C. A.; title INJUNCTION, Vol. XVII., p. 222.
(*e*) *United Telephone Co.* v. *Equitable Telephone Association* (1888), 5 R. P. C. 233.
(*f*) See title INJUNCTION, Vol. XVII., p. 274.
(*g*) *Saccharin Corporation* v. *Chemical and Drugs Co.* (1898), 15 R. P. C. 53, C. A.
(*h*) See title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 35 *et seq.*
(*i*) *Carnegie Steel Co.* v. *Bell Brothers* (1907), 24 R. P. C. 82, C. A.
(*j*) *Moseley* v. *Victoria Rubber Co.* (1886), 3 R. P. C. 351; 55 L. T. 482.

ordering it, if it is necessary in the interests of justice; but the court does what it can to protect the party compelled to disclose his secrets (*k*).

Interrogatories tending to establish the fact of infringement are allowable (*l*).

Inspection.

449. The granting of an order for inspection is in the discretion of the court (*n*), and the court requires that a *primâ facie* case of infringement shall first be made out (*o*). Sometimes the inspection is limited to scientific witnesses, who are required to refrain from disclosing any secrets which do not affect the question of infringement (*p*). A plaintiff may be allowed to take samples for analysis from the defendant's goods in order to test identity of composition of such goods and the patentee's goods (*q*). Mutual inspection by the parties may be ordered (*r*).

(v.) *Hearing and Evidence.*

Proceedings at trial.

450. Infringement actions are tried without a jury, unless the court otherwise directs (*s*). If the action is commenced in the Chancery Division, a jury cannot be obtained (*t*).

The court may, and on the request of either party must, call in the aid of an assessor specially qualified and try the case wholly or partially with his assistance (*u*). The court may also refer the matter to a referee, for the purpose of having experiments performed for the benefit of the court (*a*).

When a plaintiff is bringing a number of actions on the same patent against a number of defendants, the several actions may be consolidated, on the application of the defendants, so as to enable

(*k*) *Renard* v. *Levinstein* (1864), 10 L. T. 94.

(*l*) *Bovill* v. *Smith* (1866), L. R. 2 Eq. 459; *Swinborne* v. *Nelson* (1853), 16 Beav. 416; and see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 94, note (*n*).

(*n*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 34; and R. S. C., Ord. 53A, r. 18; *McDougall Bros here* v. *Partington* (2) (1890), 7 R. P. C. 351, 357; see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 67 *et seq.* An application for inspection may be made on motion to the court, or by summons, and supported by evidence on affidavit.

(*o*) *Bovill* v. *Moore* (1815), 2 Coop. *temp.* Cott. 56; *Batley* v. *Kynock* (1874), L. R. 19 Eq. 90; *Cheetham* v. *Oldham* (1888), 5 R. P. C. 617.

(*p*) *Flower* v. *Lloyd*, [1876] W. N. 169; *Swan* v. *Edlin-Sinclair Tyre Co.* (1903), 20 R. P. C. 435.

(*q*) *Patent Type Founding Co.* v. *Walter* (1860), 8 W. R. 353.

(*r*) *Davenport* v. *Jepson* (1862), 1 New Rep. 307; *Germ Milling Co.* v. *Robinson* (1885), 3 R. P. C. 11.

(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 31 (1).

(*t*) *Warner* v. *Murdoch*, *Murdoch* v. *Warner* (1877), 4 Ch. D. 750, C. A. An infringement action in the King's Bench Division is not usually tried with a jury, unless there is an allegation of fraud (*Lucas (Joseph), Ltd.* v. *Miller & Co., Ltd.* (1900), 17 R. P. C. 165, C. A.) or a libel is involved *Appleby's (Alfred) Twin Roller Chain, Ltd.* v. *Eadie (Albert) Chain, Ltd.* (1899), 16 R. P. C. 318).

(*u*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 31 (1); *Hattersley & Sons* v. *Hodgson* (1903), 20 R. P. C. 591; (1904), 21 R. P. C. 517, C. A.; (1905), 22 R. P. C. 229, C. A.

(*a*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 56; *Badische Anilin und Soda Fabrik* v. *Levinstein* (1883), 24 Ch. D. 156; *Edison and Swan Electric Light Co.* v. *Holland* (1888), 5 R. P. C. 459; *Moore* v. *Bennett* (1884), 1 R. P. C. 129; *North British Rubber Co.* v. *Mackintosh & Co.* (1894), 11 R. P. C. 477.

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issues common to all the actions (for example, validity) to be tried in one action (*b*).

Evidence.

451. The evidence must be given orally upon oath or affirmation (*c*). A patentee who has assigned the whole of his interest is a competent witness for the assignee (*d*). A licensee is also a competent witness.

Expert evidence.

In actions for the infringement of patents the evidence of expert witnesses is usually very important (*e*). Expert evidence is admissible to explain in what ways an invention has been used by an alleged infringer, to explain such differences as exist between an invention and the alleged infringement, or to explain technical terms and what are or are not mechanical equivalents, and to describe how machines work, at the same time pointing out what is new and old in the patentee's specification. Evidence may also be given as to whether the features claimed by the patentee as his invention are to be found in the defendant's machines (*f*). An expert may be asked what difficulties, if any, a patentee has solved; but he may not say whether there is "subject-matter" in an alleged invention, nor give his opinion on whether there is infringement, for these are matters for the court and jury respectively.

Plaintiff's proof.

A plaintiff must prove his patent and his specification unless these are admitted (*g*), and must prove the fact of infringement by showing that the defendant has made, sold, or used the manufacture, articles, or process, as the case may be.

Evidence where want of novelty or subject-matter pleaded.

452. When want of novelty has been pleaded, the plaintiff must give *primâ facie* evidence that his invention is new (*h*); and, after such evidence has been given, the burden of proof that the invention is not novel by reason of prior publication or prior user is on the defendant.

On the issue of subject-matter, the plaintiff must put his specification in evidence, that the judge may see its terms and determine the ambit of its claims. When the specification has already been construed by a court, the construction put upon it is adopted by another court of equal authority, provided the construction is not dependent on matters external to the specification itself, or, if there are such external facts, provided that they are not materially different from those before the previous court (*i*).

Models may be put in by way of evidence in the same way as, and under the conditions which regulate the admission of, documents (*j*).

(*b*) R. S. C., Ord. 49, r. 8; *Amos* v. *Chadwick*, *Robinson* v. *Chadwick*, *Smith* v. *Chadwick*, (1876), 4 Ch. D. 869; *Edison-Bell Phonograph Corporation* v. *Smith* (1894), 11 R. P. C. 148, 389, C. A.; and see Yearly Practice of the Supreme Court, 1912, pp. 698, 699.

(*c*) See title EVIDENCE, Vol. XIII., pp. 590 *et seq.*

(*d*) *Bloxam* v. *Elsee* (1825), 1 C. & P. 558, 563.

(*e*) On the functions of an expert witness, see *Brooks* v. *Steele and Currie* (1896), 14 R. P. C. 46, *per* LINDLEY, L.J., at p. 73; and see title EVIDENCE, Vol. XIII., pp. 437, note (*k*), 480—482.

(*f*) *Seed* v. *Higgins* (1860), 8 H. L. Cas. 550.

(*g*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 14 (1), 79.

(*h*) *Turner* v. *Winter* (1787), 1 Web. Pat. Cas. 77, 81.

(*i*) *National Opalite Glazed Brick and Tile Co.* v. *Grand Hotel, Birmingham* (1901), 18 R. P. C. 249; *Ehrlich* v. *Ihlee* (1888), 5 R. P. C. 437, 449, C. A.

(*j*) As to documentary evidence generally, see title EVIDENCE, Vol. XIII., pp. 510 *et seq.*

453. In default of appearance by a defendant, the plaintiff may on motion obtain judgment, upon formally proving his title and the fact of infringement (*k*). Default of appearance.

(vi.) *Relief.*

(a) *Damages or Account of Profits.*

454. A plaintiff who succeeds in upholding the validity of his patent, and who proves infringement, may be entitled, at his option, either to an account of profits or to damages; but he is not entitled to both against the same defendant (*l*). By taking an account of profits he condones the infringement (*m*). A plaintiff may, however, have an account of profits against one defendant and damages against another defendant in the same action (*n*). Damages or account of profits.

The measure of damages is the loss actually suffered by the plaintiff, and not the profit made by the infringer. The loss must be the natural and direct consequence of the defendant's acts (*o*). In calculating the damages, the loss of profit owing to competition may be considered (*p*); and in computing the damages due to competition, the plaintiff's establishment charges may be taken into consideration (*q*). Sometimes the amount may be fixed by considering what the defendant would have had to pay in royalties on his sales (*r*). Measure of damages.

455. Innocent infringers of patents granted after the 1st January, 1908, can now obtain relief from damages (*s*). The burden of proving innocence is on the infringer, as he is *primâ facie* liable for damages. Relief from damages.

456. In an inquiry as to damages, a defendant must give full information regarding the number of infringing articles he has sold, and the names and addresses of purchasers (*t*). Inquiry as to damages.

On electing to have an account of profits, a plaintiff may require the defendant to file a complete affidavit showing how many infringing articles he has made or sold (*u*). The defendant may

(*k*) *Pneumatic Tyre Co.* v. *Chisholm & Co.* (1896), 13 R. P. C. 488; *Edison United Phonograph Co.* v. *Young* (1894), 11 R. P. C. 489; see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 185 *et seq.*

(*l*) *Neilson* v. *Betts* (1871), L. R. 5 H. L. 1, 22; *De Vitre* v. *Betts* (1873), L. R. 6 H. L. 319.

(*m*) *Neilson* v. *Betts*, *supra.*

(*n*) *Booth* v. *Tootal, Broadhurst Lee Co.* (1894), 11 R. P. C. 175; *Penn* v. *Bibby*, *Penn* v. *Jack*, *Penn* v. *Fernie* (1866), L. R. 3 Eq. 308.

(*o*) *United Horse Shoe and Nail Co.* v. *Stewart & Co.* (1888), 5 R. P. C. 260, 268; 13 App. Cas. 401; and see *Meters, Ltd.* v. *Metropolitan Gas Meters, Ltd.* (1911), 28 R. P. C. 157, C. A.; 104 L. T. 113; *Clement Talbot, Ltd.* v. *Wilson* (1909), 26 R. P. C. 467; and see, generally title DAMAGES, Vol. X., pp. 310 *et seq.*

(*p*) *British United Shoe Machinery Co., Ltd.* v. *Fussell & Sons, Ltd.* (1910), 27 R. P. C. 205.

(*q*) *Leeds Forge Co.* v. *Deighton's Patent Flue Co.* (1907), 25 R. P. C. 209.

(*r*) *English and American Machinery Co.* v. *Union Boot and Shoe Machine Co.* (1895), 13 R. P. C. 64; *British Motor Syndicate* v. *Taylor (John) & Sons* (1900), 17 R. P. C. 723, C. A.; *American Braided Wire Co.* v. *Thomson & Co.* (1890), 7 R. P. C. 152.

(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 33.

(*t*) *American Braided Wire Co.* v. *Thompson & Co.* (1888), 5 R. P. C. 375; *Saccharin Corporation* v. *Chemicals and Drugs Co.* (1900), 17 R. P. C. 612, C. A. A statement of any offer made by the defendant to agree a certain sum as damages and refused by the plaintiff may be ordered to be inserted in the order directing the inquiry (*British Vacuum Co., Ltd.* v. *Exton Hotels Co., Ltd.* (1908), 25 R. P. C. 617, 630).

(*u*) *Murray* v. *Clayton* (1872), L. R. 15 Eq. 115; *Saccharin Corporation* v. *Chemicals and Drugs Co.*, *supra.*

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also be interrogated, and compelled to produce his books (*a*). The amount due on an account of profits is a debt provable in the bankruptcy of the defendant (*b*).

(b) *Injunction.*

Injunction.

457. On the principle that a person who has already infringed a patent will be likely, unless restrained, to continue to infringe, a successful plaintiff in an action for infringement may obtain an injunction against the defendant (*c*). Actual infringement is not necessary; a threat to infringe, or an obvious deliberate intention to infringe, by a defendant entitles a plaintiff to an injunction (*d*). Where there are many infringers of the same patent a patentee should not commence a large number of actions and apply for injunctions in each case; he should take proceedings against one, and inform the others what he is doing (*e*).

A person who commits a breach of an injunction or who knowingly aids and abets another in doing so is guilty of contempt of court (*f*).

(c) *Delivery up or Destruction of Infringing Articles.*

Order for delivery up or destruction of infringing articles.

458. A successful plaintiff may obtain an order of the court for delivery up or destruction of all infringing articles within his control or possession (*g*), unless such an order would be unreasonable (*h*).

(d) *Certificate of Validity.*

Certificate of validity.

459. In an action for infringement in which the validity of a patent has been upheld, the court may certify that the validity of the patent came in question (*i*). The certificate should be applied for by the plaintiff at the close of the trial. For the prevention of collusion between parties, and for the protection of the public, the judge is bound not to grant a certificate, unless validity has in fact been proved to his satisfaction (*k*). When the defendant does not

(*a*) *Saxby* v. *Easterbrook* (1872), L. R. 7 Exch. 207.

(*b*) *Watson* v. *Holliday* (1882), 20 Ch. D. 780.

(*c*) See, generally title INJUNCTION, Vol. XVII., pp. 206 *et seq.*

(*d*) *Frearson* v. *Loe* (1878), 9 Ch. D 48, 65; *Dowling* v. *Billington* (1890) 7 R. P. C. 191, C. A.; *Shoe Machinery Co.* v. *Cutlan* (1895), 12 R. P. C. 342; *British United Shoe Machinery Co.* v. *Collier* (*Simon*), *Ltd.* (1909), 26 R. P. C. 21, 534, C. A.; (1910), 27 R. P. C. 567, H. L.; *Adair* v. *Young* (1879), 12 Ch. D. 13, C. A.

(*e*) *Bovill* v. *Crate* (1865), L. R. 1 Eq. 388. An interim injunction is rarely granted in cases where the patent has not been established (*Trautner* v. *Patmore* (1911), 29 R. P. C. 60).

(*f*) *Dick* v. *Haslam* (1891), 8 R. P. C. 196; *Incandescent Gas Light Co.* v. *Sluce* (1900), 17 R. P. C. 173, C. A.; and see titles CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 306 *et seq.*; INJUNCTION, Vol. XVII., pp. 291 *et seq.*

(*g*) *Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 531; *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351, 360. The alternative order should be asked for at the trial; the option cannot be exercised on a subsequent motion to vary the minutes of the order (*British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Electrical Co., Ltd.* (1911), 28 R. P. C. 517, 532; 55 Sol. Jo. 689).

(*h*) *Siddell* v. *Vickers, Sons & Co.* (1887), 5 R. P. C. 81, 101; *Automatic Weighing Machine Co.* v. *Fearby* (1893), 10 R. P. C. 442; *United Telephone Co.* v. *London and Globe Telephone and Maintenance Co.* (1884), 26 Ch. D. 766.

(*i*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 35. A second certificate may be granted where further grounds of objection are raised in a subsequent action against a patent the validity of which has been certified (*Flour Oxidising Co., Ltd.* v. *Hutchinson* (1909), 26 R. P. C. 597).

(*k*) *Stocker* v. *Rodgers* (1843), 1 Car. & Kir. 99; *Peroni* v. *Hudson* (1884), 1 R. P. C. 261; *Gall* v. *O'Neill and Brown* (1909), 27 R. P. C. 18.

appear, or when an action is settled during the progress of the trial, *primâ facie* evidence of validity may be given, and if the judge is satisfied a certificate is usually granted (*l*). No appeal lies from the decision of a judge on the question of the grant of or the refusal to grant a certificate (*m*).

When a certificate of validity has been obtained, no further certificate need be sought in any subsequent action on the same patent (*n*), unless the patent has been amended since the grant of the certificate (*o*).

Effect of certificate of validity.

460. The effect of obtaining a certificate is that, in any subsequent action for infringement of the patent, the plaintiff, if successful, may, unless the court otherwise directs, obtain his full costs as between solicitor and client (*p*). It is for the defendant to show that he should not pay solicitor and client costs under this provision (*q*).

(e) *Revocation.*

Revocation of patent.

461. When a defendant, who has counterclaimed for revocation, proves successful in an action against him for infringement, the court may revoke the patent (*r*). Where, however, the court holds the patent invalid on some ground that admits of removal by amendment of the specification, the court may, instead of revoking the patent, order the amendment required (*s*).

(vii.) *Costs.*

Costs.

462. The costs of an action for infringement are in the discretion of the judge before whom the action is tried (*t*). It is important at the conclusion of the trial to ask for a certificate that the particulars of breaches, or the particulars of objections, as the case may be, were reasonable and proper, as no costs are allowed on taxation in respect of any particulars not so certified (*u*). The costs

(*l*) *Haydock* v. *Bradbury* (1886), 4 R. P. C. 74; *Chadburn's (Ship) Telegraph Co.* v. *Robinson* (1905), 22 R. P. C. 468; *Edison United Phonograph Co.* v. *Young* (1894), 11 R. P. C. 489; *Brooks & Co.* v. *Lycett* (1903), 20 R. P. C. 390; *Consolidated Pneumatic Tool Co.* v. *Churchill & Co.* (1905), 22 R. P. C. 367; see also *Delta Metal Co.* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1891), 8 R. P. C. 248; *Claughton* v. *Foster* (1903), 21 R. P. C. 17; *Morris and Bastert* v. *Young* (1895), 12 R. P. C. 455, H. L.; *Ferguson Superheaters, Ltd.* v. *Askern Coal and Iron Co., Ltd.* (1912), 29 R. P. C. 431

(*m*) *Haslam Co.* v. *Hall* (1888), 5 R P. C. 144, C. A.

(*n*) *Edison and Swan Electric Light Co.* v. *Holland* (1889), 6 R. P. C. 243, C. A.

(*o*) *Brooks & Co.* v. *Rendall, Underwood & Co.* (1906), 24 R. P. C. 17.

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c 29), s. 35; and see the text, *infra.*

(*q*) *Automatic Weighing Machine Co.* v. *National Exhibitions Association* (1891), 8 R. P. C. 345; *United Telephone* v. *Paterson* (1889), 6 R. P. C. 142; see also *Saccharin Corporation* v. *Dawson* (1902), 19 R. P. C. 165, 173; *Proctor* v. *Sutton Lodge Chemical Co.* (1888), 5 R. P. C. 184.

(*r*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 32; and see p. 219, *ante.* For conditions under which revocation may be obtained, see pp. 206 *et seq.*, *ante.*

(*s*) See also pp. 172, note (*q*), 208, *ante;* Patents and Designs Act, 1907 (9 Edw. 7, c. 29), s. 22.

(*t*) R. S. C., Ord. 65, r. 1; and see titles PRACTICE AND PROCEDURE; SOLICITORS.

(*u*) R. S. C., Ord. 53A, r. 22; see also *Rowcliffe* v. *Morris* (1886), 3 R. P. C. 145; *Duckett & Son* v. *Sankey & Son* (1899), 16 R. P. C. 357; *British, Foreign and Colonial Automatic Light Controlling Co., Ltd.* v. *Metropolitan Gas Meters, Ltd.* (1912), 29 R. P. C. 303; [1912] 2 Ch. 82. As to taxation of costs generally, see title SOLICITORS.

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of witnesses attending in respect of any alleged breach are not allowed, unless the particulars of such breach are certified (*a*).

Plaintiff's costs.

A plaintiff who succeeds in an action in which he has been able to plead the possession of a certificate that the validity of the patent in suit had been called in question in a previous action for infringement, is entitled to have his full costs as between solicitor and client, unless the court otherwise directs (*b*). A plaintiff whose conduct is oppressive may be deprived of his costs even though he is successful in the action (*c*). A plaintiff may discontinue after the defence has been delivered by leave of the court, upon such terms as to costs as the court may direct (*d*).

Costs on several issues.

Where one party is successful on some issues and the other party is successful on others, the costs should be apportioned (*e*). Provided the issues have been kept quite distinct, the costs are apportioned where one party has succeeded on the issue of invalidity and failed on the issue of infringement (*f*).

Special allowances.

The directors of a limited company whose servants have infringed a patent are personally liable for the costs (*g*).

When it is necessary to have scientific evidence proper fees paid to experts who have been called as witnesses will be allowed; but the fees of experts who are not witnesses but merely advise counsel are not allowed, unless a special order of the court to that effect is obtained (*h*). Costs on the higher scale are only allowed in cases of great difficulty (*i*).

(*a*) *Honiball* v. *Bloomer* (1854), 10 Exch. 538; *Longbottom* v. *Shaw* (1889), 6 R. P. C. 510.

(*b*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 35; see p. 225, *ante*; and see *Flour Oxidising Co., Ltd.* v. *Hutchinson* (1909), 26 R. P. C. 597. This provision does not apply to counterclaims (*British Vacuum Cleaner Co., Ltd.* v. *London and South Western Rail. Co.* (1910), 27 R. P. C. 649, 670).

(*c*) *Nunn* v. *D'Albuquerque* (1865), 34 Beav. 595; and see *Gill* v. *Philips & Son, Ltd.* (1911), 29 R. P. C. 397; R. S. C., Ord. 26, r. 1.

(*d*) *Wilcox and Gibbs' Sewing Machine Co.* v. *Janes Brothers* (1897), 14 R. P. C. 523; *Brooks & Co.* v. *Lycett* (1902), 19 R. P. C. 166. As to costs in cases where a counterclaim for the revocation of the patent is not proceeded with, see *Babcock and Wilcox, Ltd.* v. *Water Tube Boiler and Engineering Co.* (1910), 27 R. P. C. 626.

(*e*) *Badische Anilin und Soda Fabrik* v. *Levinstein* (1885), 29 Ch. D. 366, 418, C. A.; compare *Vidal Dyes Syndicate, Ltd.* v. *Levinstein, Ltd.* (1912), 29 R. P. C. 245, C. A.; and see *Osram Lamp Works, Ltd.* v. *"Z" Electric Lamp Manufacturing Co., Ltd.* (1912), 29 R. P. C. 401, 429; *True and Variable Electric Lamp Syndicate* v. *Bryant Trading Syndicate* (1908), 25 R. P. C. 461; *Crosthwaite Fire Bar Syndicate, Ltd.* v. *Senior* (1909), 26 R. P. C. 713, 733.

(*f*) *Phillips* v. *Ivel Cycle Co.* (1890), 7 R. P. C. 77, 85; *Cassel Gold Extracting Co.* v. *Cyanide Gold Recovery Syndicate* (1894), 11 R. P. C. 638; (1895), 12 R. P. C. 232, 258, C. A.; *Sunlight Incandescent Gas Light Co.* v. *Incandescent Gas Light Co.* (1897), 14 R. P. C. 757; *Dunlop Pneumatic Tyre* v. *Wapshare Tube Co.* (1900), 17 R. P. C. 433; *Kaye* v. *Chubb & Sons* (1887), 4 R. P. C. 289, 300; *Haskell Golf Ball Co.* v. *Hutchison* (1906), 23 R. P. C. 125.

(*g*) *Betts* v. *De Vitre* (1868), 3 Ch. App. 429, 441; *Spencer* v. *Ancoats Vale Rubber Co.* (1888), 6 R. P. C. 46, C. A.

(*h*) *Consolidated Pneumatic Tool Co.* v. *Ingersoll Sergeant Drill Co.* (1908), 25 R. P. C. 574.

(*i*) *Gadd and Mason* v. *Manchester Corporation* (1892), 9 R. P. C. 516, C. A. Three counsel may sometimes be allowed. The court will only give the costs of shorthand notes in exceptional circumstances, but it is

It is not usual for a stay upon a judgment to be granted; but sometimes when the matter is of great importance to the defendants a stay pending appeal is allowed, terms being usually imposed that the defendant shall keep an account and proceed with his appeal without delay (*k*).

SUB-SECT. 2.—*In respect of Threats of Legal Proceedings.*

463. Where any person (*l*), claiming to be the patentee of an invention, by circulars (*m*), advertisements, or otherwise (*n*), threatens (*o*) any other person with legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved thereby may bring an action against him and may obtain an injunction against the continuance of such threats, and may

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usual for the parties to agree that the costs shall be costs in the cause, or to make some other mutually acceptable arrangements; see *Dunlop Pneumatic Tyre Co.* v. *Wapshare Tube Co.* (1900), 17 R. P. C. 433; *Bradford Dyers' Association* v. *Bury* (1901), 19 R. P. C. 125; *Osram Lamp Works, Ltd.* v. "*Z*" *Electric Lamp Manufacturing Co., Ltd.* (1912), 29 R. P. C. 401, 429; compare *Wilson* v. *Wilson Brothers Bobbin Co., Ltd.* (1911), 28 R. P. C. 741, 744; and see *British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Braulik* (1910), 27 R. P. C. 209, 233, C. A.

(*k*) *Hocking & Co.* v. *Fraser & Co.* (1885), 3 R. P. C. 3, 7; *North British Rubber Co.* v. *Mackintosh & Co.* (1894), 11 R. P. C. 477; *Proctor* v. *Bennis* (1887), 4 R. P. C. 333, 363, C. A.; *Osram Lamp Works, Ltd.* v. "*Z*" *Electric Lamp Manufacturing Co., Ltd., supra*, at p. 430.

(*l*) A person who has been restrained from publishing threats does not break the injunction by subsequently bringing an action for infringement (*Beven* v. *Welsbach Incandescent Gas Light Co., Ltd* (1902), 20 R. P. C. 69), nor by subsequently issuing threatening circulars in the capacity of agent for a third person (*Ellam* v. *Martyn & Co.* (1898), 16 R. P. C. 28).

(*m*) For example of threats by circular, see *Cars* v. *Bland Light Syndicate, Ltd.* (1910), 28 R. P. C. 33. An interlocutory motion to restrain the issue of circulars may be refused or ordered to stand over until after the trial of the action for infringement (*Household* v. *Fairburn* (1884), 1 R. P. C. 109; *Barnett* v. *Barrett's Screw Stopper Bottling Co.* (1884), 1 R. P. C. 9; *Sharp* v. *Brauer* (1886), 3 R. P. C. 193), or on an undertaking to prosecute the action for infringement with due diligence (*Mackie* v. *Soho Laundry Supply Co* (1892), 9 R. P. C. 465). For form of order staying a "threats action" where the defendant offers an undertaking to commence an action for infringement, see *Wrightson* v. *Taylor, Maddox & Co.* (1907), 24 R. P. C. 347.

(*n*) The words "or otherwise" are not to be confined to threats *ejusdem generis* with "circulars or advertisements," but cover letters written in answer to inquiries (*Skinner & Co.* v. *Shew & Co.*, [1893] 1 Ch. 413, C. A.), or written without prejudice (*Kurtz* v. *Spence* (1887), 5 R. P. C. 161), or written by a solicitor (*Engels* v. *Hubert Unchangeable Eyelet Syndicate, Ltd.* (1902), 19 R. P. C. 201, following *Barrett* v. *Day* (1890), 7 R. P. C. 54; *Driffield and East Riding Pure Linseed Cake Co.* v. *Waterloo Mills Cake and Warehousing Co.* (1886), 31 Ch. D. 638; *Combined Weighing and Advertising Co.* v. *Automatic Weighing Machine Co.* (1889), 42 Ch. D. 665, approved in *Skinner & Co.* v. *Shew & Co., supra*); but a mere general warning is not a threat (*Crowther* v. *United Flexible Metallic Tubing Co., Ltd.* (1905), 22 R. P. C. 549; and see *Challender* v. *Royle* (1887), 36 Ch. D. 425, C. A., discussed in *Johnson* v. *Edge* (1892), 9 R. P. C. 142, C. A.).

(*o*) It is not necessary that the letter should refer specifically to any patent, in order to constitute a threat (*Douglass* v. *Pintsch's Patent Lighting Co.*, [1897] 1 Ch. 176). The threat must refer to some actual infringement on which an action for infringement may be founded (*Willoughby* v. *Taylor* (1893), 11 R. P. C. 45), or may refer to an intended infringement if the infringement when carried out would amount to an actual infringement (*Johnson* v. *Edge, supra, per* LINDLEY, L.J., at p. 148), but it need not be made to the person bringing the action to restrain (*Johnson* v. *Edge, supra*).

SECT. 10. Legal Proceedings.

recover such damage, if any, as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making the threats (*p*). But no action will lie if the person (*q*) making the threats with due diligence commences and prosecutes an action for infringement of his patent (*r*).

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 36. The section confers an entirely new right in which malice is not an issue between the parties; the plaintiff is relieved from establishing malice as he had to do in the old common law action (*Craig* v. *Dowding* (1908), 25 R. P. C. 259, C. A., *per* COZENS-HARDY, M.R., at p. 262; 98 L. T. 291). Express malice must be proved to obtain under the common law an interlocutory injunction to restrain threats (*Parnell* v. *Dredge* (1896), 13 R P. C. 392, following *Halsey* v. *Brotherhood* (1880), 15 Ch. D. 514; *Bonnard* v. *Perryman*, [1891] 2 Ch. 269, C. A.). The plaintiff in an action to restrain threats may, if the validity of the patent is asserted in the defence, join issue in reply (*Dowson, Taylor & Co.* v. *Drosophone Co.* (1895), 12 R. P. C. 95, C. A.).

(*q*) A person simply entitled to the benefit of an agreement for the assignment of a patent is not within the proviso of the section by reason of the fact that the patentee has commenced an action for infringement *Kensington and Knightsbridge Electric Lighting Co.* v. *Lane Fox Electrical Co.*, [1891] 2 Ch. 573).

(*r*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 36. Due diligence applies to the word "prosecute" as well as to "commence" (*Voelker Incandescent Mantle, Ltd.* v. *Welsbach Incandescent Gas Light Co., Ltd.* (1901), 18 R. P. C. 494), but the date from which an action must be proceeded with with due diligence is the date of the threat and not of the act done against which the threat is directed (*Haskell Golf Ball Co.* v. *Hutchinson* (1904), 21 R. P. C. 497, following *Challender* v. *Royle* (1887), 36 Ch. D. 425, C. A.). To come within the proviso it is not necessary that the action should be commenced after the action to restrain threats (*Barrett* v. *Day* (1890), 7 R. P. C. 54); the action for infringement may be commenced before the threats are made (*Berliner* v. *Edison Bell Consolidated Phonograph Co., Ltd.* (1899), 16 R. P. C. 336; and see *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Seddon Pneumatic Tyre Co., Ltd.* (1897), 14 R. P. C. 332, C. A.). An action for infringement is none the less proceeded with with due diligence because it is subsequently abandoned (*Peck* v. *Hindes, Ltd.* (1898), 15 R. P. C. 113; *Temler* v. *Stevenson & Sons* (1897), 15 R. P. C. 24; *Colley* v. *Hart* (1890), 7 R. P. C. 101; *English and American Machinery Co.* v. *Gare Machine Co.* (1894), 11 R. P. C. 627), or because it is dismissed by the court (*Colley* v. *Hart, supra*), or because delay is caused by the patentee's endeavour to combine his action for infringement with the action for threats by counterclaim (*Colley* v. *Hart, supra*): an action for infringement must be brought with reference to infringements of the same and not of a different character (*Combined Weighing and Advertising Co.* v. *Automatic Weighing Machine Co.* (1889), 42 Ch. D. 665, 671), but an action for infringement is within the proviso if brought against a person who although he has not been threatened is using the alleged infringement ("*Z*" *Electric Lamp Manufacturing Co., Ltd.* v. *Osram Lamp Works, Ltd.* (1911), 28 R. P. C. 479), and although the particulars of breaches do not specify all the articles in connection with which the threats are made (*Lycett Saddle Co., Ltd.* v. *Brooks & Co., Ltd.* (1904), 21 R. P. C. 656). An action for infringement on an amended specification is in substance an action for infringement within the proviso, although an application to amend the specification is pending, and the statement of claim in the infringement action asks for leave to put the amended specification in evidence (*Hall* v. *Stepney Spare Motor Wheel, Ltd.* (1910), 27 R. P. C. 233; and see S. C., [1911] 1 Ch. 514). A threat of an action for infringement may be a "satisfactory reason" within the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 27 (2), for refusing to revoke a patent (*Re Taylor's Patent*, [1912] 1 Ch. 635); see note (*k*), p. 209, *ante*. As to proceedings for infringement, see pp. 210 *et seq.*, *ante*.

SECT. 11.—*International and Colonial Arrangements.*

SECT. 11. International and Colonial Arrangements.

Inventions patented abroad.

464. A person who has applied for protection for an invention in a foreign State (*a*), of which the Government has made arrangements with the Crown for mutual protection of inventions, is entitled to a patent for his invention in priority to other applicants (*b*). The patent will bear the same date as the date of the application in the foreign State (*c*), if the application in this country is made within twelve months from the first application for protection in the foreign State (*d*), but the grantee of such a patent is not entitled to recover damages for infringements happening prior to the actual date on which his complete specification is accepted in this country (*e*).

Mode of application.

465. The application for such a patent must be made in the same manner as an ordinary application (*f*), but it must be accompanied by a complete specification (*g*); it must contain a statutory declaration that foreign application has been made for protection of the invention; it must specify all the foreign States or British possessions in which, and the official date or dates at which, any such application has been made, and it must be signed by the person or persons by whom such application was made (*h*).

Documents accompanying application.

Further, a copy or copies of the specification or specifications and drawings or documents filed or deposited by the applicant in the Patent Office of the foreign State or British possession must be left with the application, or within such further time (*i*) not exceeding three months as the Comptroller may allow; and such copy or copies must be certified or otherwise verified to the Comptroller's satisfaction (*k*). If any document is in a foreign

(*a*) As to the foreign States affected by this provision, see note (*q*), p. 230, *post*.

(*b*) Patents and Designs Act, 1907 (7 Edw. 7, c 29), s. 91 (1). "Person" includes corporation (*Re Carez's Application for a Patent* (1889), 6 R. P. C. 552; *Re Société Anonyme du Générateur du Temple's Application for a Patent* (1895), 13 R. P. C. 54, 56). As to the right to oppose such application and the grounds of opposition, see 29 R. P. C. Appendix, 1912 (A.).

(*c*) Patents Rules, 1908, r. 83. The payment of renewal fees etc. is reckoned from this date. The dates of both the foreign and the British application are to be entered in the Register; see p. 179, *ante*.

(*d*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 91 (1). A foreign patentee may obtain a patent in this country in the ordinary way without availing himself of the privileges of this provision (*British Tanning Co.* v. *Groth* (1891), 8 R. P. C. 113; 60 L. J. (CH.) 235; *Acetylene Illuminating Co.* v. *United Alkali Co.* (1902), 19 R. P. C. 213; [1902] 1 Ch. 494); and see p. 129, *ante*.

(*e*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 91 (1).

(*f*) *Ibid.*, s. 91 (3).

(*g*) *Ibid.*

(*h*) Patents Rules, 1908, r. 15. If the original signatory is dead, the application must be signed by his legal representative. The patent is only granted to the person who has actually sought protection in the foreign country (*Re Shallenberger's Application for a Patent* (1889), 6 R. P. C. 550; *Re Carez's Application for a Patent* (1889), 6 R. P. C. 552).

(*i*) Application for such extension must be made on Patents Form No. 5 (fee £2 for each month of extension) (Patents Rules, 1908, r. 16).

(*k*) *Ibid.* "*Primâ facie* the foreign specification should be considered and examined on precisely the same principles as an English patent" (ruling of the Comptroller-General, reported in the 27 R. P. C. Appendix (1910B)).

SECT. 11. International and Colonial Arrangements.

language it must be accompanied by a translation verified to the Comptroller's satisfaction (*l*).

If the complete specification is not accepted within twelve months, it and the drawings become open to public inspection (*m*).

466. A patent granted under any international or colonial arrangement is not invalidated by the publication of a description, or by the use of the invention in this country, during the twelve months in which the application may be made (*n*).

Non-acceptance. Publication.

The above provisions (*o*) for mutual protection of inventions apply only to those foreign States to which they are declared to be applicable by Orders in Council (*p*); and where a colonial legislature has made satisfactory provisions for the protection of inventions patented in this country, an Order in Council may be issued applying the provisions to that colony with any variations or additions stated in the Order (*q*).

States and colonies affected.

SECT. 12.—*Patent Agents.*

SUB-SECT. 1.—*Register.*

Register of Patent Agents.

467. A Register of Patent Agents is kept by the Chartered Institute of Patent Agents (*r*), containing a list of all agents registered, their names in full, their addresses, the dates of their registration, and any other additions which the council of the Institute may consider worthy of mention (*s*). Printed copies are published annually by the Institute, and such copies are evidence of the contents of the Register (*t*).

Registrar.

The Register is kept by a Registrar appointed by the Institute (*u*), whose duty it is to make such corrections and alterations in the Register as are ordered by the rules (*a*), or by the Institute (*b*), or by the Board of Trade (*c*); and the Board of Trade hears appeals from decisions of the Registrar or the Institute (*d*).

SUB-SECT. 2.—*Who may Act.*

Patent agent.

468. A patent agent is defined to be an agent for obtaining

(*l*) Patents Rules, 1908, r. 16.
(*m*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 91 (3).
(*n*) *Ibid.*, s. 91 (2).
(*o*) See the text, *supra*.
(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 91 (4).
(*q*) *Ibid.*, s. 91 (5). An International Convention for the Protection of Industrial Property exists between Belgium, Brazil, Denmark with Faröe Islands, France with Algeria and colonies, Great Britain with New Zealand and Queensland, Italy, Japan, Netherlands with Dutch East Indies, Surinam and Curaçoa, Norway, Portugal with the Azores and Madeira, Santo Domingo, Servia, Spain, Sweden, Switzerland, Tunis, and the United States of America. Similar arrangements for the mutual protection of inventions have been made between Great Britain and each of the following States and colonies:—Honduras, Mexico, Paraguay, Tasmania, Uruguay, Western Australia; see Instructions to Applicants, pp. 7, 8.
(*r*) The Register is kept pursuant to rules made by the Board of Trade by virtue of *ibid.*, s. 86 (1) (Register of Patent Agents Rules, 1908, Stat. R. & O., 1907, p. 856; see *Patent Agents (Institute)* v. *Lockwood*, [1894] A. C. 347).
(*s*) Register of Patent Agents Rules, 1908, r. 3.
(*t*) *Ibid.*, r. 4.
(*u*) *Ibid.*, r. 5.
(*a*) *Ibid.*, rr. 11—15.
(*b*) *Ibid.*, rr. 14, 20.
(*c*) *Ibid.*, rr. 6, 14, 16—19.
(*d*) *Ibid.*, rr. 21—27.

patents in the United Kingdom (*e*), and no person is entitled to describe himself as a patent agent, whether by advertisement, by description on his place of business, by any document issued by him, or otherwise, unless he is registered as a patent agent (*f*).

Qualifications for registration.

Only persons qualified in one of the following two ways may be registered:—(1) persons who prove to the satisfaction of the Board of Trade that they were *bonâ fide* practising as patent agents before the 24th December, 1888 (*g*); (2) persons who have passed the examination or examinations prescribed by the Board of Trade (*h*) and regulated by the Institute (*i*). The successful candidate receives a certificate (*j*) from the Institute, and on presenting this to the Registrar (*k*) is entitled to be registered as a patent agent (*l*).

Persons who must or may not be recognised as patent agents.

469. The Comptroller must refuse to recognise as agent any person who neither resides nor has a place of business in the United Kingdom or the Isle of Man (*m*); and may refuse to recognise as agent, or to receive further communications relating to patents from:—(1) any person whose name has been erased from the Register for unprofessional conduct (*n*) and not restored (*o*); (2) any person who after being given an opportunity of being heard is proved to the satisfaction of the Board of Trade to have been guilty of an offence or misconduct which would have rendered him liable, if his name had been on the Register, to have his name erased (*p*); (3) any company which, if it had been an individual, the Comptroller could refuse to recognise as agent (*p*); (4) any company or firm in which any such individual is manager, director, or partner (*q*).

SUB-SECT. 3.—*Employment.*

What a patent agent may do.

470. All communications to the Comptroller may be signed and

(*e*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 84 (4).

(*f*) *Ibid.*, s. 84 (1), (3). As to the Register of Patent Agents, see p. 230, *ante*. Anyone knowingly contravening this provision is liable to a fine of £20; but anyone may act as an ordinary agent for a patentee, and describe himself as "agent," without infringing it (*Graham* v. *Fanta* (1892), 9 R. P. C. 164; *Graham* v. *Eli*, *Graham* v. *Hughes*, *Graham* v. *Barlow* (1898), 15 R. P. C. 259).

(*g*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 84 (2). Such persons must send a statutory declaration in the prescribed form to the Board in support of their allegation (Register of Patent Agents Rules, 1908, Appendix A, Form 2), and the Board may require further proof (Register of Patent Agents Rules, 1908, r. 6). Until such persons are registered they have no *locus standi* as patent agents, and are liable to a fine of £20 if they describe themselves as patent agents (*Starey* v. *Graham* [1899] 1 Q. B. 406). A patent agent before the 24th December, 1888, must be registered and pay the necessary fees before he can continue practising as a patent agent (*Starey* v. *Graham*, *supra*).

(*h*) Register of Patent Agents Rules, 1908, rr. 7—10.

(*i*) *Ibid.*, rr. 9, 10. As to the Institute, see p. 230, *ante*.

(*j*) Register of Patent Agents Rules, 1908, r. 10 (c).

(*k*) As to the registrar, see p. 230, *ante*.

(*l*) Register of Patent Agents Rules, 1908, r. 7.

(*m*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 85 (3).

(*n*) As to professional misconduct, compare titles MEDICINE AND PHARMACY, Vol. XX., p. 321; SOLICITORS.

(*o*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 85 (1); Patents Rules, 1908, r. 9; Register of Patent Agents Rules, 1908, r. 17.

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 85 (1); Patent Office Rules, 1908, r. 9; Register of Patent Agents Rules, 1908, r. 17.

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 85 (2).

SECT. 12. Patent Agents.

all attendances upon him made by a duly authorised agent (*r*), except that the Comptroller has power to require the personal signature or presence of an applicant, opponent, or other person; and that certain documents must be signed by the individual himself (*s*).

Duties of patent agent.

A patent agent, though not bound to be accurately acquainted with patent law (*t*), is expected to be familiar with the practice of obtaining patents, and may be liable for the consequences of any failure to use the skill properly to be expected from him (*a*). He ought not to avail himself in competition with the patentee of information which he obtained in confidence when acting as his agent (*b*).

SECT. 13.—*Offences.*

False entries.

471. Any person who makes or causes to be made a false entry in any statutory register, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, is guilty of a misdemeanour (*c*).

False claim of patent rights.

472. A person who falsely represents (*d*) that any article sold by him is a patented article is liable to conviction (*e*).

Use of words "Patent Office."

473. Any person who uses on his place of business, or on any document issued by him, or otherwise, the words "Patent Office," or any other words suggesting that his place of business is officially connected with, or is, the Patent Office, is liable to conviction (*f*).

Use of words "patent agent."

474. An offence is also committed if a person falsely describes himself as "patent agent" (*g*).

(*r*) Patents Rules, 1908, r. 9.

(*s*) *I.e.*, applications for patents, or for the revocation of patents, or for the restoration of lapsed patents; requests for leave to amend applications, specifications, or letters patent: authorisations of agents; notices of opposition; requests for issue of duplicate letters patent; and surrenders of letters patent (Patents Rules 1908, r. 9).

(*t*) The Patent Office does not undertake to give legal advice or opinions on any subject connected with patent law, which, like other laws, is left to the interpretation of professional men; see Instructions to Applicants, p. 7. The remuneration of the patent agent is a matter for arrangement between him and the person employing him.

(*a*) See title NEGLIGENCE, Vol. XXI., pp. 367, 370.

(*b*) *Wheatstone* v. *Wilde* (1861), Griffin, Patent Cases, 1884—6, 247.

(*c*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 89 (1); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 743.

(*d*) The term "false representation" includes the selling of an article having stamped, engraved or impressed on it or otherwise applied to it the word "patent," "patented," or any other word expressing or implying that the article is patented (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 89 (3) (which applies even when a provisional specification has been lodged but a patent has not been registered (*R.* v. *Wallis* (1886), 3 R. P. C. 1; *R.* v. *Crampton* (1886), 3 R. P. C. 367); compare *Cheavin* v. *Walker* (1877), 5 Ch. D. 850, 863, C. A.; *Linoleum Manufacturing Co.* v. *Nairn* (1878), 7 Ch. D. 834)).

(*e*) Penalty not exceeding £5 (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 89 (2)). A person whose complete specification has been accepted is regarded as having all the privileges of a patentee (*ibid.*, s. 10; *R.* v. *Townsend* (1896), 13 R. P. C. 265).

(*f*) Penalty not exceeding £20 (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 89 (5).

(*g*) See p. 230, *ante*. As to the unlawful use of the Royal Arms, see title TRADE MARKS, TRADE NAMES, AND DESIGNS.

PAWNS AND PLEDGES.

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Part I.—The Contract of Pawn.

SECT. 1.—*Definitions.*

"Pawn." **475.** A pawn or pledge is a bailment of personal property as a security for some debt or engagement (*a*).

"Pawner." A pawner is one who, being liable to an engagement, gives to the person to whom he is liable a thing to be held as a security for the payment of his debt or the fulfilment of his liability (*b*).

"Pawnee." A pawnee is one who receives a pawn or pledge (*c*).

"Pawnbroker." A pawnbroker is one whose business it is to lend money, usually in small sums, upon pawn or pledge (*c*), and includes for

(*a*) Story, Law of Bailments, 9th ed., s. 286. It is described by HOLT, C.J., in *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, at p. 913; 1 Smith, L. C., 11th ed., pp. 173, 178, as the fourth sort of bailment "when goods or chattels are delivered to another as a pawn to be a security to him for money borrowed of him by the bailor." The different definitions are collected in *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585, 594; and see title BAILMENT, Vol. I., pp. 525, 562. For the definition of "pledge" under the Factors Act, 1889 (52 & 53 Vict. c. 45), see title AGENCY, Vol. I., p. 205, note (*x*).

(*b*) Bouvier's Law Dictionary, Vol. II., p. 634. Under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 5, "pawner" is defined as a person delivering an article for pawn to a pawnbroker.

(*c*) Bouvier's Law Dictionary, Vol. II., p. 634.

statutory purposes every person who carries on the business of taking goods and chattels in pawn (*d*). SECT. 1. Definitions.

SECT. 2.—*Classes of Pawn.*

476. By reason of the statutory provisions affecting pawnbrokers (*e*) there are two classes of pawn. The Pawnbrokers Act, 1872 (*f*), which imposes a number of restrictions and regulations for the protection of the pawner, applies only to cases where the sum borrowed is £10 or less, and where the pawnee is a pawnbroker within the statutory definition (*g*). In all other cases the contract is governed by the general law, which also applies to pawns under the Pawnbrokers Act, 1872 (*f*), unless expressly excluded thereby (*h*). Pawns at common law and under statute.

Part II.—Pawns at Common Law.

SECT. 1.—*Nature of the Contract.*

477. The contract of pawn is one of the five classes of bailment (*i*). Two main peculiarities distinguish it from the contract of mortgage: (1) it is essential to the contract of pawn that the property pledged should be actually or constructively delivered to the pawnee, whereas in mortgage the property passes by the conveyance, and possession by the mortgagee is not essential in every case (*j*), and (2) whereas in the contract of mortgage the mortgagee has an absolute interest in the property subject to a right of redemption, in pawn the pawnee has only a special property in the pledge, while the general property therein remains in the pawner and wholly reverts to him on discharge of the debt or engagement (*k*). Difference between pawn and mortgage. Delivery of pawn. Property in pawn.

478. Pawn is distinguishable from lien in that in the former a special property passes to the pawnee, while in the latter no right of property passes to the person exercising the lien, but only a right Difference between pawn and lien.

(*d*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 1; but a person is not deemed to be a pawnbroker for the purposes of the Act merely because he makes advances of sums exceeding £10 (*ibid.*, s. 10), see, further, p. 248, *post*.

(*e*) Now consolidated in the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93); see pp. 248 *et seq.*, *post*.

(*f*) 35 & 36 Vict. c. 93.

(*g*) *Ibid.*, s. 10.

(*h*) *Jones* v. *Marshall* (1889), 24 Q. B. D. 269.

(*i*) See title BAILMENT, Vol. I., pp. 525, 562. The distinguishing characteristic of pawn is that a pawnee has a special property, but a bailee generally has the custody only (*Hartop* v. *Hoare* (1743), 3 Atk. 44, 46).

(*j*) *Ryall* v. *Rolle* (1749), 1 Atk. 164, 166; see Story, Law of Bailments, 9th ed., s. 287; and see title MORTGAGE, Vol. XXI., p. 73.

(*k*) *Ryall* v. *Rolle*, *supra*, at p. 167; *Re Morritt*, *Ex parte Official Receiver* (1886), 18 Q. B. D. 222, C. A., *per* FRY, L.J., at p. 234; *Jones* v. *Smith* (1794), 2 Ves. 372; *Fraser* v. *Byas*, [1895] W. N. 112.

SECT. 1. Nature of the Contract.

to detain the subject-matter of the lien until he is paid (*l*), and this right is not transferable to a third party (*m*).

Further distinctions.

479. Pawn has been described as a security where by contract a deposit of goods is made a security for a debt and the right to the property vests in the pledgee so far as is necessary to secure the debt; in this sense it is intermediate between a simple lien and a mortgage which wholly passes the property in the thing conveyed (*n*).

Pawn does not amount to an equitable mortgage (*o*), or to a bill of sale (*p*).

Stamp on contract of pawn.

480. Since pawn or pledge is not a contract of mortgage, where it is reduced into writing it may be stamped as a simple agreement (*q*), even where such agreement contains an express power of sale by the pawnee (*r*).

SECT. 2.—*Subject-matter.*

Things capable of being pawned.

481. The subject-matter of the contract of pawn usually consists of goods and chattels capable of actual or constructive delivery (*s*), but other forms of personal property, including negotiable instruments, may be the subject of the contract where they can be identified (*a*).

Unlawful pledges.

482. Under various statutes pledges relating to the following kinds of property have been made unlawful (*b*): (1) Regimental equipments, arms and military stores generally (*c*); (2) naval

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(*l*) *Yungmann* v. *Briesemann* (1892), 67 L. T. 642, C. A.; *Thames Ironworks Co.* v. *Patent Derrick Co.* (1860), 1 John. & H. 93; see *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, C. A.; *Gladstone* v. *Birley* (1817), 2 Mer. 401; and as to the nature of lien, see title LIEN, Vol. XIX., p. 3.

(*m*) *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585, *per* BLACKBURN, J., at p. 612.

(*n*) *Halliday* v. *Holgate* (1868), L. R. 3 Exch. 299, Ex. Ch., *per* WILLES, J., at p. 302. For forms of receipt acknowledging receipt of pledged chattels, see Encyclopædia of Forms and Precedents, Vol. I., p. 215.

(*o*) *Carter* v. *Wake* (1877), 4 Ch. D. 605; *Re Richardson, Shillito* v. *Hobson* (1885), 30 Ch. D. 396, C. A., *per* FRY, L.J., at p. 403.

(*p*) *Re Hardwick, Ex parte Hubbard* (1886), 17 Q. B. D. 690, C. A.; and see title BILLS OF SALE, Vol. III., p. 7.

(*q*) *Harris* v. *Birch* (1842), 9 M. & W. 591; and see *Smith* v. *Cator* (1819), 2 B. & Ald. 778.

(*r*) *Re Attenborough* (1855), 11 Exch. 461. As to the exemption from stamp duty of special contracts under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 24, see p. 251, *post*.

(*s*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 1 Smith, L. C., 11th ed., p. 173. As to what constitutes delivery, see p. 238, *post*.

(*a*) The following cases serve as illustrations:—*Taylor* v. *Chester* (1869), L. R. 4 Q. B. 309 (half a £50 note); *Lockwood* v. *Ewer* or *Child* (*Lady*) v. *Chanstillet* (1742), 9 Mod. Rep. 275 (East India stock); *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585 (debentures); *Langton* v. *Waite* (1868), L. R. 6 Eq. 165 (railway stock); *Halliday* v. *Holgate* (1868), L. R. 3 Exch. 299, Ex. Ch. (scrip certificates). As to injunction to restrain an unlawful pledge of negotiable instruments, see title INJUNCTION, Vol. XVII., p. 266.

(*b*) Offences by pawnbrokers in their business are dealt with elsewhere see pp. 255, 256, *post*.

(*c*) Army Act, s. 156. The following are the articles there enumerated:—"Arms, ammunition, equipments, instruments, regimental necessaries, or clothing, or any military decorations of an officer or soldier, or any furniture,

stores (*d*) and seamen's clothing (*e*); (3) public stores (*f*); (4) police clothing (*g*); (5) workhouse property (*h*); (6) hosiery materials (*i*); (7) linen, apparel, unfinished goods or materials (*k*).

SECT. 2. Subject-matter.

483. Every assignment of and every charge on, and every agreement to assign or charge, any deferred pay or military reward payable to an officer or soldier, or any pension payable to him or his widow, child, or other relative, or to any person in respect of any military service, is void (*l*).

Invalid pledges: (1) Pensions.

bedding, blankets, sheets, utensils, and stores in regimental charge, or any provisions or forage issued for the use of an officer or soldier, or his horse, or of any horse employed in His Majesty's service." The offence consists in taking in pawn from a soldier or any person acting on his behalf, or in soliciting or enticing a soldier to pawn, or in assisting or acting for a soldier in pawning such articles. The burden of proof that he acted in ignorance is upon the defendant. Penalty on summary conviction—first offence, fine not exceeding £20, with treble the value of the property pawned; second offence, fine not less than £5 and not exceeding £20, with such treble value, or imprisonment with or without hard labour for a term not exceeding six months (Army Act, s. 156); as to the Army Act, see title ROYAL FORCES. As to arrest of offenders, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 300, note (*d*). As to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.* Similar offences and penalties are created by the Volunteer Act, 1863 (26 & 27 Vict. c. 65), ss. 28, 29; the Volunteer Act, 1869 (32 & 33 Vict. c. 81), ss. 3—5; and the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 22; as to property of volunteer and territorial corps, and as to such property generally, see title ROYAL FORCES.

(*d*) Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 33.

(*e*) Seamen's Clothing Act, 1869 (32 & 33 Vict. c. 57), s. 4. This Act only extends to the following dockyard towns, namely, Portsmouth, Plymouth and Devonport, Chatham, Sheerness, Cork, and Queenstown (see *ibid.*, Sched.). The term "seaman's property" means any clothes, slops, medals and necessaries, or articles deemed to be necessaries, for sailors on board ship, which belong to any seaman (*ibid.*, s. 3). For the definition of "seaman," see *ibid.*, and see title ROYAL FORCES. The burden of proof that he acted in ignorance is upon the defendant. Penalty for first offence, not exceeding £20; second offence, similar penalty or imprisonment, with or without hard labour, for a term not exceeding six months (Seamen's Clothing Act, 1869 (32 & 33 Vict. c. 57), s. 4).

(*f*) Public Stores Act, 1875 (38 & 39 Vict. c. 25), s. 9 (unlawful possession by pawnbroker of public stores; penalty, not exceeding £5).

(*g*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 17; County Police Act, 1839 (2 & 3 Vict. c. 93), s. 15 (unlawful possession of police clothing; penalty, not exceeding £10). As to police clothing generally, see title POLICE, p. 501, *post*.

(*h*) Poor Relief Act, 1815 (55 Geo. 3, c. 137), s. 2. The offence consists in any pawnbroker or other person knowingly taking in pawn any cloth ng or goods provided for the use of the poor in workhouses, or any goods, materials, furniture, or provisions for the poor, or aiding or assisting therein or causing the marks to be obliterated; penalty, not exceeding £5 and not less than £1 (*ibid.*). As to such property, see title POOR LAW, p. 521 *post*.

(*i*) These include woollen, worsted, linen, cotton, flax, mohair, or silk material to be prepared, worked up, or manufactured. The offences consist in pawning by a person entrusted with such goods for the above purposes, or receiving in pawn without the consent of the employer such goods, knowing that they have been so entrusted (Hosiery Act, 1843 (6 & 7 Vict. c. 40), ss. 2, 4); and see title MASTER AND SERVANT, Vol. XX., pp. 127, 128. Penalty, forfeiture of the full value of the goods and a sum not exceeding £10 for pawning and a sum not exceeding £20 for receiving in pawn (Hosiery Act, 1843 (6 & 7 Vict. c. 40), ss. 2, 4, 11).

(*k*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 35; see further p. 256, *post*.

(*l*) Army Act, s. 141; and as to such pensions, see titles CHOSES IN ACTION Vol. IV., p. 401; ROYAL FORCES.

SECT. 2. Subject-matter.

(2) Pawns by infants.

484. A contract, whether by specialty or otherwise, entered into by an infant for the repayment of money lent or to be lent is absolutely void (*m*). This provision, it seems, makes it impossible for an infant to make a valid contract of pawn, and if any such contract be made the pawnee can neither recover the principal nor sue for interest (*n*).

(3) Pawns by drunken persons and lunatics.

485. It is an offence for a pawnbroker to take an article in pawn from a person who appears to be intoxicated (*o*); subject to this provision, a pledge by a drunken person follows the ordinary law of contract (*p*). Similar considerations apply in the case of a pledge by a lunatic (*q*).

SECT. 3.—*Making of the Contract: Delivery.*

Delivery, actual or constructive, essential.

486. Delivery of the thing pawned in consideration of the debt or advance is a necessary element in the making of a contract of pawn (*r*). Such delivery may be actual, in the sense of physical delivery of the pledge, or constructive, in the sense that, though the pledge is legally delivered, it does not actually pass from the hands of the pawner to those of the pawnee (*s*). Constructive delivery may be effected even where the pledge remains in the possession of the pawner for a special purpose (*t*). Delivery of a key of a warehouse in which goods are stored (*a*), or of the key of a room in which a collection is stored (*b*), or of a delivery order directing a warehouseman to deliver goods to the pawnee (*c*), is sufficient delivery in law to satisfy this essential of the contract.

When advance and delivery not simultaneous.

487. The advance and the delivery need not be contemporaneous, so long as the delivery is effected within a reasonable time after the advance has been made and is in pursuance of the contract (*d*), although, until possession is given, the intended pawnee has only a right of action on the contract and no interest in the thing pawned (*e*).

(*m*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1; and see, generally, titles INFANTS AND CHILDREN, Vol. XVII., pp. 63 *et seq.*; MONEY AND MONEY-LENDING, Vol. XXI., p. 53.

(*n*) There is no direct authority on this point; but see title INFANTS AND CHILDREN, Vol. XVII., p. 69; and see p. 255, *post*.

(*o*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 32. As to offences generally, see pp. 255 *et seq.*, *post*.

(*p*) See title CONTRACT, Vol. VII., p. 342.

(*q*) See title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 396 *et seq.*

(*r*) *Martin* v. *Reid* (1862), 11 C. B. (N. S.) 730, *per* ERLE, C. J., at p. 734; *Ayers* v. *South Australian Banking Co.* (1871), L. R. 3 P. C. 548, 554.

(*s*) *Martin* v. *Reid*, *supra*; *Meyerstein* v. *Barber* (1866), L. R. 2 C. P. 38, 52.

(*t*) *Reeves* v. *Capper* (1838), 5 Bing. (N. C.) 136.

(*u*) *Young* v. *Lambert* (1870), L. R. 3 P. C. 142.

(*b*) *Hilton* v. *Tucker* (1888), 39 Ch. D. 669.

(*c*) *Grigg* v. *National Guardian Assurance Co.*, [1891] 3 Ch. 206.

(*d*) *Hilton* v. *Tucker*, *supra*.

(*e*) *Howes* v. *Ball* (1827), 7 B. & C. 481; *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585, 613.

SECT. 4.—*Extinction of the Contract.*

SECT. 4. Extinction of the Contract.

488. The contract of pawn is extinguished by the satisfaction of the debt or engagement and the redelivery of the property pledged to the pawner, since there is an implied undertaking on the part of the pawnee to redeliver the same to the pawner on payment by the latter of the sum advanced with interest (*f*). The essence of this extinction of the contract lies in the pawnee being divested wholly of his special property and possession in the property pledged (*g*). The pawnee, however, has the right to hand back to the pawner the property pledged for a special purpose without in the least affecting his security and without extinguishing the contract (*h*).

Extinction of contract of pawn.

Property handed back for special purpose.

SECT. 5.—*Rights and Duties of Pawner.*

SUB-SECT. 1.—*Who may Pawn.*

(i.) *In General.*

489. Subject to the exceptions set out above (*i*), at common law the capacity of a pawner to enter into the contract is governed by the same rules as are applicable to contracts in general (*k*).

Who may pawn at common law

(ii.) *Mercantile Agents or Factors.*

490. The capacity of mercantile agents (*l*) or factors to enter into the contract of pawn is regulated by statute (*m*). At common law, mercantile agents cannot bind their principals to a contract of pledge without the express authority of the latter (*n*).

Mercantile agents or factors.

491. Where a mercantile agent is, with the consent of the owner (*o*), in possession (*p*) of goods (*q*) or of the documents of

Power to pledge.

(*f*) *Singer Manufacturing Co.* v. *Clark* (1879), 5 Ex. D. 37; and see p. 242, *post*. For a form of receipt, see Encyclopædia of Forms and Precedents, Vol. I., p. 216.

(*g*) See *Babcock* v. *Lawson* (1880), 5 Q. B. D. 284.

(*h*) *North Western Bank* v. *Poynter, Son, and Macdonalds*, [1895] A. C. 56 (where the pawnee returned a bill of lading to the pawner, making the latter his agent to sell the goods comprised therein), distinguishing *Tod & Son* v. *Merchant Banking Co. of London* (1883), 10 R. (Ct. of Sess.) 1009.

(*i*) See p. 238, *ante*.

(*k*) See title CONTRACT, Vol. VII., pp. 335 *et seq.* As to the capacity of an executor to pledge his testator's assets, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 296; *Solomon* v. *Attenborough*, [1912] 1 Ch. 451, C. A.

(*l*) For the definition of "mercantile agent," see title AGENCY, Vol. I., p. 152; and as to agreements with his "clerk or other person authorised," see *ibid.*, p. 205

(*m*) Factors Act, 1889 (52 & 53 Vict. c. 45); see, further, title AGENCY, Vol. I., pp. 205, 206. As to factors generally, see title SALE OF GOODS.

(*n*) *City Bank* v. *Barrow* (1880), 5 App. Cas. 664; *Fuentes* v. *Montis* (1868), L. R. 3 C. P. 268, *per* WILLES, J., at p. 277.

(*o*) As to the effect of revocation of such consent, see title AGENCY, Vol. I., pp. 205, 206; and as to the presumption in favour of such consent, see *ibid.*, p. 206. As to when possession of documents of title is deemed to be with such consent, see *ibid.*, p. 205, note (*u*).

(*p*) As to when the agent is in possession of goods, see *ibid.*, p. 205, note (*t*); *Lamb* v. *Attenborough* (1862), 1 B. & S. 831. As to the effect of obtaining possession by means of larceny by a trick, see titles AGENCY, Vol. I., p. 205, note (*d*); BANKERS AND BANKING, Vol. I., p. 638; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 633; *Oppenheimer* v. *Frazer and Wyatt*, [1907] 2 K. B. 50, 56, C. A.

(*q*) "Goods" include wares and merchandise (Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1 (3)), and household furniture (*Lee* v. *Butler*, [1893] 2 Q. B. 318, C. A.).

SECT. 5. Rights and Duties of Pawner.

title (*a*) to goods, any pledge (*b*) of the goods made by him when acting in the ordinary course of business of a mercantile agent is as valid as if he were expressly authorised by the owner of the goods to make the same, provided that the pledgee acts in good faith, and has not notice at the time of the pledge that the agent has no authority to make it (*c*).

What "pledge" includes.

492. The expression "pledge" in the case of a mercantile agent includes any contract pledging or giving a lien or security on goods, whether in consideration of an original advance or of any further or continuing advance, or of any pecuniary liability (*d*). A pledge of the documents of title to goods is deemed to be a pledge of the goods (*e*); but this provision only applies to mercantile agents, and does not make the pledging of documents of title by other persons valid so as to constitute an actual right in the goods themselves, as if they had been physically handed over to the pledgee (*f*).

Custom of trade.

493. A mercantile agent's statutory authority to pledge exists notwithstanding the custom of a particular trade that such an agent has no authority to pledge goods entrusted to him for sale (*g*),

Sale or return.

and the same principle applies to a mercantile agent who is entrusted with goods for sale on the terms of "sale or return" (*h*).

Sale of Goods Act applied to pledges.

494. The provisions of the Sale of Goods Act, 1893 (*i*), as to dispositions by sellers and buyers of goods after sale and purchase are applicable to pledges made by such sellers and buyers either by themselves or by mercantile agents on their behalf (*j*).

(*a*) For the definition of "documents of title," see title AGENCY, Vol. I., p. 205, note (*u*); and see *Union Credit Bank* v. *Mersey Docks and Harbour Board*, *Same* v. *Same and North and South Wales Bank*, [1899] 2 Q. B. 205). As to the title given by a mercantile agent when selling goods, see titles AGENCY, Vol. I., p. 205; SALE OF GOODS.

(*b*) Goods entrusted by a mercantile agent to an auctioneer for sale are not dealt with by way of pledge even though the auctioneer before sale make advances upon them to the agent (*Waddington & Sons* v. *Neale & Sons* (1907), 96 L. T. 786; see *Biggs* v. *Evans*, [1894] 1 Q. B. 88); and see titles AGENCY, Vol. I., p. 205; SALE OF GOODS.

(*c*) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2 (1). As to pledges and other dispositions by mercantile agents of goods belonging to their principals, see, further, titles AGENCY, Vol. I., pp. 205, 206; SALE OF GOODS.

(*d*) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1 (5).

(*e*) *Ibid.*, s. 3.

(*f*) *Inglis* v. *Robertson*, [1898] A. C. 616. In this case the pledgor was held not to be a mercantile agent within the meaning of the Factors Act, 1889 (52 & 53 Vict. c. 45).

(*g*) *Oppenheimer* v. *Attenborough & Son*, [1908] 1 K. B. 221, C. A.

(*h*) *Weiner* v. *Harris*, [1910] 1 K. B. 285, C. A. Similarly, it is not beyond the ordinary course of business of a mercantile agent in the jewellery trade to raise money by pledging goods entrusted to him for sale (*Janesich* v. *Attenborough & Son* (1910), 102 L. T. 605). In deciding this question the actual disposition of goods and not the circumstances attending such disposition should be looked at, although the surrounding circumstances (*e.g.*, an unusual rate of interest) may be evidence against the pledgee as to the want of authority of the agent to pledge (*ibid.*, *per* HAMILTON, J., at p. 282). A mercantile agent by asking a friend to pledge goods entrusted to him for sale is not pledging goods in the ordinary course of his business as a mercantile agent (*De Gorter* v. *Attenborough & Son* (1904), 21 T. L. R. 19).

(*i*) 56 & 57 Vict. c. 71.

(*j*) See *ibid.*, ss. 25, 47; and title SALE OF GOODS.

SECT. 5. Rights and Duties of Pawner.

SUB-SECT. 2.—*Warranty by Pawner.*

Implied warranty of title; but not of quality.

495. At common law, there is an implied undertaking on the part of the pawner that the property pawned is his own, or that he has the authority of the owner to pledge it, and that it may be safely delivered back to him (*k*).

Generally speaking, the pawner does not warrant the quality of the property pawned, but if he makes a false and fraudulent representation as to such quality for the purpose of obtaining money thereby from the pawnee the pawner is indictable (*l*).

SUB-SECT. 3.—*Title and Property of Pawner.*

Possession no proof of property.

496. Subject to the provisions relating to mercantile agents (*m*), mere possession by the pawner is not sufficient proof of property in the thing pawned against the real owner (*n*). Nor can a pawner confer on a pawnee any better title to the thing pawned than he himself has (*o*).

Unauthorised pawn.

If the pawner has no authority to make the pledge the pawnee cannot hold the goods pledged against the real owner (*p*), unless such owner has so acted as to clothe the pawner with apparent authority to make the pledge (*q*). An authority to an agent to sell in circumstances particularly defined does not extend by implication to a pledge so as to give the pawnee a good title as against the real owner (*r*).

Sale before redemption

497. Before redemption the pawner can sell the thing pledged; but, after such a sale, the purchaser has only the same interest in the thing as the pawner had (*s*).

SUB-SECT. 4.—*Right to Redeem.*

Time.

498. The pawner has at common law (*t*) an absolute right to redeem the thing pledged upon tender (*t*) of the amount advanced, since the general property therein remains in him. In the absence of any agreement as to time for payment, he may redeem at any time during his life, and upon the pawnee's death this right

(*k*) *Singer Manufacturing Co.* v. *Clark* (1879), 5 Ex. D. 37, *per curiam*, at p. 42; *Cheesman* v. *Exall* (1851), 6 Exch. 341. As to illegal pawning, see p. 257, *post*.

(*l*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 693, 694; *R.* v. *Ardley* (1871), L. R. 1 C. C. R. 301; *R.* v. *Roebuck* (1856), Dears. & B. 24, C. C. R.

(*m*) See pp. 239, 240, *ante*.

(*n*) *Hoare* v. *Parker* (1788), 2 Term Rep. 376; *Kingsford* v. *Merry* (1856), 1 H. & N. 503, 516, EX. Ch.

(*o*) *Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, Ex. Ch.; but see note (*q*), p. 246, *post*.

(*p*) *Williams* v. *Barton* (1825), 3 Bing. 139, Ex. Ch.

(*q*) *Cole* v. *North Western Bank*, *supra*, *per* BLACKBURN, J., at p. 363; *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, C. A.; and see *Fry and Mason* v. *Smellie and Taylor* (1912), 106 L. T. 404, C. A.

(*r*) *City Bank* v. *Barrow* (1880), 5 App. Cas. 664.

(*s*) *Franklin* v. *Neate* (1844), 13 M. & W. 481.

(*t*) Special provisions as to redemption and tender of pledges, to which the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), applies, are dealt with elsewhere; see pp. 251, 252, *post*.

SECT. 5. Rights and Duties of Pawner.

continues against his executors (*a*). The right to redeem necessarily depends on tender of the debt by the pawner to the pawnee (*b*), and it is lost if the pawnee has lawfully sold the subject of the pledge (*c*).

Statutes of Limitation.

499. The Statutes of Limitation do not bar the right to redeem a pledge during the pawner's lifetime (*d*).

Devolution of right.

500. There is authority for the proposition that this right of the pawner is personal to him, and that it is extinguished by his death and does not pass to his executor (*e*).

Partners.

When goods are pledged by several partners jointly, the right to redeem lies in them jointly and not severally. Any partner acting for the firm may redeem, but all must join if an action is brought to recover the thing pledged (*f*).

Consolidation of securities.

501. The principle of consolidation of securities contained in the law of mortgage (*g*) does not apply to a contract of pawn, at least as against the executor of a deceased pawner (*h*).

SUB-SECT. 5.—*Remedies of Pawner.*

Trover by pawner.

502. A pawner may maintain trover against a pawnee who refuses to restore the pledge after tender of the debt (*i*), but if the ownership of the pledge is in doubt such refusal, if made reasonably, and to obtain a reasonable time for the purposes of investigation, will not ground such an action (*k*). In similar circumstances the assignee of a pawner may bring an action of trover (*l*), and may recover damages for non delivery (*m*).

(*a*) *Ratcliffe* v. *Davis* (1610), Yelv. 178; Bac. Abr., tit. Bailment.

(*b*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, 917; 1 Smith, L. C., 11th ed., 173, at p. 184.

(*c*) See p. 244, *post*.

(*d*) *Kemp* v. *Westbrook* (1749), 1 Ves. Sen. 278. A time may be fixed for redemption upon the expiration of which, in the absence of redemption, the pawnee has a power of sale; see *France* v. *Clark* (1883), 22 Ch. D. 830; and p. 244, *post*; title LIMITATION OF ACTIONS, Vol. XIX., p. 37, note (*a*).

(*e*) *Ratcliffe* v. *Davis*, *supra*. This rule is laid down strictly in this case, and has not been the subject of consideration since, but it was expressly disapproved of in *Cortelyou* v. *Lansing* (1805), 2 Caine, New York Cases in Error, 200 (American decision), and it seems doubtful if it would be followed at the present time. By the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 9, this right is expressly reserved to an executor of a deceased pawner in the case of a pledge to which that Act applies.

(*f*) *Harper* v. *Godsell* (1870), L. R. 5 Q. B. 422. As to the rights of partners generally, see title PARTNERSHIP, pp. 24 *et seq.*, *ante*.

(*g*) See title MORTGAGE, Vol. XXI., pp. 208 *et seq.*

(*h*) *Vanderzee* v. *Willis* (1789), 3 Bro. C. C. 21, where bankers who were pawnees of securities for a debt of £1,000, although the indebtedness of the testator to them largely exceeded that amount, were held to have no further lien on the securities than for the £1,000 and interest. This decision apparently disapproves *Demandray* v. *Metcalf* (1715), Prec. Ch. 419.

(*i*) *Anon.* (1693), Salk. 522; *Coggs* v. *Bernard*, *supra*; and see, generally, title TROVER AND DETINUE.

(*k*) *Vaughan* v. *Watt* (1840), 6 M. & W. 492; and see *Clayton* v. *Le Roy*, [1911] 2 K. B. 1031, 1051, C. A.

(*l*) *Franklin* v. *Neate* (1844), 13 M. & W. 481.

(*m*) *Bristol and West of England Bank* v. *Midland Rail. Co.*, [1891] 2 Q. B. 653, C. A.

SECT. 5. Rights and Duties of Pawner.

503. If the pawnee sells before he is entitled to do so, the pawner may sue him in conversion, but in such a case the damages must be measured by the loss which the pawner has actually sustained, taking into account the pawnee's interest in the goods at the time of the conversion (*n*). A sub-pledge does not amount to conversion (*o*). Measure of damage.

SECT. 6.—*Rights and Liabilities of Pawnee.*

SUB-SECT. 1.—*Property and Possession.*

504. The pawnee has a special property in the thing pledged, while the general property therein continues in the owner (*p*). Such special property exists so that the pawnee can compel payment of the debt (*q*), or can sell the goods when the right to do so arises (*r*). This property is a real right in the thing pledged as distinguished from a mere personal right of detention (*s*), and, moreover, is transferable in the sense that the pawnee can pledge his special interest (*s*), while in the case of a lien the unauthorised transfer of the subject of the lien does not transfer the personal right (*a*). This special property does not arise until possession is given to the pawnee (*b*). Special property of pawnee.

If during the contract there is any increase in the value of the security, the pawnee is entitled to that increase as part of his security (*c*). Increase in value of security.

SUB-SECT. 2.—*Care of Pawn.*

505. The law requires nothing extraordinary of the pawnee, but only that he shall use ordinary care (*d*) for restoring the thing pledged (*e*). Further, if the pawnee loses the goods pawned without default on his part, he may still recover the debt, and the loss falls on the owner. If the pawnee keeps the goods after tender of the debt to him and they are stolen, he is liable, for after tender he keeps them at his peril (*f*). Pawnee's duty to take care of pawn.

(*n*) *Johnson* v. *Stear* (1863), 15 C. B. (N. S.) 330; and see title DAMAGES Vol. X., p. 344.

(*o*) *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585; and see p. 244, *post*.

(*p*) *Ratcliffe* v. *Davis* (1610), Yelv. 178; *Harper* v. *Godsell* (1870), L. R. 5 Q. B. 422; see p. 242, *ante*. As to the insurable interest of a pawnee, see title INSURANCE, Vol. XVII., p 524.

(*q*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 1 Smith, L. C., 11th ed., p. 173.

(*r*) *Re Hardwick, Ex parte Hubbard* (1886), 17 Q. B. D. 690. C. A., *per* BOWEN, L.J., at p. 698.

(*s*) *Donald* v. *Suckling, supra, per* BLACKBURN, J., at p. 614.

(*a*) *Ibid., per* BLACKBURN, J., at p. 612; and see *Treuttel* v. *Barandon* (1817), 8 Taunt. 100.

(*b*) *Howes* v. *Ball* (1827), 7 B. & C. 481.

(*c*) Story, Law of Bailments, 9th ed., s. 292.

(*d*) For special statutory provisions applicable to the custody of pledges for sums of £10 and under, see pp. 251 *et seq., post*.

(*e*) *Coggs* v. *Bernard, supra*, at p. 917; 1 Smith, L. C., 11th ed., p. 173, at p. 184; *Syred* v. *Carruthers* (1858), E. B. & E. 469 (accidental fire); compare title BAILMENT, Vol. I., p. 514. For the principles of liability for negligence, see title NEGLIGENCE, Vol. XXI., pp. 362 *et seq.*, 430.

(*f*) *Anon.* (1693), Salk. 522.

SECT. 6. **Rights and Liabilities of Pawnee.**

Pawnee's right to use pawn.

506. The pawnee may not use the thing pledged if it would be the worse for such use, but, if this is not so, he may make a reasonable use of it at his own risk. If he is put to expense in his custody, he may take a reasonable profit from the property to recompense him. If to preserve the pledge reasonable use is necessary, the pawnee must make such use (*g*); and if the use of the property is beneficial thereto, it seems that the pawnee can use it (*h*).

SUB-SECT. 3.—*Transfer of Pawnee's Rights.*

Assignment of pawnee's rights.

507. The pawnee's special property in the thing pledged may be assigned to a third party by way of assignment of the pawnee's interest or of a sub-pledge by him (*i*). Such a transfer is not inconsistent with the contract of pawn so long as it purports to transfer no more than the pawnee's interest against the pawner, the pawnee in the meantime being responsible for due care being taken for the safe custody of the property (*k*). At the same time, the pawner may in such a case recover substantial damages if the property is damaged in the hands of the third party, or if he is prejudiced by any delay in the delivery of the property to him after tender of his debt (*l*).

SUB-SECT. 4.—*Remedies of Pawnee.*

Power of sale.

508. The contract of pawn carries with it an implication that the security may be made available to satisfy the obligation (*m*). Under this implication the pawnee has a power of sale on default in payment if the time for payment has been fixed (*n*). If there is no stipulated time for payment, the pawnee may demand payment, and in default thereof may sell, upon notice to the pawner of his intention to do so (*o*), the pawner retaining his right to redeem at any moment up to sale (*p*).

Warranty of title.

509. If the pawnee is a pawnbroker, a sale by him does not carry with it any warranty as to the title of the goods sold (*q*).

(*g*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 1 Smith, L. C, 11th ed., p. 173; *Anon.* (1693), Salk. 522; *e.g.*, clothes would be the worse for use; not so jewels, which, however, would be used at the pawnee's risk; a horse may be ridden or a cow milked (*ibid.*); see also *Cooke* v. *Haddon* (1862), 3 F. & F. 229, where the consumption by the pawnee of part of some wine pledged to him was held to forfeit his rights therein.

(*h*) Story, Law of Bailments, 9th ed., ss. 329, 330.

(*i*) *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585; *Halliday* v. *Holgate* (1868), L. R. 3 Exch. 299, Ex. Ch; and see *Mores* v. *Conham* (1609), Owen, 123.

(*k*) *Donald* v. *Suckling*, *supra*, *per* BLACKBURN, J., at pp. 615, 616; and see *Nicholson* v. *Hooper* (1838), 4 My. & Cr. 179.

(*l*) *Donald* v. *Suckling*, *supra*, *per* COCKBURN, C.J., at p. 618.

(*m*) *Re Morritt*, *Ex parte Official Receiver* (1886), 18 Q. B. D. 222, C. A., *per* COTTON, L.J., at p. 232; *Re Hardwick*, *Ex parte Hubbard* (1886), 17 Q. B. D. 690, C. A.; *Pothonier* v. *Dawson* (1816), Holt (N. P.), 383.

(*n*) *Re Morritt*, *Ex parte Official Receiver*, *supra*, *per* FRY, L.J., at p. 235.

(*o*) *France* v. *Clark* (1883), 22 Ch. D. 830 (citing with approval Story, Law of Bailments, 9th ed., p 275, s. 308, and distinguishing *Re Tahiti Cotton Co.*, *Ex parte Sargent* (1874), L. R. 17 Eq. 273); *Pigot* v. *Cubley* (1864), 15 C. B. (N. S.) 701; *Martin* v. *Reid* (1862), 11 C. B. (N. S.) 730; *Burdick* v. *Sewell* (1883), 10 Q. B. D. 363, 367.

(*p*) *Re Morritt*, *Ex parte Official Receiver*, *supra*, *per* COTTON, L.J., at p. 232. As to the pawner's remedy against the pawnee in case of an illegal sale, see p. 243, *ante*.

(*q*) *Morley* v. *Attenborough* (1849), 3 Exch. 500, cited with approval in *Sims* v.

SECT. 6. **Rights and Liabilities of Pawnee.**

510. If sale by the pawnee of the pledge does not realise the amount of his debt, the pawnee can sue for the deficit, and there is nothing in the statutory special contract of pawn which affects the common law right (*r*).

Recovery of deficiency on sale.

511. The pawnee has a right of action for his debt notwithstanding the possession by him of the pledge (*s*), subject to the rights of the pawner above mentioned (*t*).

Right of action for debt.

Where the pledge is of a perishable nature and no time for redemption has been fixed, this right of the pawnee remains, notwithstanding that the pledge perishes, and the pawner has no remedy (*u*).

Right of action for trespass.

512. Where the pawnee is wrongfully deprived of possession of the thing pledged he may maintain an action, and the measure of damage is the full value of the thing taken and not merely the amount for which it stands security (*a*). He may maintain such an action without joining the pawner as a party (*b*).

No right of foreclosure.

513. The pawnee has no right of foreclosure since he never had the absolute ownership at law; and his equitable rights cannot exceed his legal title (*c*), the contract of pawn differing in this respect from that of mortgage (*d*).

SECT. 7.—*Intervening Rights of Third Parties.*

SUB-SECT. 1.—*On Execution or Distress.*

Execution against goods pawned.

514. Where judgment has been obtained against the pawner of goods and execution issued thereon, the sheriff cannot seize the goods pawned unless he satisfies the claim of the pawnee (*e*).

If execution issues against a pawnee the sheriff may seize goods in pledge in the pawnee's possession, but may sell only those in respect of which the period for redemption has expired; with respect to the rest he has a right to possess the qualified property of the pawnee, to sell when the twelve months and a week have expired, or to receive any money paid for its redemption (*f*).

Marryat (1851), 17 Q. B. 281, 290. In the case of a pawnee, not a pawnbroker, it seems that the ordinary principles of the law of sale of goods apply; see title SALE OF GOODS.

(*r*) *Jones* v. *Marshall* (1889), 24 Q. B. D. 269. As to such special contracts, see p. 251, *post*.

(*s*) *Anon.* (case 951) (1701), 12 Mod. Rep. 564, *per* HOLT, C. J.; *South-Sea Company* v. *Duncomb* (1731), 2 Stra. 919; *Lawton* v. *Newland* (1817), 2 Stark. 72.

(*t*) See pp. 241 *et seq.*, *ante*.

(*u*) *Ratcliffe* v. *Davis* (1610), Yelv. 178.

(*a*) *Swire* v. *Leach* (1865), 18 C. B. (N. S.) 479; and see title DAMAGES, Vol. X., pp. 342—344. As to the nature of such possession, see p. 241, *ante*.

(*b*) *Saville* v. *Tankred* (1748), 1 Ves. Sen. 101.

(*c*) *Carter* v. *Wake* (1877), 4 Ch. D. 605, *per* JESSEL, M.R., at p. 606; *Fraser* v. *Byas* (1895), 13 R. 452.

(*d*) *Lockwood* v. *Ewer* or *Child* (*Lady*) v. *Chanstillet* (1742), 9 Mod. Rep. 275.

(*e*) *Rogers* v. *Kennay* (1846), 9 Q. B. 592; *Legg* v. *Evans* (1840), 6 M. & W. 63; and see title EXECUTION, Vol. XIV., p. 51.

(*f*) *Re Rollason*, *Rollason* v. *Rollason*, *Hals's Claim* (1887), 34 Ch. D. 495. As to the fixed period of redemption in the case of pawnbrokers, see p. 251, *post*; see also titles EXECUTION, Vol. XIV., p. 51; INTERPLEADER, Vol XVII., p. 614.

SECT. 7. Intervening Rights of Third Parties.

Distress.

515. Goods pledged with the pawnbroker are not liable to distress (*g*).

SUB-SECT. 2.—*On Bankruptcy.*

Bankruptcy.

516. The bankruptcy of the pawner or the pawnee transfers to the trustee in bankruptcy his respective property in the thing pledged (*h*).

Bankruptcy of pawner.

The bankruptcy of the pawner renders the pawnee a secured creditor in the bankruptcy with respect to things pledged before the date of the receiving order and without notice of a prior available act of bankruptcy (*i*); but where the pawnee has notice of such an act he cannot, without the sanction of the court, receive payment of his debt and hand over the security (*k*).

Pawnbroker's title against trustee.

A pawnbroker, who claims to hold pledges as against the trustee in bankruptcy of the pawner, must have complied with the statutory provisions as to the entry of pledges in his books (*l*) or his claim may be disallowed (*m*).

SUB-SECT. 3.—*Rights of True Owner.*

Owner's rights against pawner of stolen goods.

517. The owner of goods stolen and wrongfully pawned by the thief may maintain trover against the pawnee (*n*). Even a sale in market overt will not defeat the title of the true owner if the thief is prosecuted to conviction (*o*), although the latter principle does not apply where the goods have been obtained by fraud or other wrongful means not amounting to larceny (*p*). Where a chattel obtained by fraud is pledged, the pawner having obtained a voidable title thereto, and the owner seeks to avoid the fraudulent transaction and to recover it from the pawnee, the burden of proof that the pawnee took the chattel with notice of the fraud or otherwise than in good faith lies on the owner (*q*).

(*g*) *Swire* v. *Leach* (1865), 18 C. B. (N. S.) 479. It should be noted that in this case the pawnee was a pawnbroker by trade, and his position was compared to that of a wharfinger or warehouse-keeper. The privilege does not, apparently, extend to goods pledged with a person not a pawnbroker; see title DISTRESS, Vol. XI., pp. 134 *et seq.* As to the measure of damages in cases of wrongful distress, see *ibid.*, p. 206.

(*h*) See, generally, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 87 *et seq.*, 114 *et seq.*

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 49, 168. Under the latter provision a secured creditor is defined as one "holding a mortgage charge or lien on the property of the debtor or any part thereof as security for a debt due to him from the debtor." As to proof by a secured creditor, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 67.

(*k*) *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank, Ltd.*, [1906] 2 Ch. 444, C. A.

(*l*) See p. 249, *post*.

(*m*) *Fergusson* v. *Norman* (1838), 5 Bing. (N. C.) 76.

(*n*) *Leicester* v. *Cherryman*, [1907] 2 K. B. 101; and see *Singer Manufacturing Co.* v. *Clark* (1879), 5 Ex. D. 37.

(*o*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24 (1); see title CRIMINAL LAW, Vol. IX., pp. 686, 688 *et seq.*; and see title SALE OF GOODS.

(*p*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24 (2).

(*q*) *Whitehorn Brothers* v. *Davison*, [1911] 1 K. B. 463; and see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 23. This case, it seems, is distinguishable from the principles set out p. 241, *ante*, and notes (c), (*d*), p. 247, *post*, in that

SECT. 7. Intervening Rights of Third Parties.

Order for delivery of unlawfully pledged goods, in the metropolis.

518. In the Metropolitan Police District (*r*) the pawnee of goods stolen or unlawfully obtained, and subsequently unlawfully pawned or pledged, may be ordered to appear before a magistrate, to produce the goods and deliver them to the owners, either with or without payment by the latter according to the circumstances of the case. If the pawnee fails to obey the order, or sells the goods after notice that they have been stolen, he is liable to forfeit the full value thereof (*s*). These provisions also apply in the case of goods unlawfully pledged although they were obtained lawfully (*t*).

Where property has come into the possession of the police in connection with any criminal charge or under the Metropolitan or City of London Police Acts, 1839 (*u*), or under a search warrant (*v*), or under the Pawnbrokers Act, 1872 (*a*), a court of summary jurisdiction may, on application by an officer of police, or by a claimant of the property, make an order for the delivery of the property to the person appearing to the court to be the owner thereof, or, if the owner cannot be ascertained, may make such other order as may, in the circumstances, be just (*b*).

Title where goods illegally pawned.

519. As against the true owner, the pawnee can obtain no better title than the pawner has (*c*), and cannot hold goods, pledged by the pawner without authority, to which the latter has no title (*d*).

Interpleader

520. Where adverse claims to property pledged are made against the pawnee, he may perhaps have a right to interplead, notwithstanding his interest in the debt for which the property has been pledged (*e*).

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here the pawner at the time of the pledge had a title to the chattel which had not been avoided by the owner.

(*r*) See titles MAGISTRATES, Vol. XIX., p. 548; POLICE, p. 467, *post*.

(*s*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 27; see title MAGISTRATES, Vol. XIX., p. 577.

(*t*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), ss. 27, 28.

(*u*) 2 & 3 Vict. c. 47, s. 66; 2 & 3 Vict. c. xciv., s. 48.

(*v*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 103; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 310; MAGISTRATES, Vol. XIX., p. 606. As to the time within which proceedings by the claimant against the person in possession must be brought, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 181, 182.

(*a*) 35 & 36 Vict. c. 93, s. 34.

(*b*) Police Property Act, 1897 (60 & 61 Vict. c. 30), s. 1 (1).

(*c*) *Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, Ex. Ch.; and see *Kilmont* v. *Bentley* (1886), 18 Q. B. D. 322, *per* Lord ESHER, M.R., at p. 326; see also p. 241, *ante*.

(*d*) *Williams* v. *Barton* (1825), 3 Bing. 139, Ex. Ch.; and see p. 241, *ante*, and cases there cited. It seems that this principle would hold good in the case of a pledge of goods belonging to a bill of sale holder or a vendor on a hire-purchase agreement which passes no property in the goods to the hirer. There seems to be no reported case where such property has been pawned without the consent of the owner.

(*e*) There is no reported case on this point. See title INTERPLEADER, Vol. XVII., p. 587; *De Rothschild Frères* v. *Morrison, Kekewich & Co., La Banque de Paris et des Pays Bas* v. *Same, La Banque de France* v. *Same* (1890), 24 Q. B. D. 750, C. A. (wharfinger interpleading though having a claim for payment of charges); *Best* v. *Hayes* (1863), 1 H. & C. 718 (auctioneer claiming commission); *Attenborough* v. *St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, C. A.

Part III.—Pawns under the Pawnbrokers Act (*f*).

SECT. 1.—*Regulation of Pawnbroker's Business.*

SUB-SECT. 1.—*Pawnbroker's Licence.*

SECT. 1. **Regulation of Pawnbroker's Business.**

Pawnbroker's licence.

521. A pawnbroker who carries on business as such, and to whom the Pawnbrokers Act, 1872 (*g*) (in this part of the title referred to as "the Act"), applies in relation to loans not exceeding £10, must take out a yearly excise licence for carrying on his business (*h*). Such licence is only granted on the production and in pursuance of a certificate granted under conditions hereinafter set out (*i*), except in the case of a pawnbroker already licensed at the commencement of the Act (*g*), who, with his executors, administrators, assigns, and successors, is exempt from the necessity of obtaining such a certificate (*k*). Such exemption, while not confined to the business then carried on by him, but extending to shops subsequently opened by him (*l*), does not extend to a successor who sets up a new business in a town other than that in which the business to which he succeeded is situate (*m*).

Notice of application for licence.

522. Before a certificate is applied for, the applicant must give twenty-one clear days' notice of his application by registered post to one of the overseers of the parish or place in which he intends to carry on business, and to the superintendent of the police of the district, and, twenty-eight days before the application, must cause a like notice to be affixed and maintained between 10 a.m. and 5 p.m. on two consecutive Sundays on the door of the church or chapel of the parish or place, and, if there is none, in some public or conspicuous place (*n*).

By whom certificate granted.

523. Certificates are granted in the Metropolitan Police District and in other places within the jurisdiction of a stipendiary magistrate by a stipendiary magistrate (*o*), and in other cases by the district council of the district in which the application is made (*p*).

(*f*) The Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), and consequently this part of the present title, apply only to contracts of pawn where the sum borrowed is £10 or less, and where the pawnee is a pawnbroker within the meaning of the Act; see p. 235, *ante*.

(*g*) 35 & 36 Vict. c. 93. A person is not deemed to be a pawnbroker by reason only of his entering into contracts of pawn for sums exceeding £10 (*ibid.*, s. 10).

(*h*) *Ibid.*, s. 37. For forms of licence and notice of application therefor, see Encyclopædia of Forms and Precedents, Vol. X., pp. 177, 178.

(*i*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), ss. 40—44; and see the text, *infra*.

(*k*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 39.

(*l*) *R.* v. *Inland Revenue Commissioners, Ohlson's Case and Garland's Case*, [1891] 1 Q. B. 485.

(*m*) *R.* v. *Inland Revenue Commissioners, Ex parte Silvester*, [1907] 1 K. B. 108.

(*n*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 42.

(*o*) *Ibid.*, s. 40. As to such magistrates, see title MAGISTRATES, Vol. XIX, pp. 545, 548.

(*p*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93); Local Government Act,

An appeal lies from the decision of the authority, but no costs can be ordered against a district council if the appeal is successful (*q*).

Grounds for refusal of certificate.

524. A certificate can only be refused on the following grounds or one of them: (1) that the applicant has failed to produce satisfactory evidence of good character; (2) that the shop in which he intends to carry on business or any adjacent house or place owned or occupied by him is frequented by thieves or persons of bad character; (3) that he has not given the requisite notice (*r*).

Form of certificate. Forgery.

525. A certificate must be in the prescribed form (*s*).

Forgery of a certificate or tender of a forged certificate is an offence punishable on summary conviction with a fine not exceeding £20 or imprisonment for six months with or without hard labour. A licence granted in pursuance of a forged certificate is void, and use of a forged certificate with knowledge that it is forged perpetually disqualifies a person from obtaining a licence (*t*).

Excise duty on licence.

526. The licence must be taken out yearly for each shop, and carries an excise duty of £7 10*s*. Every licence bears the date of issue and terminates on the 31st July in each year (*u*). Pawnbrokers who carry on business in partnership only require one licence for each place of business (*v*).

Penalty for acting without licence.

527. To act as a pawnbroker without a licence is an offence punishable with an excise penalty not exceeding £50 (*a*).

Cancellation on conviction.

528. The conviction of a pawnbroker on indictment for fraud in his business or for receiving stolen goods renders the licence liable to cancellation by the court before which the conviction is obtained (*b*).

SUB-SECT. 2.—*Conduct of Business.*

Books and documents to be kept.

529. A pawnbroker must keep and use certain prescribed books and documents, which include pledge-books, pawn-tickets, sale-books, declarations of claim and loss, and receipts and forms of special contracts, and entries must be made therein in the manner

1894 (56 & 57 Vict. c. 73), s. 27; see title LOCAL GOVERNMENT, Vol. XIX., p. 266.

(*q*) *R.* v. *Northumberland Justices, Ex parte Amble Urban District Council* (1907), 96 L. T. 700. As to such appeals, see p. 259, *post*.

(*r*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 43. For analogous cases where such grounds have to be considered, see title INTOXICATING LIQUORS, Vol. XVIII., pp. 54 *et seq*.

(*s*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 41, Sched. VI.

(*t*) *Ibid.*, s. 44. As to the offence of forgery generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 711 *et seq*. As to the prosecution of offences punishable on summary conviction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq*.

(*u*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 37.

(*v*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 7.

(*a*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 37. It seems that this provision only applies to pawnbrokers who actively carry on business as such, and does not apply to persons who in the ordinary way of business enter into contracts of pawn when their business has in itself no connection with pawnbroking; see the definitions of "pawnbroker," p. 234 *ante*. As to the recovery of excise penalties, see title REVENUE.

(*b*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 38.

SECT. 1. **Regulation of Pawnbroker's Business.**

indicated in the prescribed forms. Failure to comply with these provisions constitutes an offence (*c*).

Notices to be exhibited.

530. A pawnbroker must keep exhibited in large characters over the outer door of his shop his full name with the word "pawnbroker." He must also keep exhibited in a conspicuous part of his shop, so as to be legible to persons doing business therein, the information which is contained on the prescribed form of pawn-tickets. Failure to comply with these provisions constitutes an offence (*d*).

Secret partnership.

It seems that an agreement for secret partnership in a pawnbroker's business is contrary to these provisions and that no legal partnership is thereby constituted (*e*), but at the same time contracts made in relation to the business so carried on are not void by reason only of such defect (*f*).

Acts of agent or servant.

531. For the purposes of the Act (*g*) everything done or omitted by the servant, apprentice or agent of a pawnbroker in the course of or in relation to the business of the pawnbroker, is deemed to be done or omitted by the pawnbroker, and acts of a pawnbroker authorised by statutory provisions may be done by such servant, apprentice or agent (*h*).

Application to personal representatives.

532. The provisions of the Act (*g*) extend to executors and administrators of deceased pawnbrokers, except that they are not liable for any penalty or forfeiture personally, or out of their own estate, unless the same is incurred by their own act or neglect (*i*).

Money-lending.

533. A pawnbroker in respect of business carried on by him in accordance with the Act (*g*) is not a "money-lender" within the Money-lenders Act, 1900 (*k*).

SECT. 2.—*Pawning and Redemption of Pledges.*

Pawn-ticket.

534. A pawnbroker must, on taking a pledge in pawn, give to the pawner a pawn-ticket, and must not take such pledge unless the pawner takes the pawn-ticket (*l*).

(*c*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 12. The prescribed form of these books and documents are found in *ibid.*, Sched. III.; see Encyclopædia of Forms and Precedents, Vol. X., pp. 178 *et seq.* As to the prosecution of offenders, see pp. 258, 259, *post.*

(*d*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 13. As to the prosecution of offenders, see pp. 258, 259, *post.*

(*e*) So held in *Gordon* v. *Howden* (1845), 12 Cl. & Fin. 237, H. L.; and *Armstrong* v. *Armstrong, Lewis* v. *Armstrong* (1834), 3 My. & K. 45, decided under stat. (1800) 39 & 40 Geo. 3, c. 99 (now repealed), and not of certain authority under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93).

(*f*) See p. 257, *post.*

(*g*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93).

(*h*) *Ibid.*, s. 8.

(*i*) *Ibid.*, s. 7.

(*k*) 63 & 64 Vict. c. 51, s. 6. The fact that he has on one occasion lent money on the security of a bill of sale does not make him such a "money-lender" (*Newman* v. *Oughton*, [1911] 1 K. B. 792); and see title MONEY AND MONEY-LENDING, Vol. XXI., p. 44.

(*l*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 14. The forms of pawn-tickets are prescribed by *ibid.*, Sched. III. They contain, *inter alia*, the scales of charges, terms as to time of redemption, and directions as to the steps to be taken when the pledge is destroyed by fire, or the ticket is lost, mislaid, or

Special contracts for loans over 40s.

535. Where the loan exceeds 40*s.* but does not exceed £10 (*m*), the pawnbroker may make a special contract with the pawner, provided that he delivers to the pawner at the time of the pawning a special contract pawn-ticket signed by himself, and the pawner signs a duplicate thereof. Such a special contract is within the provisions of the Act (*n*) save as far as they are excluded by the terms of the special contract (*o*), and is also subject to rules of common law where these are not repugnant to the provisions of the statute (*p*).

Profits and charges allowed.

536. The pawnbroker may only demand or take certain specified profits and charges on a loan on a pledge (*q*), unless the loan exceeds £10, when the statutory provisions do not apply at all (*r*). Specified profits and charges are provided where the loan exceeds 40*s.* (*s*), but it is submitted that these only apply in cases where no special contract has been made (*t*). The pawnbroker must at the time of redemption, if required, give a receipt for the amount of the loan and profit paid to him (*u*).

Time for redemption.

537. Every pledge is redeemable within twelve months from the day of pawning, exclusive of that day, but seven days of grace are added within which, if not redeemed within the year, it continues to be redeemable (*v*).

Pledges for 10*s.* and under.

A pledge pawned for 10*s.* or less, if not redeemed within the year and days of grace, becomes, at the end of the days of grace, the absolute property of the pawnbroker (*a*). This provision does not, however, give the pawnbroker such a property in the pledge as would prevail against the claim of the real owner where the pledge had been pawned without the owner's consent by a person who has no title to the pledge (*b*).

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stolen. The pawnbroker is entitled to charge for the ticket itself; see *ibid.*, Scheds. III. and IV. A pawn-ticket is the subject of larceny (*R.* v. *Morrison* (1859), Bell, C. C. 158); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 642).

(*m*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 10 (which altogether excludes from the Act contracts where the loan exceeds £10). For forms of special contracts for loans exceeding £10, see Encyclopædia of Forms and Precedents, Vol. X., pp. 184, 186, 187.

(*n*) See note (*f*), p. 248, *ante*.

(*o*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 24. This ticket is exempt from stamp duty (*ibid.*). As in the case of ordinary pawn-tickets, a special form is provided, which must be used by the pawnbroker (*ibid.*, s. 12, Sched. III., Form 7). In the absence of special terms, where the loan exceeds 40*s.*, Sched. III., Form 2, C, is provided.

(*p*) *Jones* v. *Marshall* (1889), 24 Q. B. D. 269.

(*q*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 15. The charges are set out in *ibid.*, Sched. IV.

(*r*) *Ibid.*, s. 10. In such a case none of the provisions of the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), apply, and any terms may be agreed upon as to profits and charges by pawner and pawnee.

(*s*) *Ibid.*, s. 15, Sched. IV.

(*t*) *Ibid.*, ss. 10 (2), 24.

(*u*) *Ibid.*, s. 15. This receipt is not liable to stamp duty unless the profit amounts to 40*s.* or more (*ibid.*). As to stamp duty generally, see title REVENUE.

(*v*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 16.

(*a*) *Ibid.*, s. 17.

(*b*) *Singer Manufacturing Co.* v. *Clark* (1879), 5 Ex. D. 37, *per curiam*, at p 45.

SECT. 2. **Pawning and Redemption of Pledges.**

A pledge pawned for above 10*s.* continues redeemable until disposed of by sale or otherwise, although the year of redemption and days of grace have expired (*c*).

Pledges for over 10*s.*

Who may redeem.

538. The holder for the time being of the pawn-ticket is presumed to be the person entitled to redeem the pledge, and the pawnbroker, on payment to him of the loan and profit, must deliver the pledge to the person producing the pawn-ticket and is indemnified for so doing (*d*). This indemnity only applies as between the pawnbroker and the pawner, or the owner who has authorised the pledge, and in no degree affects the common law rights of an owner whose property has been pledged against his will (*e*).

SECT. 3.—*Sale of Pledges.*

SUB-SECT. 1.—*Conduct of Sales.*

Unredeemed pledges for over 10*s.*

539. A pledge pawned for a sum above 10*s.* must, when disposed of by the pawnbroker, be disposed of by sale by public auction, subject to special regulations (*f*). The pawnbroker may bid for and purchase at such a sale a pledge pawned with him, and on purchase is deemed to be the absolute owner of the pledge purchased (*g*). A title thus acquired is not valid against the true owner of a pledge which has been fraudulently pawned without his consent by a pawner having no title thereto (*h*). At any time within three years after such an auction, the holder of the pawn-ticket may inspect the entry of the sale in the pawnbroker's book (*i*) and the authenticated catalogue of pledges (*k*) or either of them (*l*).

Right to inspect catalogues.

SUB-SECT. 2.—*Application of Surplus.*

Surplus to be paid to holder of pawn-ticket.

540. Where after sale of a pledge pawned for a sum above 10*s.* there appears in the pawnbroker's book to be a surplus over and above the amount of the loan and profit due at the time of the sale, the pawnbroker must, on demand, within three years after the sale, pay the surplus, the necessary costs and charges of the sale being first deducted, to the holder of the pawn-ticket. If within twelve months before or after a sale resulting in a surplus another sale of a pledge or pledges of the same person results in a deficit, the pawnbroker has a right of set-off and is only liable for the balance due thereafter (*m*). These provisions do not affect the common law right of a pawnbroker to sue the pawner for a deficit after sale (*n*).

Set-off.

(*c*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 18; and see p. 251, *ante*.
(*d*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 25; see p. 253, *post*.
(*e*) *Singer Manufacturing Co.* v. *Clark* (1879), 5 Ex. D. 37.
(*f*) See Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 19, Sched. V.; and see, further, title AUCTION AND AUCTIONEERS, Vol. I., pp. 507, 508. As to the penalty for breach of statutory provisions by auctioneer, see *ibid.*, p. 508, where the regulations are set out.
(*g*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 19.
(*h*) *Burrows* v. *Barnes* (1900), 82 L. T. 721.
(*i*) As to the pawnbroker's books, see p 249, *ante*.
(*k*) As to this catalogue, see title AUCTION AND AUCTIONEERS, Vol. I., pp. 507, 508.
(*l*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 21.
(*m*) *Ibid.*, s. 22.
(*n*) *Jones* v. *Marshall* (1889), 24 Q. B. D. 269; see p. 245, *ante*.

SECT. 4.—*Redelivery of Pledges.*

SUB-SECT. 1.—*Production of Pawn-ticket.*

Redemption by holder of pawn-ticket.

541. The pawnbroker must on payment of loan and profit deliver the pledge to the person producing the pawn-ticket (*a*), but, subject to certain provisions (*b*), he is not bound to deliver back the pledge unless the pawn-ticket is delivered to him (*c*). These provisions only apply as between pawner and pawnee, and do not affect the rights of real owners of pledges pledged without their consent (*d*).

Redemption when ticket lost or stolen.

Sworn declaration.

542. Any person claiming to be the owner of a pledge, but not holding the pawn-ticket, and alleging that the same has been lost, mislaid, destroyed, or stolen or fraudulently obtained from him, may apply to the pawnbroker for a printed form of declaration, which must be delivered to him by the pawnbroker (*e*). The declaration must be in the prescribed form (*f*), and may be made before a commissioner for oaths (*g*) or a justice by the applicant and by a person identifying him. If the applicant delivers such declaration to the pawnbroker, he acquires as between himself and the pawnbroker all the same rights and remedies as if he produced the pawn-ticket (*h*).

When declaration is effectual.

The declaration is not effectual unless it is duly made and delivered to the pawnbroker not later than on the third day after the day on which the form is delivered to the applicant, exclusive of a day or days on which the pawnbroker is prohibited from carrying on business, the pawnbroker being indemnified for not delivering the pledge to any person until the expiration of this period (*i*).

Indemnity of pawnbroker.

543. The pawnbroker is further indemnified for delivering the pledge or otherwise acting in conformity with the declaration unless he has actual or constructive notice that the declaration is fraudulent or false in any material particular (*k*).

Real owner's right of action.

544. The real owner of goods pledged without his consent is not confined for his remedy to the foregoing provisions, but may sue at once to recover the goods (*l*).

False declaration.

545. A person who wilfully makes such a declaration knowing it to be false or not believing it to be true, is guilty of a misdemeanour and is liable to punishment by imprisonment or a fine (*m*).

(*a*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 25.

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

(*c*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 26.

(*d*) *Singer Manufacturing Co.* v. *Clark* (1879), 5 Ex. D. 37.

(*e*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 29 (1). The delivery of the ticket by mistake to a third person, if that person has absconded and the ticket cannot be obtained from him, is a "loss" within these provisions (*Burslem* v. *Attenborough* (1873), L. R. 8 C. P. 122).

(*f*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), Sched. III., Form V.

(*g*) Commissioners for Oaths Act, 1891 (54 & 55 Vict. c. 50), s. 1; see titles EVIDENCE, Vol. XIII., p. 627; SOLICITORS.

(*h*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 29 (2).

(*i*) *Ibid.*, s. 29 (2), (3).

(*k*) *Ibid.*, s. 29 (4).

(*l*) *Singer Manufacturing Co.* v. *Clark*, *supra*, at p. 45.

(*m*) Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), repealing that part only of the

SECT. 4. Redelivery of Pledges.

SUB-SECT. 2.—*Damage to Pledge.*

Liability of pawnbroker for damage by fire.

546. If a pledge is destroyed or damaged by or in consequence of fire, the pawnbroker is liable, on application within the period available for redemption, to pay the value of the pledge after deducting the amount of the loan and profit, such value to be the amount of the loan and profit and 25 per cent. on the amount of the loan. The pawnbroker is entitled to insure to the extent of this value (*n*).

Liability of pawnbroker for damage by neglect.

547. Where a person entitled and offering to redeem a pledge shows to a court of summary jurisdiction that the pledge has become or has been rendered of less value than it was at the time of pawning by or through the default, neglect, or wilful misbehaviour of the pawnbroker, the owner may be awarded reasonable satisfaction in respect of the damage, and the amount awarded must be deducted from the amount payable to the pawnbroker or must be paid by the pawnbroker as the court directs (*o*). In order to obtain a remedy under this provision the owner must prove actual default or neglect in the pawnbroker, which is not presumed in the case of accident (*p*).

SUB-SECT. 3.—*Orders for Delivery.*

Orders for delivery.

548. An order for the delivery of goods and chattels to the owner may, on proof of ownership, be made by the court before which the conviction is obtained (*q*), either on payment of the loan or any part thereof to the pawnbroker, or without payment, according to the conduct of the owner and the other circumstances of the case, in the following cases:—

(1) Where a person is convicted in a court of summary jurisdiction of knowingly and designedly pawning with a pawnbroker the property of another person without the authority of the owner;

(2) Where a person is convicted in any court of feloniously taking or fraudulently obtaining any goods and chattels, and it appears to the court that the same have been pawned with a pawnbroker;

(3) Where in any proceedings before a court of summary

Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 29, which deals with perjury in this matter; penalty, penal servitude for not more than seven years or imprisonment with or without hard labour for not more than two years, or a fine alone or added to the other penalties; and see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 490. Making a false declaration as to a pledge of greater value than £10 was held not to be an offence under the repealed provision (*R.* v. *Tregoning* (1899), 63 J. P. 504).

(*n*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 27; and see title INSURANCE, Vol. XVII., p. 524.

(*o*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 28.

(*p*) *Syrel* v. *Carruthers* (1858), E. B. & E. 469 (accidental fire). This case was decided on similar words occurring in stat. (1800), 39 & 40 Geo. 3, c. 99, s. 24 (now repealed). As to the common law liability of pawnees, see p. 243, *ante*; titles BAILMENT, Vol. I., pp. 544, 564; NEGLIGENCE, Vol. XXI., p. 430.

(*q*) See the text, *infra*, and p. 255, *post*.

jurisdiction it appears to the court that any goods and chattels brought before the court have been unlawfully pawned (*r*).

No bar to action by real owner.

549. An order for delivery made by a court of summary jurisdiction is no bar to an action at common law by the owner against the pawnbroker for the return of the goods, where the order has been applied for by a person other than the owner (*s*).

Penalty for non-delivery to person entitled.

550. A pawnbroker who, without reasonable excuse (proof whereof lies on him) (*t*), neglects or refuses to deliver a pledge to the person entitled to have delivery thereof is guilty of an offence (*u*); and a court of summary jurisdiction may, with or without imposing a penalty, order the delivery of the pledge on payment of the amount of the loan and profit (*a*).

SECT. 5.—*Offences.*

SUB-SECT. 1.—*By Pawnbrokers.*

Offences in relation to conduct of business.

551. A pawnbroker commits an offence (*b*) if he does any of the following things:—(1) takes an article in pawn from any person apparently under the age of fourteen, whether offered by that person on his own behalf or on behalf of any other person (*c*), or from any person appearing to be intoxicated; (2) purchases or takes in pawn or exchange a pawn-ticket issued by another pawnbroker; (3) employs any servant or apprentice or other person under the age of sixteen years to take pledges in pawn; (4) carries on the business of a pawnbroker on Sunday, Good Friday, or Christmas Day, or a day appointed for public fast, humiliation, or thanksgiving; (5) under any pretence purchases, except at public auction, any pledge while in pawn with him; (6) suffers any pledge while in pawn with him to be redeemed with a view to his purchasing it; (7) makes any contract or agreement with any person pawning or offering to pawn any article, or with the owner thereof for the purchase, sale, or disposition thereof within the time of redemption; (8) sells or otherwise disposes of any pledge pawned with him except at the time and in the manner authorised by the Act (*d*).

(*r*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 30; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 688. As to the powers of magistrates in the metropolis generally, see p. 247, *ante*.

(*s*) *Leicester & Co.* v. *Cherryman*, [1907] 2 K. B. 101. Even if the owner had applied for the order, *quære* whether there would have been an estoppel as against him (*ibid.*).

(*t*) In the absence of dishonesty, the loss of the pledge by the pawnbroker is a "reasonable excuse" (*Allworthy and Walker* v. *Clayton*, [1907] 2 K. B. 685).

(*u*) For penalty, see p. 258, *post*.

(*a*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 31.

(*b*) For penalty, see p. 258, *post*.

(*c*) Children Act, 1908 (8 Edw. 7, c. 67), s. 117, which raises the age to fourteen from twelve years as laid down in the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 32, mentioned in note (*d*), *infra*; and see title INFANTS AND CHILDREN, Vol. XVII., p. 172.

(*d*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 32. As to offences by retailers of spirituous liquors taking pledges as security for a debt for such liquors, see title INTOXICATING LIQUORS, Vol. XVIII., pp. 170, 171.

SECT. 5. **Offences.**

Pawning bailed apparel, unfinished goods etc.

552. A pawnbroker who knowingly takes in pawn any linen or apparel or unfinished goods or materials entrusted to any person to wash, scour, iron, mend, manufacture, work up, finish or make up, commits an offence, and is liable on summary conviction to forfeit a sum not exceeding double the amount of the loan, and to restore the pledge to the owner in the presence of the court or as the court directs (*e*). Unfinished goods or materials include any goods of any manufacture, or of any part or branch of any manufacture, either mixed or separate, or any materials whatever plainly intended for the composing or manufacturing of any goods, after such goods or materials are put into a state or course of manufacture or into a state for any process or operation to be performed thereupon or therewith, and before the same are completed or finished for the purpose of wear or consumption (*f*).

Search warrant.

553. The owner of any such articles above mentioned, if they have been pawned, or of an article unlawfully pawned (*g*), may obtain a search warrant, upon proof before a justice on oath of probable cause of suspicion, and that the goods, if unlawfully pawned, have been unlawfully obtained (*h*). The warrant must be executed within the hours of business at the shop of the suspected pawnbroker (*h*). Resistance to the search entitles the constable to break open the shop and is an offence. If the above-mentioned goods, or any of them, are found, the court must, on due proof of property by the owner, cause them to be restored to him (*i*).

Production of books etc.

554. A pawnbroker must at any time, when ordered or summoned by a court of summary jurisdiction, attend before the court and produce all books and papers relating to his business required by the court (*k*). Failure to comply with this provision is an offence (*k*).

Offences as to sales.

555. The following acts and defaults by a pawnbroker with respect to pledges for loans of more than 10*s.* are offences punishable summarily by a fine not exceeding £10 (*l*):—(1) Failing to comply with the provisions as to sale; (2) entering in his book a pledge as sold for less than the sum realised or failing to enter the same; (3) refusing to any person entitled thereto inspection of an entry of sale in his book or of the authenticated catalogue; (4) failing without lawful excuse (proof whereof lies on him) to

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(*e*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 35. The amount forfeited must be paid to the overseers of the poor of the parish in which the offence is committed (*ibid.*). For the prosecution of offences punishable on summary conviction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*f*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 5.

(*g*) As to unlawful pawning, see p. 257, *post*.

(*h*) As to search warrants in general, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 310; MAGISTRATES, Vol. XIX., p. 576; POLICE, p. 498, *post*.

(*i*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 36; and see p. 254, *ante*.

(*k*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 50. For penalty, see p. 258, *post*.

(*l*) As to summary convictions generally, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

produce such a catalogue on lawful demand; (5) refusing to pay on demand the surplus to the person entitled thereto (*m*).

Contract of pawn not avoided by conviction of pawnbroker.

556. Where a pawnbroker is guilty of an offence against the Act (*n*) (apart from offences relating to licences (*o*)), any contract of pawn or other contract made by him in relation to his business of pawnbroker is not void by reason only of the offence; nor by reason only of the offence does he lose his lien on or right to the pledge or to the loan and profit. This enactment does not affect any provision relating to orders for delivery or restoration made by any court (*p*).

SUB-SECT. 2.—*By Pawners.*

Illegal pawning of property of another.

557. Any person is guilty of an offence who knowingly and designedly pawns with a pawnbroker the property of another person, without being employed or authorised by the owner thereof to pawn the same, and is liable on summary conviction to a fine not exceeding £5 and, in addition thereto, any sum not exceeding the full value of the pledge as ascertained by the court (*q*). The fact that a person has been convicted of larceny of a chattel is no bar to a subsequent prosecution for unlawfully pawning the stolen chattel (*r*).

Pawning of goods by unlawful means.

558. Any person is guilty of an offence (*s*) who (1) offers to a pawnbroker an article by way of pawn, being unable or refusing to give a satisfactory account of the means by which he became possessed of the article; (2) wilfully gives false information to a pawnbroker as to whether an article offered by him in pawn is his own property or not, or as to his name and address, or as to the name and address of the owner of the article; (3) not being entitled to redeem, and not having any colour of title by law to redeem a pledge, attempts or endeavours to redeem the same (*t*).

Detention of person illegally pawning goods.

559. In the cases mentioned in the preceding paragraph, and where a pawnbroker reasonably suspects (*a*) that an article offered to

(*m*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 23.
(*n*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93).
(*o*) See p. 249, *ante*.
(*p*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 51. As to such orders, see p. 254, *ante*.
(*q*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 33. The fine may be applied to compensate the person injured and to defray the costs of prosecution, but in case the person injured declines to receive compensation, or there is a surplus, the fine or surplus must be paid to the overseers of the poor of the parish in which the offence was committed (*ibid.*). The pawnbroker himself may be the prosecutor (*Fancett* v. *Bierman* (1898), 14 T. L. R. 148). As to the prosecution of offences punishable on summary conviction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*
(*r*) *Pickford* v. *Corsi*, [1901] 2 K. B. 212.
(*s*) For penalty, see p. 258, *post*.
(*t*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 34.
(*a*) The reasonable suspicion need not be a suspicion that the person offering the goods is himself the thief, nor need the pawnbroker leave his shop to make further inquiries (*Howard* v. *Clarke* (1888), 20 Q. B. D. 558). In an action for false imprisonment against a pawnbroker arising in such a case, the question as to whether the defendant's suspicion was reasonable is one for the judge and not for the jury (*ibid.*); and see title EVIDENCE, Vol. XIII., p. 431.

SECT. 5. Offences.

him in pawn has been stolen or otherwise illegally or clandestinely obtained, he may seize and detain the person or article, or either of them, to be delivered up as soon as possible into the custody of the police, and in the case of a person so detained to be brought before a justice (*b*).

Compensation to pawnbroker.

The pawnbroker, upon certificate of the justice, may in such a case be compensated for his expenses, trouble and loss of time, such certificate having the effect of an order of court upon the offender for the payment of the expenses of a prosecution (*b*) under the Criminal Law Act, 1826 (*c*).

London.

Similar provision for detention is made, under special statutes, in cases arising in the Metropolitan Police District (*d*) and the City of London (*e*).

Detention of person producing counterfeit pawn-ticket.

560. A pawnbroker may, on reasonable suspicion that a pawn-ticket has been counterfeited, forged or altered, detain the person uttering, producing, showing or offering the same and the ticket, or either of them, and deliver the person and the ticket, or either of them, into the custody of the police (*f*).

SECT. 6.—*Penalties and Prosecution.*

Penalty for offences under the Act.

561. A pawnbroker or other person found guilty of an offence under the Act (*g*), in respect of which no specific forfeiture or penalty is therein prescribed, is liable on summary conviction to a penalty not exceeding £10 (*h*).

Application of penalties.

562. Penalties in the absence of a special direction may be applied by the court (1) where the complainant is the party aggrieved, by paying one moiety of the penalty to him, and (2) where the complainant is not the party aggrieved, by paying him no part thereof, or such part only as the court thinks fit (*i*).

Amends for frivolous prosecution.

563. Where it appears to the court that the information or complaint is frivolous, the informer or complainant may be ordered

(*b*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 34.

(*c*) 7 Geo. 4, c. 64, s. 23; now repealed and replaced by the Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 9 (6); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 324, note (*t*), 445.

(*d*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 66. As to the Metropolitan Police District, see titles MAGISTRATES, Vol. XIX., p. 548; POLICE, p. 467, *post*.

(*e*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv), s. 48.

(*f*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 49. Uttering a forged pawn-ticket with intent to defraud is an offence under the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 23, as the same is an "accountable receipt" within that section (*R.* v. *Fitchie* (1857), Dears. & B. 175, C. C. R.; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 719 *et seq.* A pawn-ticket is the subject of larceny (*R.* v. *Morrison* (1859), Bell, C. C. 158).

(*g*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93).

(*h*) *Ibid.*, s. 45. As to the prosecution of offences punishable on summary conviction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* A common informer may commence proceedings (*Caswell* v. *Morgan* (1859), 1 E. & E. 809 (a case relating to penalties under a repealed Act)).

(*i*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 46.

to pay, as amends to the defendant, a sum not exceeding £5, recoverable as a penalty (*k*).

Compounding offences.

564. A common informer compounding, delaying, or withdrawing any information for money directly or indirectly paid to him commits an offence (*l*).

Appeals in general.

565. An appeal lies to quarter sessions from a summary conviction for an offence under the Act (*m*), in accordance with the general provisions governing appeals in summary jurisdiction (*n*).

Appeal from refusal to grant certificate.

566. An appeal from a refusal to grant a certificate for a licence (*o*), must be made to a court of general or quarter sessions of the district held not less than fifteen days, and unless adjourned by the court, not more than four months, after the decision complained of. Seven days' notice of the appeal and of the grounds thereof must be given to the other party by the appellant, who immediately thereafter must enter into the usual recognisance before a justice with two sureties. If the appellant is in custody he may be released therefrom on entering into the recognisance. The court may adjourn the appeal or confirm, reverse, or modify the decision or remit the matter with the opinion of the court thereon, or make such other order as it thinks just, and the court has a complete discretion as to costs (*p*).

No *certiorari*.

567. No order or conviction of the court of summary jurisdiction, the subject of an appeal, may be quashed for want of form or be removed by *certiorari* or otherwise at the instance of either party (*q*).

Pleading special matter.

568. Any person sued or prosecuted for anything done by him in pursuance or execution or intended execution of the Act (*r*) may plead generally that the same was done under those circumstances and give the special matter in evidence (*s*).

(*k*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 47.

(*l*) *Ibid.*, s. 48. For penalty, see p. 258, *ante*.

(*m*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 52; Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4 and Sched. (repealing in part the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 52).

(*n*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49); and see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*o*) See p. 249, *ante*. All other appeals are governed by the general law as to appeals to quarter sessions, for which see title MAGISTRATES, Vol. XIX., pp. 638—650.

(*p*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 52. This section has been repealed (see the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4) except so far as it relates to an appeal in this particular matter.

(*q*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 53; and see title CROWN PRACTICE, Vol. X., pp. 155, 160.

(*r*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93).

(*s*) *Ibid.*, s. 55.

PAYMASTER-GENERAL.

See CONSTITUTIONAL LAW; COURTS; REVENUE.

PAYMENT AND TENDER.

See CONTRACT; LIMITATION OF ACTIONS; MONEY AND MONEY-LENDING; SALE OF GOODS.

PAYMENT INTO COURT.

See COUNTY COURTS; PRACTICE AND PROCEDURE; RECEIVERS; TRUSTS AND TRUSTEES.

PEACE, ARTICLES OF THE.

See MAGISTRATES.

PEACE, CLERK OF THE.

See LOCAL GOVERNMENT; MAGISTRATES.

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PEERAGES AND DIGNITIES.

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Part I.—Peerage.

SECT. 1.—*In General.*

SECT. 1. In General.

Definition of peerage.

569. "Peerage" may be defined as a hereditary dignity to which is attached the right to a summons by name to sit and vote in Parliament (*a*). The right has, however, been modified by the Acts of Union (*b*) to this extent, that peers of Scotland and peers of Ireland sit in the Parliament of the United Kingdom by representative peers only (*c*).

Classification of peers.

570. There are now five classes of peers:—

(1) Peers of England. They are all entitled to a summons to the Parliament of the United Kingdom.

(2) Peers of Scotland. They are represented in the Parliament of the United Kingdom by sixteen representative peers of Scotland (*d*).

(3) Peers of Great Britain. These are peers created between the dates of the Union with Scotland and the Union with Ireland. They are entitled to a writ of summons to the Parliament of the United Kingdom (*e*).

(4) Peers of Ireland. They are represented in the Parliament of the United Kingdom by twenty-eight elected representative peers of Ireland (*f*).

(5) Peers of the United Kingdom. These are peers created since the Union with Ireland other than peers of Scotland or Ireland, and the Lords of Appeal in Ordinary (*g*). They are entitled to a writ of summons to sit in Parliament (*h*).

Dignity of a peer.

571. Whereas the dignity of the Sovereign is world-wide, that of a peer is confined to the country in which it is held (*i*).

There are peers who are not lords of Parliament, and lords of Parliament who are entitled to be summoned and to sit and vote in Parliament but are not peers, for example, the Lords Spiritual (*k*).

(*a*) See title PARLIAMENT, Vol. XXI., pp. 622 *et seq.* As to peerages for life, see p. 269, *post*.

(*b*) Union with Scotland Act, 1706 (6 Anne, c. 11); Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67); and see titles CONSTITUTIONAL LAW, Vol. VII., pp. 10 *et seq.*; PARLIAMENT, Vol. XXI., pp. 624 *et seq.*

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

(*d*) Union with Scotland Act, 1706 (6 Anne, c. 11), s. 1, arts. 22, 23; and see title PARLIAMENT, Vol. XXI., p. 625. There is a fresh election for each Parliament. A peer of Scotland who is also a peer of Great Britain or of the United Kingdom may be, but is not usually, elected a representative peer.

(*e*) See title PARLIAMENT, Vol. XXI., p. 622; and see *ibid.*, note (*p*).

(*f*) Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), s. 1, art. 4; and see p. 270, *post*; title PARLIAMENT, Vol. XXI., p. 626. Election is for life.

(*g*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 6; see title PARLIAMENT, Vol. XXI., p. 628.

(*h*) See title PARLIAMENT, Vol. XXI., p. 622.

(*i*) *Douglas* v. *Milford* (1480), Y. B. 20 Edw. 4, fo. 6, pl. 6; *Calvin's Case* (1608), 7 Co. Rep. 1 a, 15 b, 16 a; and see *Lord Advocate* v. *Walker's Trustees*, [1912] A. C. 95, *per* Lord ATKINSON, at p. 104.

(*k*) See titles ECCLESIASTICAL LAW, Vol. XI., p. 387; PARLIAMENT, Vol. XXI., pp. 619, 621.

SECT. 2.—*Degrees of Peerage.*

SUB-SECT. 1.—*In General.*

Right to peerage distinct from title of honour.

572. The right to a peerage is distinct from a title of honour conferring a particular rank in the peerage, which is a matter merely collateral (*l*).

SUB-SECT. 2.—*Dukes.*

Dukes.

573. "Duke" is the highest degree of peerage, though third in order of antiquity. The title, though formerly used as a special description of an earl (*m*), was in 1338 distinguished from the latter title by the creation of Edward, Earl of Chester, as Duke of Cornwall (*n*).

SUB-SECT. 3.—*Marquesses.*

Marquesses.

574. "Marquess" (*o*), the second degree of peerage in precedence, but fourth in antiquity, was first introduced into England as a title or dignity in 1385, when Robert de Vere, Earl of Oxford, was created Marquess of Dublin (*p*). The creation was by charter and for life only; and precedence was given between the dukes and earls (*q*).

(*l*) *Norfolk* (*Earldom*) *Peerage Claim*, [1907] A. C. 10, *per* Lord DAVEY, at p. 17.

(*m*) Selden, Vol. I., c. 8, s. 30.

(*n*) 2 Co. Inst. 5; 9 Co. Rep. 49 a; Charter, 11 Edw. 3 (held to be an Act of Parliament (*Prince's Case* (1605), 8 Co. Rep. 1)). The dignity and lands were entailed on the eldest son of the *de facto* king (*ibid.*); and see, further, title CONSTITUTIONAL LAW, Vol. VI., p. 368. Henry Plantagenet, Earl (Palatine) of Lancaster (see Complete Peerage of England, by G. E. C., Vol. V., p. 7) was, on 6th March 1350-1351, created Duke of Lancaster, and King Richard II. created several members of the Royal Family dukes. King Richard II. also created Robert de Vere, Earl of Oxford, to be Marquess of Dublin and afterwards Duke of Ireland, but both dignities appear to have been for life and to relate to the office of governor (see Complete Peerage of England, by G. E. C., Vol. IV., p. 321). John, Earl of Huntingdon, was created Duke of Exeter by King Henry IV. "*in Ducatu illo cingendo sibi gladium ac appositionem cappe capiti suo investimus ut est moris*" to hold to him and the heirs male of his body (Dignity of a Peer of the Realm, Vol. V., pp. 241, 242).

(*o*) Also spelt "marquis" (Oxford English Dictionary, Vol. VI.).

(*p*) Selden, Vol. I., c. 4, p. 39; Vol. II., c. 6, p. 693; 2 Co. Inst. 5.

(*q*) Rotuli Parliamentorum, Vol. III., p. 209. The next creation was in 1397, when Richard II. created John, Earl of Somerset, marquess of the same, to him and the heirs male of his body. The title was extinguished by King Henry IV., and the Lords and Commons having petitioned His Majesty to restore the honour, the earl himself objected as the name of marquess was "strange in this kingdom." The words of creation were "*de stilo titulo ac nomine Marchionis loci predicti per cincturam gladii investimus.*" The charter was granted in Parliament (Dignity of a Peer of the Realm, Vol. V., p. 117; Rotuli Parliamentorum, Vol. III., p. 488; Palmer, Peerage Law in England, pp. 3, 57). The name is supposed to have been first applied in Europe to lords marchers or governors of frontier provinces (Selden, Vol. II., c. 5, s. 54).

SECT. 2. SUB-SECT. 4.—*Earls.*

Degrees of Peerage.

Earls.

575. "Earl" is the third degree of peerage in order of precedence, but first in antiquity (*r*). The name of a county was not an essential part of the dignity, but was used to distinguish earls of the same christian name (*s*).

Earldom.

An earldom is not confined to a place, but extends through the whole kingdom. It was designed for the defence of the King and country and extends over all the land (*t*). It is an office as well as a dignity (*u*).

SUB-SECT. 5.—*Viscounts.*

Viscounts.

576. "Viscount" is the most recent degree of peerage, and ranks after earls but above barons (*a*). The first introduction of the title into England was in 1440, when John Lord Beaumont was, by letters patent and investiture, created Viscount of Beaumont (*b*).

SUB-SECT. 6.—*Barons.*

Barons.

577. "Baron" is the fifth degree of peerage, and ranks after viscount. At the time of the Conquest, and as late as Magna Charta, there were greater and lesser barons (*c*).

(*r*) Cruise, Origin of Dignities, c. 1, s. 55; 4 Co. Rep. 49 a. The earldom of Surrey was created by King William II., and certain magnates are styled *comites* in Domesday Book. These earls are, however, always called by their personal names, and it is doubtful whether they held English earldoms or were counts of Normandy. If the latter, they were counts created by a duke, which power existed in dukes of the Empire. Their status, therefore, was presumably below that of English earls when the latter were established. The first charters now existing are those creating—(1) Geoffrey de Mandeville, Earl of Essex, to hold to him and heirs "*post eum hereditabiliter*"; (2) Milo de Gloucester, Earl of Hereford; (3) Aubrey de Vere, Earl of Cambridge, with liberty, if he could not have that name, to choose from Oxfordshire, Berkshire, Wiltshire, and Dorsetshire. The charter to Milo is printed in full, and the material parts of the others are given in Selden's Titles of Honour on the authority of chroniclers. The charter to Geoffrey de Mandeville is in the British Museum, and has been printed in Palmer, Peerage Law in England, p. 241; Round, "Geoffrey de Mandeville." Earls and barons are the only dignities known to have existed before the constitution of Parliament.

(*s*) Round, "Geoffrey de Mandeville," p. 144.

(*t*) *R.* v. *Knollys* (1694), 1 Ld. Raym. 10, 12; S. C., *sub nom. R.* v. *Knowles*, 12 Mod. Rep. 60.

(*u*) *Norfolk (Earldom) Peerage Claim*, [1907] A. C. 10.

(*a*) Selden, Vol. II., c. 5, s. 31; see the letters patent creating John, Lord Beaumont, to be Viscount Beaumont (printed in Palmer, Peerage Law in England, p. 275).

(*b*) King Henry VI. created this peerage; see 2 Co. Inst. 5; and see note (*a*), *supra*. The Latin expression "*vice comes*" is not strictly equivalent, for it anciently meant the sheriff. The dignity has always been created by letters patent in England, but in Ireland the three dignities of Buttevant, Fermoy, and Gormanston are in a list of prescriptive peerages recognised by King Henry VII. Gormanston was created by patent in 1478, and the constitution of the other two are unknown (Complete Peerage of England by G. E. C., Vol. III., p. 326).

(*c*) Cruise, Origin of Dignities, 2nd ed., c. 1, s. 50. The word was anciently assigned to all military tenants in chief of the Crown (see the opinion of the author of the Dignity of a Peer of the Realm, Vol. I., p. 85), which is corroborated by the fact that such tenants in chief retained the title in Scotland long subsequent to th creation of Lords of Parliament.

Barony by tenure was not preserved by the Abolition of Tenures Act (*d*) and no longer exists (*e*).

SECT. 3.—*Creation of Peers.*

Modes of creation.

578. Peers have been created by Act of Parliament, by charter, by letters patent and, in England, by writ of summons to Parliament followed by a sitting (*f*).

Baronies. Effect of writ of summons.

579. A writ of summons, followed by a sitting, creates a barony only. A writ by the name of "earl" does not create an earldom (*g*).

A writ does not create a peerage if it can be referred to a previous instrument of creation (*h*).

Necessity of sitting.

There must be a sitting as well as a writ (*i*), and evidence to explain the absence of sitting is not enough (*j*); but proof of a sitting is *ipso facto* proof of the writ (*k*).

See also the charter of King Henry I. (printed in the Statutes of the Realm, Vol. I., p. 1), containing the words "*Si quis baronum, Comitum meorum, sive aliorum qui de me tenent*"; "*si quis baronum, vel aliorum hominum meorum.*" A "*homo regis*" was a tenant in chief, and the charter shows that baron and "*homo*" were distinct ranks forty years after the Conquest. For a fuller disquisition on this question see the three first divisions of the Dignity of a Peer of the Realm. The opinion there expressed may be held to differ from that of the text, *supra*. It was in fact the object of the author of the Lords' Reports to reject all claims to peerage founded on tenure. It must be concluded that the reports and the rulings in various claims to baronies by writ go far to deny that the barons who obtained Magna Charta (see title CONSTITUTIONAL LAW, Vol. VI., p. 377, note (*l*)) were peers in the present meaning of peerage. Similarly, King Henry II. in 1154 granted a charter which mentions "*Comites et Barones et omnes mei homines*" (Statutes of the Realm, Vol. I., p. 4); and see note (*k*), *infra*.

(*d*) Stat. (1660) 12 Car. 2, c. 24; see titles CONSTITUTIONAL LAW, Vol. VI., p. 380, note (*e*); REAL PROPERTY AND CHATTELS REAL.

(*e*) *Berkeley Peerage* (1861), 8 H. L. Cas. 21. Up to the accession of William III. (1689) the theory that all peerage in its origin was by tenure of land was held by all judges and writers, but has now been abandoned, so that their authority is now of little value.

(*f*) *Prince's Case* (1605), 8 Co. Rep. 1. It is sometimes difficult to decide whether a particular instrument is an Act of Parliament or a charter granted in Parliament. But the distinguishing feature seems, as a rule, to be the assent of the Commons. The validity of the instrument may depend on this distinction; see title CONSTITUTIONAL LAW, Vol. VI., pp. 454, 456. For example of such Acts, see Palmer, Peerage Law in England, ch. 4. Although historical evidence tends to show that pre-eminent dignities entitling or qualifying the holders to attend the King's Council or Parliament were created by public investiture by the Sovereign himself, and that written documents were evidence of creation rather than creation itself, the contrary opinion is, however, asserted that earldoms and higher dignities are created by charter or patent, and that investiture is the outward sign of creation.

(*g*) *Norfolk (Earldom) Peerage Claim*, [1907] A. C. 10.

(*h*) *Vaux Peerage* (1837), 5 Cl. & Fin. 526.

(*i*) *Barony of Clifton* (1673), Collins on Baronies, p. 292; *Freschville Peerage* (1677), Dignity of a Peer of the Realm, Vol. III., p. 29.

(*j*) *De Wahull Claim* (1892), Minutes of Evidence of Claims before Committee for Privileges.

(*k*) *Hastings Peerage* (1841), 8 Cl & Fin. 144; *Vaux Peerage, supra*; *Braye Peerage* (1836), 6 Cl. & Fin. 757.

SECT. 3. **Creation of Peers.**

A writ of summons to an assembly other than a Parliament consisting of lords spiritual and temporal and elected representatives of counties, cities and boroughs does not create a peerage (*l*).

Summons to Parliament essential.

First creation of baron.

The first creation of a baron by letters patent appears to have been in 1388 (11 Ric. II.), when John de Beauchamp of Holt, steward of the King's household, was created Lord de Beauchamp and Baron of Kidderminster to him and the heirs male of his body (*m*).

Creation of new peerages.

580. Since the Union with Scotland (*n*) no new peer of

(*l*) *De Wahull Claim* (1892), Minutes of Evidence of Claims before Committee for Privileges. The first evidence of such a Parliament is the issue of writs by Simon de Montfort, Earl of Leicester, in 1264, when King Henry III. was a captive, and this date was allowed in the claim to the barony of de Ros (Collins on Baronies, p. 261). Subsequently this Parliament was abandoned, the King not being a free agent, and it was held in the *Mowbray Claim* (1887), that the first Parliament, a summons to which may prove peerage, was that of 23 Edward I. (Edward for Henry) in 1295.

(*m*) Dignity of a Peer of the Realm, Vol. V., p. 81; Palmer, Peerage Law in England, p. 263. In the Dignity of a Peer of the Realm, Vol. V., a number of charters and letters patent creating dignities are printed, of which a few relate to baronies. These creations are by letters patent of Kings Henry VI. and Edward IV. The earlier creations contain no clear limitation, but some make provision for the sustentation of the dignity, which is limited to heirs or heirs male of the body. One Act of King Henry III. (26th year), with its sequel, may be considered to throw light on the early constitution of baronies (Dignity of a Peer of the Realm, Vol. V., p. 244; Sir Harris Nicholas, Report, p. 204). The Act recites that Warin, late Baron de Lisle, was seised of the lordship of Kingston Lisle in the county of Berks; that his estates descended to Elizabeth, Countess of Warwick, who left three coheirs, the eldest of them married to John Talbot, Earl of Shrewsbury; that the earl and countess had granted the lordship to their son John, which lordship was the portion of the eldest coheir; that Warin and all his ancestors had the dignity of Baron and Lord of Lisle in right of the said manor and lordship beyond the memory of man. The King therefore grants the dignity of Baron de Lisle to John, son of the earl, with right to sit in Parliament. This supports the proposition that in the fifteenth century the heirs in possession of certain landed baronies had always belonged and ought to belong to the class styled "Barones Majores." Baronies have for the last four centuries been always created by letters patent with limitations to heirs male of the body (further special remainders being sometimes added), except in Scotland, where earldoms and baronies descendible to heirs were created down to the union of the kingdoms (Dignity of a Peer of the Realm, Vol. V., p. 252). King Henry VI., in his twenty-fifth year, created the barony of Saye and Sele without words of limitation, and granted a provision limited to heirs and assigns (Complete Peerage of England, by G. E. C., Vol. VII., p. 64; *Saye and Sele Barony* (1848), 1 H. L. Cas. 507). Whether the barony was created by this instrument or by writ, or whether the grantee was heir of an earlier barony, is open to argument, but the use of the word "assigns" must be noted as raising the question whether any of the letters patent creating dignities, without words of limitation expressly applied to the dignities, did in fact create hereditary peerages according to the law of England.

(*n*) Union with Scotland Act, 1706 (6 Anne, c. 11); and see titles CONSTITUTIONAL LAW, Vol. VII., p. 10; PARLIAMENT, Vol. XXI., p. 625.

England or Scotland can be created; and, since the Act of Union with Ireland (*o*), no new peer of Great Britain can be created. The Crown has, however, power to create any number of peers of the United Kingdom (*p*).

Irish peers.

581. The Crown can only create one new Irish peerage for every three that become extinct, provided the number of Irish peers entitled to sit in the House of Lords does not fall below one hundred, in which case that number is to be maintained (*q*). But the extinction of one out of several peerages held by the same person will not give rise to the right, because the word "peerage" here means the status or condition of a peer (*a*). The creation of a new Irish peerage on the supposed extinction of an old one is not, however, affected by the revival of the latter (*b*).

Procedure on creation of peerage.

582. A peerage is now (*c*) created by letters patent under the

(*o*) Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67); and see title PARLIAMENT, Vol. XXI., pp. 626, 627.

(*p*) See title CONSTITUTIONAL LAW, Vol. VI., p. 445.

(*q*) Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 4.

(*a*) *Fermoy Peerage Claim* (1856), 5 H. L. Cas. 716. In this case the holder of an Irish earldom received, before the Act of Union, a new patent creating him an Irish baron with remainder over in default of heirs male of his body. He died without heirs male of his body, so that the earldom became extinct, but the barony went over. It was held that the extinction of the earldom was not, under the circumstances, an extinction within the meaning of the statute. As to extinction, see p. 273, *post*.

(*b*) *Bloomfield Peerage* (1831), 2 Dow & Cl. 344.

(*c*) The ancient method of creation appears to have been by writ of summons. One of the demands of the barons conceded in Magna Charta (see title CONSTITUTIONAL LAW, Vol. VI., p. 377, note (*l*)) was that summonses must be addressed to the Barones Majores separately and individually when general summonses to the tenants in chief were addressed to the sheriffs of counties. But whether a tenant in chief became a greater baron by any form of creation, or whether, between the date of Domesday Book (1086) and that of the earliest writs of summons to Parliament, any person was created a baron with a territorial name of dignity, is unknown. In the subsequent writs one or two persons were summoned as barons, while the vast majority were called "chivalers." It is possible that these persons had been created barons by charter. No such charter, however, is known to exist. The writ of summons was "*ad consulendum ad tractandum de negotiis*," or some such words inapplicable to military service, followed by a sitting in Parliament (Co. Litt. 16 b; Com. Dig., tit. Dignity (C. 3); *Vaux Peerage* (1837), 5 Cl. & Fin. 526; *Braye Peerage* (1839), 6 Cl. & Fin. 757; *Hastings Peerage* (1841), 8 Cl. & Fin. 144, 157; *Wharton Peerage* (1845), 12 Cl. & Fin. 295). This created a peerage barony descendible to heirs (*ibid.*), unless it appeared that the writ was addressed to an official (*Barony of Clifton* (1673), Collins on Baronies, p. 292). The only use of this writ now remaining is the writ addressed to the eldest son of a peer of any degree calling him to the House of Lords in his father's barony, but this writ does not create a new dignity (*Ex parte Perry* (1782), 5 Bro. Parl. Cas. 509). If, however, this mode of creation is still valid, it is doubtful whether or not a writ issued to such an eldest son in respect of a barony which his father does not in fact possess would create a barony descendible to heirs. For a collection of limitations from the reign of King Stephen to 20 Henry VI., see Palmer, Peerage Law in England, p. 76. The mere sitting in Parliament under the King's writ only confers peerage, but not any particular rank in peerage (*Norfolk (Earldom) Peerage Claim*, [1907] A. C. 10).

SECT. 3. Creation of Peers.

Great Seal by the Sovereign (*d*). A precept to pass the seal receives the Sign Manual superscribed, and the letters patent are countersigned by the Secretary of State for the Home Department (*e*). The letters patent are thereupon enrolled at the Public Record Office.

Form of letters patent.

583. The letters patent must specify the patentee and name of the dignity, the limitation thereof to future heirs of the patentee, and the limitation must be one known to the law (*f*).

Limitation of grant.

The rule in England now is a limitation to heirs male of the body, with an occasional addition of special remainders; and there is a presumption of law that the limitation of an English peerage in a lost grant was to heirs male of the body (*g*). A limitation to heirs male, as distinguished from heirs male of the body, is void in England (*h*), but not in Scotland. The presumption of law now in the case of a Scottish peerage the grant of which has been lost or cannot be found is that the limitation was to the heirs male generally (*i*); but this presumption is rebuttable (*k*).

Shifting clause.

584. A shifting clause in letters patent, directing that the dignity should pass from the holder of the dignity to another person by special remainder upon his succession to an older or greater dignity, is bad; but the letters patent themselves are not rendered invalid thereby, nor by reason of any limitation becoming incapable of taking effect (*l*). A special remainder after the

(*d*) See title CONSTITUTIONAL LAW, Vol. VI., p. 476. Creation by writ being peculiar to the English peerage, it is doubtful whether a peerage of the United Kingdom can be created in this manner.

(*e*) As to the functions of the Secretary of State for the Home Department, see title CONSTITUTIONAL LAW, Vol. VII., pp. 82 *et seq.*

(*f*) See title CONSTITUTIONAL LAW, Vol. VI., p. 456; *Wiltes Claim of Peerage* (1869), L. R. 4 H. L. 126, *per* Lord CHELMSFORD, L.C., at pp. 153, 162; *Cope* v. *De la Warr* (*Earl*) (1873), 8 Ch. App. 982; Cruise, Origin of Dignities, c. 2. As to life peers, see *Wensleydale Peerage* (1856), 5 H. L. Cas. 958; and p. 269, *post*. A grant without words of limitation is bad in England. In Scotland a grant in fee would be presumed.

(*g*) The first known limitation of an earldom to heirs male of the body was in 1322, on the creation of the earldom of Carlisle; it is, however, arguable whether the earldom of Winchester, created in 1207, was not so limited. All the earldoms of the eleventh and twelfth centuries were limited to heirs, and the presumption that the limitation in a lost grant was to heirs male of the body is not founded in antiquity; see, further, *Norfolk* (*Earldom*) *Peerage Claim*, [1907] A. C. 10; p. 264, *ante*; and see title CONSTITUTIONAL LAW, Vol. VI., pp. 457 *et seq.*

(*h*) *Wiltes Claim of Peerage*, *supra*; *Devon's* (*Earl*) *Case* (1831), 2 Dow & Cl. 200; see Sir Harris Nicholas, The Devon Peerage (1832), with appendices of the Nevill, Purbeck, Lovell, and Oxford Cases; Finlayson, History of Hereditary Dignities, with special reference to the Earldom of Wiltes (1869).

(*i*) *Herries Peerage Claim* (1858), L. R. 2 Sc. & Div. 258; 3 Macq. 585; *Perth Earldom* (1848), 2 H. L. Cas. 865; *Mar Peerage* (1875), 1 App. Cas. 1, 24, 36, and cases there cited.

(*k*) *Herries Peerage Claim*, *supra*; *Mar Peerage*, *supra*.

(*l*) *Buckhurst Peerage Case* (1876), 2 App. Cas. 1; compare *Wiltes Claim of Peerage*, *supra*. Such a clause may, however, be

exhaustion of the original limitation is good; the remainder taking effect as a new grant.

Naming of a place.

585. The naming of a place is not essential to the creation of a peerage (*m*).

Refusal of grant.

586. A subject cannot refuse to accept a peerage (*n*), even if conferred upon him in his infancy (*a*).

SECT. 4.—*Estate in and Descent of a Peerage.*

Nature of estate and descent.

587. A peerage is an incorporeal hereditament, inalienable and descendible according to the words of limitation contained in the grant (*b*).

A limitation to a man "and his heirs" will not carry it to collateral heirs (*c*). For the purposes of descent, therefore, this limitation is practically equivalent to "heirs of the body."

Baronies by writ are presumed to be limited to heirs (*d*).

Each successive heir to a peerage takes under the original grant.

In the case of a lord of appeal in ordinary his dignity as a lord of Parliament does not descend to his heirs (*e*).

SECT. 5.—*Privileges and Precedence.*

SUB-SECT. 1.—*Privileges.*

Right to sit and vote in Parliament.

588. The most important privilege of a peer is to sit and vote

valid to impede succession (*Cope* v. *De la Warr* (*Earl*) (1873), 8 Ch. App. 982). An example of a shifting clause may be found in the very elaborate letters patent creating the earldom of Cromartie, printed in "the Cromartie Book," by Sir William Fraser.

(*m*) *R.* v. *Knollys* (1694), 1 Ld. Raym. 10; *Re Rivett-Carnac's* (*Sir J.*) *Will* (1885), 30 Ch. D. 136.

(*n*) *Egerton* v. *Brownlow* (*Lord*) (1853), 4 H. L. Cas. 1; see title CONSTITUTIONAL LAW, Vol. VI., pp. 456, 457.

(*a*) *Mortimer Sackville's Case* (1719), cited 2 App. Cas. 6, n.; *Queensberry's* (*Duke*) *Case* (1719), 1 P. Wms. 582.

(*b*) *R.* v. *Purbeck* (*Viscount*) (1660), Show. Parl. Cas. 1, 5; *Norfolk* (*Earldom*) *Peerage Claim*, [1907] A. C. 10. A peerage cannot, therefore, be the subject of a trust or pass to a trustee in bankruptcy (*Buckhurst Peerage* (1876), 2 App. Cas. 1). But see *Re Rivett-Carnac's* (*Sir J.*) *Will*, *supra*. In this case it was held that an hereditary dignity was "land" within the meaning of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 37; see also *Re Aylesford's* (*Earl*) *Settled Estates* (1886), 32 Ch. D. 162; *Cowley* (*Earl*) v. *Cowley* (*Countess*), [1901] A. C. 450.

(*c*) *De Ros Peerage* (1804), Minutes of Evidence of Claims before Committee for Privileges; Collins on Baronies, p. 266.

(*d*) *Vaux Peerage* (1837), 5 Cl. & Fin. 526; *Braye Peerage* (1839), 6 Cl. & Fin. 757; *Hastings Peerage* (1841), 8 Cl. & Fin. 144.

(*e*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 6.

SECT. 5. Privileges and Precedence.

Disqualifications.

in Parliament (*f*). But a peer is disqualified for receiving a writ of summons and for sitting and voting in Parliament if he is (1) an infant (*g*); (2) an alien (*h*) not naturalised (*i*); (3) a bankrupt, during the continuance of the bankruptcy (*k*); or (4) convicted of treason or felony, until pardoned, or until completion of sentence (*l*).

A patent of a peerage for life does not confer the right to sit and vote in Parliament (*m*).

Peers qualified to sit in House of Commons.

589. Although peers of England, Scotland, Great Britain, and the United Kingdom are disqualified for election as members of the House of Commons, peers of Ireland, who have not been elected representative peers, are qualified to represent constituencies in Great Britain (*n*).

Peers qualified to vote at parliamentary elections.

590. Peers of England, Scotland, Great Britain, and the United Kingdom are disqualified for voting at elections of members of the House of Commons, and cannot be placed on the register of voters (*o*); but peers of Ireland, who have been actually elected and are serving as members of the House of Commons, are not so disqualified (*p*).

General rights of Scottish peers.

591. Since the Union with Scotland a peer of Scotland cannot, merely by virtue of such peerage, sit and vote in Parliament; but he has all the privileges of the peerage of England except only that of sitting and voting in Parliament (*q*).

General rights of Irish peers.

592. An Irish peer has, unless he chooses to waive them in order to become a member of the House of Commons, all

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(*f*) *Norfolk* (*Earldom*) *Peerage Claim*, [1907] A. C. 10, 17; see title PARLIAMENT, Vol. XXI., p. 779. As to representative peers of Scotland and Ireland, see *ibid.*, p. 624; *Breadalbane Peerage Claim* (1872), L. R. 2 Sc. & Div. 269; see also title CONSTITUTIONAL LAW, Vol. VI., p. 456.

(*g*) Standing Order of the House of Lords, 22nd May, 1685; and see titles INFANTS AND CHILDREN, Vol. XVII., p. 47; PARLIAMENT, Vol. XXI., pp. 622, 623.

(*h*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3.

(*i*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 7; see title ALIENS, Vol. I., p. 314.

(*k*) Bankruptcy Disqualification Act, 1871 (34 & 35 Vict. c. 50), ss. 6, 7, 8. A peer who commits an act of bankruptcy may be dealt with under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), as though he had no privilege of Parliament (*ibid.*, s. 124); and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 12, 88.

(*l*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 2; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 428, 429.

(*m*) *Wensleydale Peerage* (1856), 5 H. L. Cas. 958.

(*n*) Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), s. 1, art. 4; see title PARLIAMENT, Vol. XXI., p. 625.

(*o*) *Beauchamp* (*Earl*) v. *Madresfield* (1872), L. R. 9 C. P. 245; *Rendlesham* (*Lord*) v. *Haward* (1873), L. R. 9 C. P. 252; *Bristol* (*Marquis*) v. *Beck* (1907), 96 L. T. 55; and see title ELECTIONS, Vol. XII., p. 140. As to municipal elections, see *ibid.*, p. 183.

(*p*) Anson, Law and Custom of the Constitution, Vol. I., p. 124

(*q*) Union with Scotland Act, 1706 (6 Anne, c. 11), s. 1, art. 23.

the privileges of peerage except that of sitting in the House of Lords (*r*).

593. A peer is at all times free from arrest in civil cases (*s*), and process for contempt of court cannot, it seems, be served against him (*t*). Hence, a peer ought not to be appointed a receiver (*a*). An order of court may, however, be enforced against a peer by sequestration (*b*).

Privilege from process in civil cases.

Where a party to legal proceedings desires to plead privilege of Parliament, for example, peerage, he must assert definitely that he is a peer; for, if he merely alleges facts on which the jury may find that he is a peer, he will be treated as being an ordinary person and will be estopped by judgment against him from setting up his peerage (*c*); and it has been held that, if the peerage is denied by the other side, the party pleading peerage must state in his reply how he claims the dignity (*d*).

Right of audience.

Pleading privilege.

594. In legal proceedings a peer of Ireland is entitled, if a lord of Parliament, to be described by his title of dignity; but, if he is not a lord of Parliament, he should be described by his proper name with the addition of his title and degree, but without the expression "commonly called," which is only used in the case of courtesy titles of sons of dukes, marquesses, viscounts, or earls (*e*).

Description in proceedings.

595. A peer who is a plaintiff and out of the jurisdiction must give the usual security for costs (*f*).

Security for costs.

596. A peer indicted for treason or felony must be tried by his peers (*g*).

Trial.

This right is extended to Scottish peers by the Union with Scotland Act, 1706 (*h*), and to Irish peers by the Union with Ireland Act, 1800 (*i*), and to peeresses, whether married or sole, by statute (*k*).

(*r*) *Irish Peer's Case* (1806), Russ. & Ry. 117; *Robinson* v. *Rokeby* (*Lord*) (1803), 8 Ves. 601.

(*s*) *Shrewsbury's* (*Earl*) *Case* (1610), 9 Co. Rep. 46 b, 49 b; *Foster* v. *Jackson* (1615), Hob. 52, 61; *Cowhe* v. *Arundel* (*Lord*) (1802), 3 East, 127; and see title PARLIAMENT, Vol. XXI., pp. 779, 780.

(*t*) *Pheasant* v. *Pheasant* (1670), 2 Vent. 340; but see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 320, note (*m*).

(*a*) *A.-G.* v. *Gee* (1813), 2 Ves. & B. 208.

(*b*) *Pheasant* v. *Pheasant, supra*; *Eyre* (*Justice*) v. *Shaftsbury* (*Countess*) (1723), 2 P. Wms. 103, 110; and, as to sequestration, see title EXECUTION, Vol. XIV., pp. 79 *et seq.*

(*c*) *Digby* v. *Alexander* (1832), 9 Bing. 412.

(*d*) *Stirling* (*Earl*) v. *Clayton* (1832), 1 Cr. & M. 241.

(*e*) *R.* v. *Graham* (1791), 2 Leach, 547.

(*f*) *Aldborough* (*Lord*) v. *Burton* (1834), 2 My. & K. 401; and, as to security for costs, see title PRACTICE AND PROCEDURE.

(*g*) *I.e.*, his equals (*R.* v. *Audley* (*Lord*) (1631), 3 State Tr. 401). This right is not strictly a privilege, because it is the ordinary right of every subject by Magna Charta and cannot be waived; and see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 270; PARLIAMENT, Vol. XXI., p. 653.

(*h*) 6 Anne, c. 11.

(*i*) 39 & 40 Geo. 3, c. 67.

(*k*) Stat. (1441-2) 20 Hen. 6, c. 9; see title PARLIAMENT, Vol. XXI., p. 653

SECT. 5. **Privileges and Precedence.**

Peers who are lords of Parliament have the privileges of members of Parliament (*l*).

A peer may act as advocate in civil and criminal causes (*m*).

Rights and privileges of peeresses.

597. Peeresses have the same rights and privileges, except that of sitting and voting in Parliament, as peers, and, although a peeress by marriage loses such rights and privileges if she marry a commoner, a peeress in her own right in the like event retains them (*n*).

SUB-SECT. 2.—*Precedence.*

Precedence in Parliament.

598. The precedence of peers in Parliament is regulated by statute (*o*), under which none but the King's children can sit on either side of the cloth of estate (*p*) in Parliament. The Lord Chancellor, the Lord Treasurer, the Lord President of the Council and the Lord Privy Seal, being of the degree of barons of Parliament or above, sit on the left side of the Parliament chamber above all dukes other than such as shall happen to be the King's son, brother, uncle, nephew, or brother's or sister's sons (*q*). After the Lord Privy Seal come the Great Chamberlain, the Constable, the Marshal, the Lord Admiral, the Grand Master or Lord Steward and the King's Chamberlain in the order named (*r*). If the King's Chief Secretary is a baron of Parliament or a bishop, he takes precedence of all barons or bishops not holding any of the above-named offices (*s*). All dukes, other than those above-mentioned, and all marquesses, earls, viscounts and barons not holding any of the offices aforesaid, take precedence according to seniority (*t*). If, however, the holders of the office of Lord Chancellor, Lord Treasurer, Lord President of the Council, Lord Privy Seal, or Chief Secretary are under the degree of a baron of Parliament, they sit at the upper end of a seat in the middle of the Parliament chamber in the order named (*a*).

Since the Union with Scotland, peers of Scotland take precedence next after peers of England of the same degree (*b*). Peers of Ireland, created before the Union with Ireland, take precedence next after peers of Great Britain of the same degree; if created

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(*l*) See title PARLIAMENT, Vol. XXI., pp. 779 *et seq.*, 785 *et seq.*

(*m*) See titles BARRISTERS, Vol. II., p. 371; PARLIAMENT, Vol. XXI., pp. 649, note (*h*), 754, note (*b*).

(*n*) *Rutland's (Countess) Case* (1605), 6 Co. Rep. 52 b; Co. Litt. 16 b; *Rivers' (Countess) Case* (1651), Sty. 252; *Anon.* (1676), 1 Vent. 298; *Acton's Case* (1603), 4 Co. Rep. 117 a; compare *Cowley (Earl)* v. *Cowley (Countess)*, [1901] A. C. 450; and see the text, *supra*.

(*o*) Stat. (1539) 31 Hen. 8, c. 10; and see title CONSTITUTIONAL LAW, Vol. VI., pp. 455, 456.

(*p*) Stat. (1539) 31 Hen. 8, c. 10, s. 1.

(*q*) *Ibid.*, s. 4; and see title CONSTITUTIONAL LAW, Vol. VII., pp. 57, 63. As to the places of archbishops and bishops, see titles ECCLESIASTICAL LAW, Vol. XI., pp. 387, 388, 404; PARLIAMENT, Vol. XXI., p. 621.

(*r*) Stat. (1539) 31 Hen. 8, c. 10, s. 5.

(*s*) *Ibid.*, s. 6.

(*t*) *Ibid.*, s. 7. The expression in the statute is "after ther auncients as it hathe ben accustomed."

(*a*) *Ibid.*, s. 8.

(*b*) Union with Scotland Act, 1706 (6 Anne, c. 11), s. 1, art. 23.

since the Union they rank *pari passu* with peers of the United Kingdom of the same degree (*c*). SECT. 5. Privileges and Precedence.

SECT. 6.—*Extinction or Suspension of a Peerage.*

SUB-SECT. 1.—*Failure of Issue.*

599. On failure of the heirs indicated at the creation of a peerage it becomes extinct (*d*). Failure of issue.

SUB-SECT. 2.—*Abeyance.*

600. The doctrine of abeyance relates not to the extinction but to the dormant existence of a peerage. It does not apply to Scottish peerages (*e*) and is of recent origin, not being known before the seventeenth, nor fully developed till the nineteenth century (*f*). It must be distinguished from coheirship, the law applicable to which is the common law. Effect of doctrine.

When the owner of a fief died leaving no male issue but more than one daughter, his land fell to such daughters in equal shares, though in case of a landed barony it was held that the eldest must have the *caput baroniæ* where seisin was taken for the whole (*g*). Abeyance arising on death.

A dignity being impartible and all the daughters having equal right to it, the peerage right is held to be latent in all the coheirs (*h*).

(*c*) Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), s. 1, art. 4.

(*d*) *Knollys' Case* (1694), Marcham's Report, 464; *sub nom. R.* v. *Banbury* (*Earl*), Skin. 517, where the House of Lords held that the first Earl of Banbury left no sons, and consequently that the earldom became extinct by failure of issue.

(*e*) *Herries Peerage Claim* (1858), L. R. 2 Sc. & Div. 258; 3 Macq. 585.

(*f*) The law of abeyance, as distinguished from coheirship, and first enunciated in the seventeenth century, is set forth in the letters patent dated 7th May, 1663, creating Mary, Countess of Kent, to be Baroness Lucas of Crudwell, which provided that, if at any time after the death of the said Mary, and in default of heirs male of her body, begotten by the Earl of Kent, there should be more persons than one who shall be coheirs of her body, so that the King or his heirs might declare which of them should have the dignity or otherwise, the dignity should be suspended or extinguished, then, nevertheless, the dignity should not be suspended or extinguished, but should go and be held and enjoyed from time to time by such of the said coheirs as by course of descent and the common law of the realm should be inheritable in other entire and indivisible inheritances as, namely, an office of honour and public trust, or a castle for the necessary defence of the realm, and the like in case such inheritance had been given and limited to the said countess and the heirs of her body by the said earl begotten. Except as to the earldom of Cromartie, which was not the subject of any judicial decision, this doctrine has not been applied to any dignity other than a barony by writ; the point was expressly left open in *Norfolk* (*Earldom*) *Peerage Claim*, [1907] A. C. 10.

(*g*) 2 Pollock and Maitland, 272, citing Bract., Vol. II., 272.

(*h*) It was formerly held to revert or be escheated to the fountain of honour, *i.e.*, the Crown, but the law was subsequently ascertained to be that a peerage in coheirs was not extinguished, and that the Sovereign possessed it only so long as coheirship existed; so that if at any future time there should be but one heir, the right revived and the dignity was said to have been in abeyance (*Willoughby de Broke Case* (1695), Cruise, Origin of Dignities, p. 197; Collins on Baronies, p. 321; Skin. 432).

SECT. 6. **Extinction or Suspension of Peerage.**

The King can terminate such abeyance in favour of one coheir (*i*), but cannot grant the dignity to anyone but a coheir (*k*).

An office of honour is not inherited by any one coheir, but remains vested in all the coheirs, who must perform any duty pertaining to the honour by deputy approved by the Sovereign (*l*).

Abeyance arising on disqualification.

601. Abeyance may arise from the disqualification of the heir. Thus, when the heir to a peerage is an alien, the right to a writ of summons does not descend, but remains dormant until such time as the disqualification is removed (*m*).

Lapse of time.

602. Lapse of time, if satisfactorily explained, is no bar to a claim to a peerage (*n*), but may give rise to a presumption against the right of the claimant (*o*).

SUB-SECT. 3.—*Merger.*

Merger.

603. If the holder of a peerage succeeds to the Crown, the dignity merges in the Crown and can only be revived or re-created by grant (*p*).

A barony by writ does not merge in a subsequent earldom (*q*).

(*i*) Com. Dig., tit. Dignity (C 3); title CONSTITUTIONAL LAW, Vol. VI., p. 457; and see, further, pp. 276, 278, *post*.

(*k*) This power in the Sovereign was exercised frequently in the nineteenth century in respect of abeyances of long duration, some of the instances being remarkable.

(*l*) See the claims to the office of Lord Great Chamberlain (1902), Wollaston, Coronation Claims, pp. 296, 301, 302; see also (1625), Collins, Prac. 173 (where, upon the death of the Earl of Oxford, leaving daughters and no male issue, it was reported to the King by the judges that his baronies reverted to the Crown to dispose of the King's measure, and that the office of Great Chamberlain went to his heir-at-law). Nevertheless, the House of Lords recently resolved that the eldest coheir was entitled to the Barony of Lucas (Minutes of Proceedings before the Committee for Privileges, 1907); and see note (*f*), p. 273, *ante*.

(*m*) *Newburgh's (Earldom) Case* (1830), Minutes of Evidence before the Committee for Privileges. It was at one time held by the House of Lords that a Scottish peer was disqualified under the Union with Scotland Act, 1706 (6 Anne, c. 11), from being created a peer of the United Kingdom (*Queensberry's (Duke) Case* (1720), 1 P. Wms. 582; *Brandon's (Duke) Case* (1711), Lords' Journals, Vol. XIX., p. 396). This decision has been reversed (*Brandon's (Duke) Case* (1782), Lords' Journals, Vol. XXXVI., p. 516 b). As to the effect of bankruptcy on a peer, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 88, note (*s*); and as to the effect of a conviction for felony, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429; and see p. 270, *ante*.

(*n*) Com. Dig., tit. Dignity (E); *Hastings Peerage* (1841), 8 Cl. & Fin. 144, 163—165; *Fitzwalter Peerage* (1844), 10 Cl. & Fin. 946, 957.

(*o*) *De Wahull Claim* (1892), Minutes of Evidence before the Committee for Privileges.

(*p*) See *Oranmore's (Lord) Claim* (1836), 2 H. L. Cas. 910; compare *Buckhurst Peerage* (1876), 2 App. Cas. 1, *per* Lord CAIRNS, L.C., at p. 28. The effect of the King becoming coheir to a barony by writ in abeyance has never been argued. As to the titles of the Crown, see title CONSTITUTIONAL LAW, Vol. VI., p. 360. Merger might arise if the Sovereign terminated the abeyance in his own favour; and see the text, *supra*.

(*q*) *Roos Barony* (1666), Collins on Baronies, p. 261; *Grey of Ruthyn Barony* (1640), Collins on Baronies, p. 195; and see title CONSTITUTIONAL LAW, Vol. VI., p. 457.

SUB-SECT. 4.—*Resignation and Surrender.*

SECT. 6. **Extinction or Suspension of Peerage.**

Resignation and surrender.

604. A peer of England cannot surrender, resign (*r*), or extinguish his dignity by fine, grant, or any other conveyance to the King (*a*).

A Scottish peer could resign his dignity into the hands of the King in order to extinguish it, or, which was usual, resign for a *novodamus* altering the course of descent (*b*).

SUB-SECT. 5.—*Forfeiture.*

Forfeiture consequent on attainder.

605. Forfeiture of all civil rights follows upon attainder (*c*). Dignities held by the attainted person, or to which any person claiming through him becomes heir, escheat to the Crown and the blood of the attainted person is "corrupted," so that he cannot subsequently inherit, nor transmit to his heirs the capacity to inherit, any dignity (*d*).

The barony of an attainted person is not preserved by his son having been summoned to Parliament in his father's barony prior to the attainder (*e*).

When succession or subsequent limitation unaffected.

If, however, an attainted person dies without issue before becoming heir to a dignity, the succession to the dignity is not affected (*f*),

(*r*) *Norfolk* (*Earldom*) *Peerage Claim*, [1907] A. C. 10. Before the seventeenth century it was supposed that a peer had power to surrender or resign, and many earls did in fact purport to do so.

(*a*) *R.* v. *Purbeck* (1660), Show. Parl. Cas. 1, 5; Com. Dig., tit. Dignity (E).

(*b*) The power seems to have been abolished by the Union with Scotland Act, 1706 (6 Anne, c. 11).

(*c*) Common law conviction of treason or felony, followed by sentence of death, involved attainder. Persons can also be attainted by Act of Parliament, even after death (4 Bl. Com. 380; Co. Litt. 290 b; Chitty, Criminal Law, p. 723); as to Bills of Attainder, see title COURTS, Vol. IX., p. 20; and see titles CONSTITUTIONAL LAW, Vol. VI., p. 457; PARLIAMENT, Vol. XXI., p. 727.

(*d*) 2 Bl. Com. 253; 4 Bl. Com. 380; Chitty, Criminal Law, pp. 726 *et seq*

(*e*) *Montacute and Monthermer Peerages* (1874), L. R. 7 H. L. 305, *per* Lord CAIRNS, L.C., at p. 315, *per* Lord HATHERLEY, at p. 316.

(*f*) *Perth Earldom* (1848), 2 H. L. Cas. 865; and see the *Southesk Earldom* (1848), 2 H. L. Cas. 908. For example, if A. has three sons, B., C., and D., the line of B. remains pure, the line of C. becomes corrupt through attainder of a descendant, and the line of D. remains pure. The issue of B. and C. become extinct, and the descendant of D. becomes heir of the person ennobled. If in fact any descendant of C. became heir, all the descendants of D. are barred. The chief authority for this statement of the law is the *Airlie Earldom* (1813), Parliamentary Papers, and Cruise, Origin of Dignities, p. 131. The judges were sent for and delivered their unanimous opinion in the House of Lords by the mouth of the Lord Chief Justice of the Common Pleas on 2nd June, 1818. They held that an estate tail is not protected from forfeiture by the statute *De Donis Conditionalibus* (Statute of Westminster II. (1285) 13 Edw. 1, c. 1); they discussed cases in Dyer, p. 115 (*R.* v. *Hussey* (1596), Cro. Eliz. 519; *Sheffeild* (*Lord*) v. *Ratcliffe* (1615), Hob. 334, Ex. Ch.) and the opinion of Lord GILBERT, C.B., as author of the title "Leases" in Bacon's Abridgement, who asserted that the donee of an estate tail holds by homage, fealty etc. If a peerage is held by homage and fealty, as the ceremony of the Coronation indicates, the argument is perhaps irresistible. In the *Airlie Earldom*, *supra*, the claimant consequently failed, and subsequently obtained an Act of Parliament reversing the

SECT. 6. Extinction or Suspension of Peerage.

nor is the inheritance of a dignity under a special remainder barred by the attainder of an heir under the prior limitation (*g*).

On the attainder of one coheir to a barony in abeyance, the dignity does not escheat to the Crown; the title of the other coheir or coheirs is not affected (*h*).

Forfeiture without attainder.

606. Forfeiture without attainder has been imposed by Act of Parliament (*i*); and no judgment can cause attainder or corruption of blood for forfeiture or escheat except judgment of outlawry (*k*).

Restitution of blood.

607. The effect of an attainder can only be removed by statute, which, in the case of attainder by Act of Parliament, takes the form of a repealing Act. Restitution of blood does not revive a forfeited dignity. It does, however, enable the attainted person or his heirs subsequently to inherit a dignity (*l*).

SUB-SECT. 6.—*Deprivation.*

Deprivation.

608. No peer can be deprived of peerage except by Act of Parliament (*m*).

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attainder of the peerage and thus succeeded to the dignity. It will be observed, therefore, that the law of forfeiture as applicable to dignities has been extremely doubtful, and that although it is considered settled by authority of the *Airlie Earldom* (1813) (the dignity being Scottish, and brought within the law of England only by the Union with Scotland Act, 1706 (6 Anne, c 11), yet the decision rests on the supposition that the law of dignities follows that of land held in chief of the Crown. It is also worthy of note that the earldom of Airlie was limited to "heirs male," which limitation—if "heirs male of the body" is not implied—would be void (see p. 268, *ante*), and none of the authorities quoted would apply; compare the *Ferrers (Earl) Attainder* (1760), 2 Eden, 373; Third Report on the Dignity of a Peer of the Realm, p. 54, on the question whether attainder for felony has the same effect as attainder for treason, and the facts of the *Athol Case* (1813), Cruise, Origin of Dignities, 2nd ed., p. 192, particularly in relation to the barony of Strange; see also the *Dacre Barony* (1605), and others, cited in Palmer, Peerage Law in England, pp. 197—199.

(*g*) By the terms of the grant, enjoyment by the second grantee is made to depend on a future event. Both creations are emanations of the same royal prerogative, perfectly distinct and independent of each other; therefore, the forfeiture of the first by treason does not prevent the second from arising and taking effect at the time appointed (*Somerset's (Dukedom) Case*, Third Report on the Dignity of a Peer of the Realm, p. 56).

(*h*) *Braye Peerage* (1839), 6 Cl. & Fin. 757; *Camoys Peerage* (1839), 6 Cl. & Fin. 789; *Beaumont Peerage* (1840), 6 Cl. & Fin. 868. As to abeyance, see p. 273, *ante*.

(*i*) Stat. (1534) 26 Hen. 8, c. 13 (now repealed).

(*k*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 1. The provision is not retrospective, and all the authorities applicable to peerage apply to the previous period; see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 428 *et seq.*; and see title CONSTITUTIONAL LAW, Vol. VI., p. 457. A judgment of outlawry standing in the way of a claim to a dormant barony, though clearly erroneous, cannot be overlooked, but must be reversed (*Wharton Peerage* (1845), 12 Cl. & Fin. 295).

(*l*) *Montacute and Monthermer Peerages* (1874), L. R. 7 H. L. 305.

(*m*) Com. Dig., tit. Dignity (E); *Waterford's (Earl) Claim* (1832), 6 Cl. & Fin. 133; title CONSTITUTIONAL LAW, Vol. VI., p. 457.

SECT. 7.—*Claims to Peerage.*

SUB-SECT. 1.—*Jurisdiction.*

Jurisdiction as to claims to dignities.

609. The body of the Lords Spiritual and Temporal is an entity distinct from any House of Parliament (*n*).

Jurisdiction to determine a claim to a dignity exists only in the Sovereign, and can be delegated by him only, and has in fact been delegated by him at various periods to different authorities, such as the Lord Steward of England and the Court of the Marshal (*o*). A question of dignity or honour cannot be tried by a court of law (*p*).

Jurisdiction of House of Lords.

610. The jurisdiction of the House of Lords is confined to claims to the right to vote there (*q*).

The House of Lords claims to have an inherent right to decide claims to Scottish and Irish peerages upon the ground that the petition is in fact a claim by the petitioner to be placed on a register of voters who elect members of the House (*r*).

(*n*) There are persons in possession of dignities, both ecclesiastical and lay, who are not peers of Parliament, but are, it is apprehended, lords of the realm. Bishops and prelates, barons by tenure, if any, are examples; for the occupants of ancient episcopal sees are to some extent disqualified, and a baron by tenure could claim no writ of summons to the House of Lords. They may nevertheless be lords spiritual or temporal. It is to be observed, also, that the proclamation of a new Sovereign emanates from the lords spiritual and temporal taking such advice as they think proper, no reference to either House of Parliament appearing in the form used; see title CONSTITUTIONAL LAW, Vol. VI., p. 325. The original theory of monarchy is to this extent preserved. The subject is one not easily defined, and if the distinction is well founded it affects the question of jurisdiction; but see title PARLIAMENT, Vol. XXI., pp. 619 *et seq.*

(*o*) See title COURTS, Vol. IX., pp. 26, 116. Of trials in the Court of the Marshal in the seventeenth century, there are many records preserved at the College of Arms; see p. 288, *post.*

(*p*) *Cowley* (*Earl*) v. *Cowley* (*Countess*), [1901] A. C. 450.

(*q*) This is evidenced by the passing and repealing of a Standing Order (now obsolete) to compel peers on first sitting in Parliament to hand in a pedigree showing the position of heirs to their dignities. The Earl of Berkeley made use of this order to hand in a pedigree showing his eldest son to be legitimate, thus raising a question which the peers, without reference from the Crown, had apparently no jurisdiction to try. The Standing Order was, probably for this reason, repealed. It is not evident that the question raised by the Earl of Berkeley could have been tried in any court before a right in someone had emerged. In *R.* v. *Knollys* (1694), 1 Ld. Raym. 10, HOLT, C.J., held that the question whether the person before the court was, or was not, earl was within his jurisdiction, and, contrary to the opinion of the House of Lords, he quashed an indictment for felony, because the person charged was described as Charles Knollys, whereas he ought to have been described as Earl of Banbury; and this after the House of Lords had refused the claim of the person charged to be tried as a peer (Report of the Attorney-General, p. 42, printed with the Minutes of Evidence before the Committee for Privileges).

(*r*) See *Waterford's* (*Earl*) *Claim* (1832), 6 Cl. & Fin. 133. This assertion has never been made where the claimant has petitioned the King; but in the years 1790-1793 certain persons claiming peerages voted at an election of Scottish peers, and the House summoned them to establish their right on a petition of a defeated candidate who desired that the return might be altered. The evidence in these claims was printed, probably the first

SECT. 7. Claims to Peerage.

Persons claiming to vote as Irish peers petition the House of Lords that their names may be entered on the Roll of Irish Peers (*s*).

SUB-SECT. 2.—*Procedure and Evidence.*

Claims by petition.

611. A claim to peerage is initiated by petition to the Sovereign. The claimant must state the creation of the dignity, and the steps by which the right has devolved upon him (*a*).

Form of prayer of petition.

612. In the case of a peerage of England, Great Britain, or the United Kingdom, the prayer of the petition is that a writ of summons to Parliament may be issued to the petitioner. In the case of a peerage of Scotland or Ireland, which is already on the Roll of Scottish or Irish peers, the prayer is that the petitioner may be admitted to vote at the election of representative peers. If the peerage is not on the Roll, a prayer that the peerage may be placed on the Roll is included.

If a barony is in abeyance, the petition prays that the Sovereign may be pleased to terminate the abeyance in favour of the petitioner. In that case the only question is whether or not the petitioner is a coheir to the barony, the termination of the abeyance being a matter of favour and not of right.

A mere statement of the alleged right by the claimant is not enough (*b*).

Report of law officers and reference to Committee for Privileges.

The petition is sent to the Secretary of State for the Home Department, who refers it to the law officers of the Crown (*c*).

The law officers may report the claim proved and recommend a writ to be issued, but it is more usual to report that the claim is one fit to be referred to the House of Lords. The Secretary of State then presents it to the Sovereign, by whom it is invariably, though not necessarily, referred to the House of Lords, who refer it to the Committee for Privileges (*d*). The House or Committee thereupon appoint a day on which to hear the claimant or his counsel, and the

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occasion of printing—the papers are very rare. As to the election of Scottish and Irish representative peers, see title PARLIAMENT, Vol. XXI., pp. 625 *et seq.*

(*s*) Such petitions are by Standing Orders referred to the Lord Chancellor of Great Britain, whose report is usually adopted; see title PARLIAMENT, Vol. XXI., p. 627, note (*a*). In cases of difficulty or doubt the Lord Chancellor recommends reference to the Committee for Privileges; see *ibid.*, p. 641. For cases where the claim has already been dealt with by a committee of the Irish peers, see *Roscommon's (Earl) Claim* (1828), 6 Cl. & Fin. 97; *Waterford's (Earl) Claim* (1832), 6 Cl. & Fin. 133.

(*a*) The Standing Orders require the claimant to hand in a printed case, stating precisely the creation and limitation of the dignity and the steps by which the right has descended, and this in the form of separate paragraphs, the relative documents being stated with each paragraph, and usually printed *in extenso* in an appendix to the case. The printed case must be on the table of the House for a period defined in the Standing Orders. These vary from time to time and must be ascertained. Compare title PARLIAMENT, Vol. XXI., pp. 622, 623, 627.

(*b*) *Huntly Peerage* (1838), 5 Cl. & Fin. 349. As to the case when the right of the claimant's predecessor in the peerage is admitted, see title PARLIAMENT, Vol. XXI., p. 622.

(*c*) *Buckhurst Peerage* (1876), 2 App. Cas. 1, 17.

(*d*) This Committee is of the whole House; see title PARLIAMENT

law officers of the Crown appear nominally in opposition, and more especially to advise the House or Committee when asked (*e*). In a proper case the Committee may assign counsel to take up a case where the claimant is prevented by lack of means (*f*). Claims to Peerage.

The Committee may in proper cases hear persons who are not claimants, but appear to be concerned (*g*).

It is the duty of the Committee to consider the effect of any clause in a patent in the case referred to it (*h*).

613. The admissibility of evidence in a peerage claim is entirely within the jurisdiction of the Committee hearing the claim, and the Committee is not bound by any decision of its predecessors (*i*), even in cases where the limitations in the patents are exactly similar (*k*), nor by any rules of evidence prevailing in the civil courts (*l*). Evidence. Admissibility.

614. In all peerage claims evidence of creation, descent, and extinction of nearer heirs must be proved; and in addition, in a claim to be declared coheir to a barony in abeyance, the persons who are the other coheirs must, so far as it is known, be stated, Evidence of creation.

Vol. XXI., p. 641. It is not a court of record (see title COURTS, Vol. IX., p. 9), and is not bound by its own decisions or by those of any other court (*Devon's (Earl) Case* (1831), 2 Dow & Cl. 200; *Wiltes Claim of Peerage* (1869), L. R. 4 H. L. 126); and see the text, *infra*.

(*e*) As to counsel for the claimant becoming a law officer of the Crown during the hearing, see *Tracy Peerage* (1843), 10 Cl. & Fin. 154; *Wharton Peerage* (1845), 12 Cl. & Fin. 295; *Shrewsbury Peerage* (1858), 7 H. L. Cas. 1; *Fermoy Peerage Claim* (1856), 5 H. L. Cas. 716.

(*f*) *Roscommon's (Earl) Claim* (1828), 6 Cl. & Fin. 97.

(*g*) *Slane Peerage* (1835), 5 Cl. & Fin. 23; *Braye Peerage* (1839), 6 Cl. & Fin. 757; *Shrewsbury Peerage, supra*; compare *Berkeley Peerage* (1861), 8 H. L. Cas. 21.

(*h*) *Buckhurst Peerage* (1876), 2 App Cas. 1.

(*i*) *Vaux Peerage* (1837), 5 Cl. & Fin. 526, 541; *Braye Peerage* (1839), 6 Cl. & Fin. 757, 766; and see *Latymer Peerage* (1912), *Times*, 16th July, *per* Lord HALSBURY.

(*k*) *Wiltes Claim of Peerage, supra*; compare *Donoughmore Peerage* (1853), 3 H. L. Cas. 822; *Huntly Peerage* (1838), 5 Cl. & Fin. 349. The following have been tendered in evidence in various cases, and have been received or rejected according to the circumstances:—private Acts of Parliament (*Wharton Peerage, supra*; *Shrewsbury Peerage, supra*); copies of inscriptions no longer legible (*ibid.*, at p. 27); inscriptions on tombs in churches (*ibid.*, at p. 22); statements in wills as to pedigree (*ibid.*); incomplete documents and records (*ibid.*, at p. 32; *Slane Peerage, supra*; *Crawford and Lindsay Peerages* (1848), 2 H. L. Cas. 534; and compare *Vaux Peerage, supra*); coat of arms in St. George's Chapel, Windsor (*Berkeley Peerage, supra*, at p. 37; *Shrewsbury Peerage, supra*); records from the Heralds' College (*Vaux Peerage, supra*, at pp. 541, 544; *Tracy Peerage, supra*, at p. 157; *Shrewsbury Peerage, supra*, at pp. 24, 31, 33). As to proof of handwriting, see *Fitzwalter Peerage* (1843), 10 Cl. & Fin. 193; *Shrewsbury Peerage, supra*; and see, further, title EVIDENCE, Vol. XIII., pp. 560, 561. In *Fairfax Peerage*, [1908] W. N. 226, a predecessor of the claimant having made out his claim in 1800, the claimant produced in evidence the testimony of relatives, an old family Bible, and monumental inscriptions (there being no early record of births, deaths, and marriages in Virginia, U.S.A., where the family had settled since 1750, and most of the records having been destroyed by the Northern Army during the American Civil War), and the Committee accepted secondary evidence in support of the claim to the barony.

(*l*) *Shrewsbury Peerage, supra*, at pp. 15, 16.

SECT. 7. Claims to Peerage.

and their pedigree proved (*m*), and it must be proved that they have all been served with notice of the claim (*n*).

To prove the creation of the dignity the claimant must produce the instrument of creation, or, if it cannot be found, the enrolment (*o*), or give such evidence as the House requires (*p*).

In the case of baronies by writ, the claimant must produce from the Close Rolls (*q*) the record of the writ of summons and proof of sitting from the Journals of the House of Lords (*r*). In cases before the dates of existing Journals (*s*), he must prove by record that the ancestor took part in some proceeding which necessitated his presence (*a*). This is sufficiently proved by evidence that a particular peer was appointed to do some act, hear some appeal, or be a member of some commission (*b*).

Evidence of descent

615. The claimant must prove descent from the original grantee within the original limitation (*c*), except in proving a

(*m*) *Braye Peerage* (1839), 6 Cl. & Fin. 757. Strict proof of the pedigree of coheirs is not insisted on where conclusive proof is impossible; see *Braye Peerage, supra*; *Fitzwalter Peerage* (1843), 10 Cl. & Fin. 946.

(*n*) *Vaux Peerage* (1837), 5 Cl. & Fin. 526; *Braye Peerage, supra*, at p. 789; notice by post has been held insufficient (*Camoys Peerage* (1839), 6 Cl. & Fin. 789, 794).

(*o*) *Tracy Peerage* (1843), 10 Cl. & Fin. 154; see p. 278, *ante*.

(*p*) In the case of ancient dignities, the instrument of creation is usually lost, but some act may be on record which implies creation; see the *Crawford and Lindsay Peerages* (1848), 2 H. L. Cas. 534, where the proof accepted in the claim to the earldom of Crawford was an entry in the Lord Treasurer's accounts of the expense of creating that dignity and two royal Dukedoms in Parliament. As to proof by circumstantial evidence, see also *Mar Peerage* (1875), 1 App. Cas. 1. Statements by chroniclers and contemporary historians are not admissible as evidence of creation (*Vaux Peerage, supra*). In all such cases the existence of the dignity is abundantly proved by records, and it is merely its origin which required to be established; compare also *Perth Earldom* (1848), 2 H. L. Cas. 865. The Committee may accept an examined copy coming from proper custody, in the absence of the original letters patent (*Lanesborough's (Earl) Claim* (1848), 1 H. L. Cas. 510, n.; *Saye and Sele Barony* (1848), 1 H. L. Cas. 507; and compare *Huntly Peerage* (1838), 5 Cl. & Fin. 349); and the limitations of the peerage may be proved from the Journals of the House of Lords (*Saye and Sele Barony, supra*; *Re Dufferin and Claneboye (Lord)* (1837), 4 Cl. & Fin. 568). As to the presumption where no evidence of the limitations is to be found, see p. 268, *ante*. It is, however, always necessary to prove that every possible effort has been made to find the missing instrument, and the persons employed in the search are necessary witnesses.

(*q*) See Palgrave's Parliamentary Writs. If the Close Roll is lost the writ may be proved by other evidence.

(*r*) See title PARLIAMENT, Vol. XXI., p. 631.

(*s*) There are no Lords' Journals before the time of Henry VIII.; see *Vaux Peerage, supra*. As to proof of sitting, where there are no Lords Journals in existence, see *Slane Peerage* (1835), 5 Cl. & Fin. 23.

(*a*) What constitutes a proceeding in Parliament may be a matter of argument; see *Hastings Peerage* (1841), 8 Cl. & Fin. 144, 150, 151, 160—162; Cruise, Origin of Dignities, p. 188.

(*b*) *Botetourt Case* (1764), Palmer, Peerage Law in England, p. 46 (the roll of 50 Edw. 3, showing John, Lord Botetourt, to have been a mainpernor of Parliament, allowed as proof of sitting). In *Mowbray Peerage Claim* (1877), Minutes of Evidence of Proceedings before the Committee for Privileges, a statement or recital in letters patent describing the patentee as Baron Mowbray was admitted to prove termination of an abeyance.

(*c*) *Grey de Ruthyn Case* (1640), Collins on Baronies, p. 256.

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claim to a barony which, although revived after being previously in abeyance, is again in abeyance, when it is sufficient to prove descent from the holder in whose favour it was last revived (*d*).

If it has happened that the peerage, validly created, has ceased to exist or its extinction in law can be argued, the Committee may hear the argument and decide the question whether there is a dignity capable of being claimed before allowing any evidence of pedigree to be adduced (*e*).

Declarations as to pedigree by living persons.

616. Declarations by living (*f*) persons as to pedigree are admissible in peerage claims *quantum valeant*. When made by near relations, they are always admitted (*g*). Any declaration made *post litem motam* may be rejected (*h*).

A peer may give evidence and subsequently participate in the judgment in the same case (*i*).

Resort may be had to an action to perpetuate testimony (*k*). But this course should not be adopted where the real question in dispute can be determined at once by other proceedings (*l*), for example, to obtain a declaration of legitimacy (*m*).

Documentary evidence.

617. Where the letters patent creating a barony are lost the creation may be proved by proof of summons and sitting (*n*).

Documents in public custody are proved by certified copies as in ordinary legal proceedings (*o*). Other documents must be proved by production of the original from proper custody (*p*).

(*d*) *Fitzwalter Peerage* (1843), 10 Cl. & Fin. 946.

(*e*) This may happen in cases of attainder (see the *Southesk Earldom* (1848), 2 H. L. Cas. 908); and the power was also exercised in the *Montrose Peerage Claim*, but the procedure of allowing a claimant to prove his right subject to attainder or other obstacle has been more often adopted.

(*f*) As to declarations by deceased persons, see title EVIDENCE, Vol. XIII., pp. 469 *et seq.* A written declaration by a deceased person is not always admissible (*Berkeley Peerage Case* (1811), 4 Camp. 401; and compare *Shrewsbury Peerage* (1858), 7 H. L. Cas. 1).

(*g*) See, as to statements by remote relations, *The Huntly Peerage* (1838), 5 Cl. & Fin. 349; *Lindsay Peerage Case* (1877), Minutes of Evidence of Proceedings before the Committee for Privileges.

(*h*) See title EVIDENCE, Vol. XIII., p. 469. In the *Annandale Case* (1878), Minutes of Evidence of Proceedings before the Committee for Privileges, a printed case was admitted to prove that a pedigree alleged to come from the charter chest was in reality prepared *post litem motam*; see the *Berkeley Peerage Case, supra*; *Slane Peerage* (1835), 5 Cl. & Fin. 23.

(*i*) *R.* v. *Five Popish Lords* (1685), 7 State Tr. 1218, 1458; *R.* v. *Macclesfield (Earl)* (1725), 16 State Tr. 767.

(*k*) R. S. C., 1883, Ord. 37, r. 35; see title EQUITY, Vol. XIII., pp. 45, 46.

(*l*) *West* v. *Sackville (Lord)*, [1903] 2 Ch. 378, C. A.

(*m*) Under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93); see title BASTARDY, Vol. II., pp. 433, 434; and see p. 282, *post*.

(*n*) See p. 265, *ante*; *Hastings Peerage* (1841), 8 Cl. & Fin. 144, 150, 151.

(*o*) Standing Orders of the House of Lords (Public Business), 1902, No. 87, as amended 6th March, 1902; Journals of the House of Lords, 1902, Vol. CXXXIV., p. 96. As to the proof of wills prior to 1700, see the *Fitzwalter Peerage, supra*, at p. 952; and see the *Shrewsbury Peerage, supra*; as to French marriage registers, see the *Perth Earldom* (1848), 2 H. L. Cas. 865; as to the general rules for proof of records, see title EVIDENCE, Vol. XIII., pp. 517 *et seq.*

(*p*) Proper custody in the case of private documents is the charter chest

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A document not coming from out of proper custody is *primâ facie* inadmissible, and its condition as a ground for admission may be open to argument, as, for example, whether it is complete in respect of matter, signature or seal, and free from alteration or erasure.

Reports of proceedings on other claims are not evidence (*a*), but may be used for convenience and to assist the Committee (*b*), and leave to reprint the evidence is sometimes given.

Legitimacy.

618. Questions as to legitimacy frequently arise in connection with claims to peerages. In such cases the ordinary law as to legitimacy in relation to succession to land and the effect of domicil thereon applies (*c*).

The status of legitimate or lawful heir may be questioned in respect of an ancestor, but has usually arisen in respect of the claimant himself at the instance of a counter-claimant or the Crown (*d*).

In such cases the physical fact of incompetency or of non-access (*e*) or of non-generating access, as the case may be, may always be fully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved (*f*).

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of the family, or of the present possessor of estates acquired from an ancestor of the claimant; see the *Camoys Peerage* (1839), 6 Cl. & Fin. 789, 801; and see the *Chandos Peerage* (1802), Brydges Report; *The De Ros Peerage* (1804), Minutes of Evidence of Proceedings before the Committee for Privileges. An old attested copy of a deed coming from proper custody may be admissible (*Fitzwalter Peerage* (1843), 10 Cl. & Fin. 946, 953). An inscription on a portrait in proper custody has been received in evidence (*Camoys Peerage, supra*, at pp. 801, 802; see, further, title EVIDENCE, Vol. XIII., pp. 505, 512 *et seq.*).

(*a*) *Berkeley Peerage* (1861), 8 H. L. Cas. 21, 37.

(*b*) *Ibid.*, at p. 36; *Beaumont Peerage* (1840), 6 Cl. & Fin. 868, 871; *Braye Peerage* (1839), 6 Cl. & Fin. 757, 766.

(*c*) See titles BASTARDY, Vol. II., pp. 426, 437; CONFLICT OF LAWS, Vol. VI., pp. 182 *et seq.*, 252 *et seq.*, 272 *et seq.*; HUSBAND AND WIFE, Vol. XVI., pp. 278 *et seq.*; p. 283, *post*. The liability of a peer to attend in Parliament when his presence is required does not prevent him from acquiring a foreign domicil (*Hamilton* v. *Dallas* (1875), 1 Ch. D. 257).

(*d*) *Banbury Peerage Case* (1811), 1 Sim. & St. 153, fully reported in Nicolas, Treatise on Adulterine Bastardy (1836), p. 182. For a case where a claimant brought a petition in the Probate Division of the High Court of Justice under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), ss. 4, 11, see *Sackville-West* v. *A.-G.*, [1910] P. 143; and see titles BASTARDY, Vol. II., pp. 433, 434; EQUITY, Vol. XIII., pp. 45, 46. Whether a claimant can establish his status as lawful heir to a peerage, when his father or ancestor has contracted a marriage invalid by the law of England but valid in the country of domicil, has not yet been decided in a peerage claim. *Sussex Peerage* (1844), 11 Cl. & Fin. 85, is not strictly relevant on this point. In that case the Duke of Sussex was married to Lady Augusta Murray validly by the law of Rome, though the parties were not domiciled in Rome, but the marriage was invalid under the Royal Marriages Act, 1772 (12 Geo. 3, c. 11), s 1; see title CONSTITUTIONAL LAW, Vol. VI., pp. 370, 371.

(*e*) *Saye and Sele Barony* (1848), 1 H. L. Cas. 507.

(*f*) *Banbury Peerage Case, supra;* Minutes of Evidence of Proceedings before the Committee for Privileges, 269. Impotency and impossibility of access were formerly the only allegations which could rebut the presumption "*pater est quem nuptiæ demonstrant.*" As to access, see

Legitimation of illegitimate children by the subsequent marriage of their parents depends on the domicil of the father at the time of the marriage (*q*).

Part II.—The Baronetage.

619. The hereditary dignity of Baronet (*h*) was first instituted by King James I. in 1611, to be granted to those persons who should contribute to the expenses of the Plantation of Ulster (*i*).

Institution of dignity.

The dignity is created by letters patent under the Great Seal (*k*).

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also *Gardner Peerage Case* (1824), Petition, Case, and Minutes of Evidence of Proceedings before the Committee for Privileges; *Claims to the Barony of Gardner*, Le Marchant; *Poulett Peerage*, [1903] A. C. 395. As to a declaration by either spouse as to non-access before marriage, see *ibid.*, *per* Lord HALSBURY, L.C., at p. 398; title BASTARDY, Vol. II., p. 429, note (*d*); as to evidence of a wife as to her child's legitimacy, see title HUSBAND AND WIFE, Vol. XVI., p. 479. The occasions on which such evidence is on general grounds admitted as relevant are rare; see, further, *Saye and Sele Barony* (1848), 1 H. L. Cas. 507; *Aylesford Peerage* (1885), 11 App. Cas. 1; and, as to incompetency, see title HUSBAND AND WIFE, Vol. XVI., pp. 470 *et seq.*

(*g*) *Strathmore Peerage Case* (1821), Minutes of Evidence of Proceedings before the Committee for Privileges (father newly domiciled in England at time of marriage; no legitimation); *Lauderdale Peerage* (1885), 10 App. Cas. 692 (father domiciled in Scotland; children, though described in will as illegitimate, legitimised by death-bed marriage); and see title CONFLICT OF LAWS, Vol. VI., pp. 182 *et seq.*

(*h*) The meaning of the word "baronet" is obscure. A few examples exist of its use, and the distinction between the barones and barones majores in Magna Carta (stat. 9 Hen. 3, c. 5) is suggested. There is, however, no satisfactory proof that the revival of any ancient rank was intended, and if King James invented the term it is noteworthy that the persons he wished to decorate were always called barons in Scotland. It is also clear that great doubt existed in 1611 whether the more important untitled gentlemen would accept the proposed title. The object was to raise money for State purposes, and there is evidence that some gentlemen were willing to advance the money without accepting the dignity. Hereditary knighthood existed in the Holy Roman Empire, but never obtained a footing in England, and cannot be considered as the foundation of baronetcy. It has been held that a baronetcy is an incorporeal hereditament, and, being limited to the heirs of the body, is within the Statute *De Donis Conditionalibus* (Statute of Westminster II. (1285) 13 Edw. 1, c. 1), and is descendible as an estate tail and not a fee simple conditional, although no place be named in its creation (*Re Rivett-Carnac's* (*Sir J.*) *Will* (1885), 30 Ch. D. 136, where it was also held that a baronetcy was "land" within the meaning of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 37). The soundness of this decision has been doubted (Hood and Challis, Conveyancing Acts, 7th ed., p. 298; and see title REAL PROPERTY AND CHATTELS REAL.

(*i*) At the close of his reign, King James consented to establish an Order of Baronets for Scotland, the consideration for which was the colonisation of districts in New Scotland, called Nova Scotia. This dignity was territorial, and the charters granted a definitely bounded barony in regality, held feudally, with seisin taken at Edinburgh, together with the title of baronet. The letters patent were, therefore, of great length. Few of these were granted, and King Charles I. granted the hereditary title of "knight baronet" without any lands to several persons.

(*k*) Previous to the granting of letters patent, there was issued by Commissioners a memorandum that A. B. had offered to charge himself

PART II. The Baronetage.

There is now no limit to the number of baronetcies which the Crown may create (*l*).

Privileges.

620. The privileges of a baronet are set forth in the letters patent of creation, and comprise the right to the title or prefix "Sir," and the right to rank above all knights except Knights of the Garter (*m*), and immediately below the sons of barons, and he has no privileges except those stated in his patent (*n*). A baronet takes precedence amongst other baronets according to priority in date of creation (*o*).

The wife of a baronet is entitled to the prefix "Dame."

621. A claim to a baronetcy should be made by petition to

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with the yearly entertainment of thirty foot (soldiers) for three years after the rate of 8*d.* a day for the plantation of Ulster, and that His Majesty having graciously accepted this service is pleased in recompence thereof to confer on him the dignity and place of a baronet. A royal warrant followed for the preparation of "a booke in due form containing on grant of the dignity of baronett to the said A. B. and the heirs male of his body." The first letters patent recited the King's desire to promote the plantation and the precise sum to be contributed.

(*l*) It had been originally promised that the number of baronets of England should not exceed 200, and that vacancies by extinction of issue should not be filled up. However, up to the time (1706) of the union with Scotland, 697 baronetcies of England, 58 baronetcies of Ireland, and 166 baronetcies of Scotland had been created. After the promulgation of the Union with Scotland Act, 1706 (6 Anne, c. 11), England and Scotland ceased to exist in contemplation of law, and it is conceived that no new baronetcy of either kingdom could be created, but whereas the question of the peerage of each kingdom was carefully dealt with in the Act, no reference to baronetcy appears therein.

(*m*) As to Knights of the Garter, see p. 286, *post*. Some of the first created baronets claimed to be knighted, and as the result of a controversy respecting their precedence, the King covenanted that all the then baronets, and the eldest sons or heirs apparent of baronets, should be knighted at their request on reaching the age of twenty-one. This latter right was abolished by Royal Warrant dated 19th December, 1827. As, however, the status required for a baronet was that he possessed a thousand pounds a year in land, and that his father and grandfather at least must have been gentlemen of coat armour, the vast majority must have been persons who could have been called upon to accept knighthood, whether or not the new grade had been founded.

(*n*) The King originally covenanted that he and his successors would never create any new dignity having precedence between barons, lords of Parliament, and baronets, and it has been contended that a warrant granting precedence to the children of life peers is a breach of this covenant. It is thought, however, that a distinct hereditary dignity was meant.

(*o*) All the evidence relating to the status of a baronet which can be collected from the public records purports to be printed in (1) The Herald and Genealogist, Vol. III.; (2) A History of the Baronetage, by Francis W. Dixley, published in 1900; (3) The preface to the Baronetage, by G. E. C., and (4) The Baronetage, by an anonymous author, published in 1911; see also some observations by Selden, Titles of Honour, Part 2. Careful study of such evidence raises grave doubt whether the King intended to create a degree of nobility, or whether he merely intended to grant a hereditary pre-eminence among squires similar to the distinction of knights banneret and ordinary knights: for the persons whom it was proposed to dignify with the prefix "Sir" and the suffix "Baronet" were those who would in the ordinary course of military tenure be called upon to accept knighthood.

the King in Council, and is heard by a committee of the Privy Council (*p*).

The Baronetage.

622. Provision has been made for an official roll of baronets to be drawn up (*q*) and maintained (*r*). A registrar has been appointed (*a*) and his duties are defined (*b*), and no person is to be officially styled a baronet unless his name appears on the roll (*c*).

Claim to baronetcy.

Official roll.

Part III.—Knighthood.

623. Knighthood (*d*) is a personal dignity conferred for life. It is not in any sense a local title. It is an order of chivalry recognisable in every part of the King's dominions (*e*).

Knighthood in general.

An individual of the male sex is now legally entitled to be addressed with the prefix "Sir" (*f*) and to rank before untitled persons only (*f*) if the King or his especially appointed lieutenant (*g*) (who must be a knight (*h*)) has directed him to kneel before him, has

(*p*) Royal Warrant, 8th February, 1910, art. 4 (*London Gazette*, 15th February, 1910). A Committee of the Privy Council was appointed by Order in Council, 5th March, 1910 (*London Gazette*, 8th March, 1910). One such claim has already been heard; see *Baronetcy of Cox of Dunmanway* (1911), *Times*, 10th November. It was the practice of King James I. to refer claims to dignities to the Commissioners for exercising the office of Earl Marshal, and it was promised that baronetcies should be subject to the same jurisdiction, but no commissioners or other functionaries to represent the Earl Marshal have existed for the last two centuries. The rights of the Earl Marshal are expressly saved by the Royal Warrant of the 8th February, 1910, except in so far as they are contained in the cancelled warrants of 3rd December, 1783, 24th February, 1785, 30th September, 1789 (Royal Warrant, 8th February, 1910, arts. 12, 13). The practice in future will probably be that if the Secretary of State, after obtaining a report from the King of Arms, finds any difficulty in advising the King as to the validity of any claim to be placed on the roll, the claim will be referred to the Attorney-General for England, the Lord Advocate for Scotland, or the Attorney-General for Ireland, as the case may be, for opinion, and ultimately to the Privy Council as above stated. The Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), gives no jurisdiction to investigate or decide a claim to a baronetcy (*Frederick* v. *A.-G.* (1874), L. R. 3 P. & D. 196).

(*q*) Royal Warrant, 8th February, 1910, arts. 1, 3.

(*r*) *Ibid.*, arts. 5, 6, 11. The fees to be paid by new baronets are laid down (*ibid.*, art. 10).

(*a*) *Ibid.*, art. 7. The first registrar and assistant-registrar were appointed by Order in Council, 5th March, 1910.

(*b*) Royal Warrant, 8th February, 1910, arts. 8, 9.

(*c*) *Ibid.*, art. 2.

(*d*) For the history of knighthood out of England and the early history in England, see Selden, Titles of Honour; Nicholas, History of the Orders of Knighthood of the British Empire. The most authentic list of English Knights is in Shaw, List of Knights of England.

(*e*) See *Lord Advocate* v. *Walker's Trustees*, [1912] A. C. 95, 104.

(*f*) As to foreign dignities and orders, see p. 290, *post*.

(*g*) The Lord Lieutenant of Ireland has, by virtue of his office, authority to confer knighthood (unanimous opinion of the judges summoned by the King in Council, 1823; see Nicolas, History of the Orders of Knighthood of the British Empire, xiii.).

(*h*) See, however, Nicolas, History of the Orders of Knighthood of the British Empire, xv.

PART III. Knighthood.

struck his shoulder with a naked sword and has said "*Sois Chevaler au nom de Dieu*" and "Arise Sir Knight" or "*Avancey Chevaler*," or has created him a knight by letters patent (*i*).

Orders of knighthood: Order of the Garter.

624. The age of chivalry produced societies the membership of which was restricted to knights. Of these the earliest in England was a society, founded by King Edward III., of knights under the name of the Order of the Garter. The foundation of the order was in 1349. It is limited to twenty-five knights in addition to the Sovereign, who is head of the order; but the Sovereign has power to create additional Royal knights; and, although usually bestowed upon a peer, the recipient of the honour need not necessarily belong to the peerage (*j*). Knights of the Garter take precedence in England before Privy Councillors and baronets (*k*).

Order of the Bath.

Another society of knights in England, the precise origin of which is not clear, is that of the Bath (*l*). The Order of the Bath or rank of knighthood has, however, been so altered by its conversion into a military order by George II., and by a subsequent division into grades of companionship by King George III., that it has lost the mediæval character preserved by the Garter. The order is now divided into two branches, military and civil (*m*).

Other orders of knighthood are:

Order of the Thistle.

Knights of St. Andrew or the Thistle, founded or revised in Scotland by King Charles II. in 1687 (*n*), and re-established on the 31st December, 1703;

Order of St. Patrick.

Knights of St. Patrick, founded in Ireland by King George III. on the 5th February, 1783 (*o*), and revised in 1905;

(*i*) If a Sovereign knights a Sovereign he also passes his arm around the shoulders. It was formerly conferred by ceremonial investiture, which is now represented by the accolade; much of the ceremonial of the investiture still survives in the ceremony of the Coronation, *e.g.*, in the vesting of the King in garments of a sacerdotal character and girding him with the sword and spurs; see title CONSTITUTIONAL LAW, Vol. VI., p. 327. Knights have also been created by letters patent since 1777 (Nicolas, History of the Orders of Knighthood of the British Empire, xv.).

(*j*) The Right Honourable Sir Edward Grey, Baronet, M.P., Secretary of State for Foreign Affairs, was made a Knight of the Garter in March, 1912.

(*k*) See p. 284, *ante*.

(*l*) The bath was the first part of the ceremonial for creating a knight, but to call knights of the twelfth century K.B. (see Shaw, List of Knights of England, Vol. I., p. 109) seems somewhat strange. It is considered that knighthood by baptism existed side by side with knighthood by accolade. The antiquity of the bath is illustrated by the Coronation ceremony. The ancient practice was for the King to bathe at the palace of Westminster, the day before he proceeded to the Abbey, with a number of youthful aspirants who were knighted by the King when crowned, after investiture as a knight by the Church.

(*m*) It is also divided into three classes, namely, Knights Grand Cross, Knights Commanders (both of which are entitled to be called knight after investiture with the insignia of the order and to take precedence of knights bachelor), and Companions, who take precedence of esquires but are not entitled to be called knight. Each class is restricted in point of numbers.

(*n*) Nicolas, History of the Orders of Knighthood of the British Empire.

(*o*) *Ibid.*

Order of the Star of India.

Order of St. Michael and St. George.

Order of the Indian Empire.

Royal Victorian Order.

Knights bachelor.

Knights of the Order of the Star of India, founded in 1861, and used to reward service in connection with India (*p*);

Knights of St. Michael and St. George, founded in 1818 (*q*) to reward service in the Mediterranean, chiefly Maltese and Ionic, but now used to reward all colonial service;

Knights of the Order of the Indian Empire, founded to commemorate the title of Emperor or Empress of India in 1878 (*r*);

Knights of the Royal Victorian Order, founded in 1896 (*s*).

625. Knights bachelor, or ordinary knights, are those who are merely created knights but belong to no particular Order (*t*).

Ordinary knighthood is usually conferred upon the Judges of the Supreme Court of Judicature, the Attorney-General and Solicitor-General, and occasionally upon civic dignitaries on state occasions. There are numerous Orders and Dignities which do not confer any title or right of precedence (*u*).

(*p*) *London Gazette*, 25th June, 1861. It consists of the Sovereign, the Grand Master, and a fixed number of Companions divided into three classes, namely, Knights Grand Cross, Knights Commanders, and Companions.

(*q*) *Ibid.*, 27th April, 1818. It comprises a fixed number of Knights Grand Cross, Knights Commanders, and Companions. Each class ranks next after the corresponding class of the Order of the Star of India.

(*r*) It consists of the Sovereign, Grand Master, and three classes, namely, Knights Grand Cross, Knights Commanders, and Companions. Each class ranks next after the corresponding class of the Order of St. Michael and St. George.

(*s*) *Ibid.*, 24th April, 1896. It consists of the Sovereign and ordinary members. It is divided into five classes, namely, Knights Grand Cross, Knights Commanders, Companions, members of the Fourth and Fifth Classes. Ordinary members must be subjects of the British Crown who have rendered extraordinary or important or personal services to the Sovereign. Foreign princes may be appointed honorary members. Knights Grand Cross and Knights Commanders rank after the corresponding classes of the Order of the Indian Empire. Companions rank after knights bachelor. Members of the Fourth Class rank after Companions of the Indian Empire. Members of the Fifth Class after the eldest sons of knights bachelors. The number of members is unlimited

(*t*) Originally there were no orders of knights, but all knights were either knights banneret or knights bachelor. The distinction between these two classes was purely military, the former being entitled to a banner in time of war, and to have command over the latter, who were only entitled to a pennon. The distinction appears to have become obsolete; and see 1 Bl. Com., pp. 404, 405.

(*u*) For instance, the Distinguished Service Order, instituted by Royal Warrant dated the 6th September, 1886; the Imperial Service Order, founded 8th August, 1902; the Order of Merit, founded 23rd June, 1902; the Order of Victoria and Albert, instituted in 1862; the Imperial Order of the Crown of India, instituted in 1878; the Kaisar-i-Hind medal; the Victoria Cross, instituted by Royal Warrant 29th January, 1856; the Volunteer Officers Decoration, founded by Royal Warrant 25th July, 1892; the Indian Distinguished Service Medal, founded by Royal Warrant 25th June, 1907; the Albert Medal, founded by Royal Warrant 7th March, 1866; the Edward Medal, founded by Royal Warrant 13th July, 1907; and the Red Cross, founded by Royal Warrant 23rd April, 1883.

PART IV. The College of Arms.

Part IV.—The College of Arms.

Incorporation.

626. The College of Arms (*x*) was incorporated in 1556 by Royal Charter granted by King Philip and Queen Mary in fulfilment of the intention of King Edward VI. (*a*).

Kings of arms.

It consists at present of three kings of arms, six heralds, and four pursuivants. They are under the jurisdiction of the Earl Marshal (*b*).

627. The kings of arms are certain heralds to whom at an early, though not perfectly ascertained, date the Sovereign granted the right and duty to exercise his right of granting arms.

For the purpose of such grants, and for regulating the use of armorial bearings of such as possess them, there have existed for centuries two provincial kings of arms—Clarencieux (or Surroy) and Norroy (*c*).

About a century after the institution of the Order of the Garter (*d*), Garter King of Arms was instituted as an officer of that order, who was styled principal king of arms for all England, and his co-operation with each provincial king of arms in his respective province had, by the end of the seventeenth century, become essential (*e*).

Heralds.

The right to grant arms is inherent in the office of king of arms, but the exercise of that right is regulated by an order of the Earl Marshal of England directing the kings of arms not to create new arms in favour of any individual without a special warrant from the Earl Marshal in each case directed to Garter King of Arms and the appropriate provincial king of arms.

Each king of arms has appropriate arms belonging to his office, which he is entitled to bear in conjunction with his family arms.

628. The heralds (*f*) number six, and are known as Windsor, Chester, Lancaster, Somerset, York, and Richmond. Additional

(*x*) Also called the Heralds' College.

(*a*) The charter is printed *in extenso* with a translation in Noble's College of Arms. The present building was built after the Great Fire on the site of Derby Place, granted to the College by the charter. A chapter of the corporation is held every month, and has frequently issued under its common seal certificates of the armorial bearings, but more often of the descent of individuals.

(*b*) This office is hereditary in the family of the Duke of Norfolk; for the duties of the Earl Marshal at coronations, see title CONSTITUTIONAL LAW, Vol. VI., p. 326; and see title COURTS, Vol. IX., p. 116.

(*c*) Their jurisdictions were south and north of the Trent respectively; and see the text, *infra*.

(*d*) See p. 286, *ante*.

(*e*) In addition there is a fourth English king of arms, known as Bath or Gloucester, who is not a member of the College, whose jurisdiction is over the principality of Wales. There are also a Lyon King of Arms for Scotland and Ulster King of Arms for Ireland.

(*f*) The number of heralds has varied from time to time. Heralds were originally, as their name imports, ambassadors or messengers, the bearers of compliment or defiance from one prince to another, habited for the purpose with the armorial insignia of their masters. The habit still survives in the herald's tabard.

heralds may be appointed for special purposes (*q*). It is not the function of a herald to grant arms, but to present memorials to the Earl Marshal. His duty is to assist the Earl Marshal in the work of his department.

629. The pursuivants are four in number, known as Rouge Croix, Rouge Dragon, Bluemantle, and Portcullis. Pursuivants.

630. In the sixteenth and seventeenth centuries most of the counties of England were visited two or three times by heralds acting as delegates for the kings of arms, with Royal authority to record the pedigrees of those who could produce evidence of the right to coat armour and to use the title of "esquire" and gentleman (*h*). Visitations.

The returns of these Royal commissioners, called visitations, are kept in the College of Arms and are evidence in the courts of law (*i*). They can be produced in evidence, and the proper witness to produce them is an officer of arms under *subpœna* (*j*).

631. The absolute jurisdiction of the Earl Marshal over all persons concerning themselves with armorial insignia, whether by personal use or as tradesmen (*k*), and visitations is now discontinued, but the jurisdiction is dormant, not abolished. It would still be in the power of the Sovereign to revive either if he so thought fit, and to appoint a judge of the court of the Earl Marshal on the latter's nomination (*l*). Jurisdiction of Earl Marshal.

632. It appears that the jurisdiction of the officers of arms in matters armorial cannot be challenged in any court of law (*m*). Most of the rights and duties of officers of arms have in course of time become obsolete, but it still remains the law that no man is entitled to the dignity of a gentleman and to armorial insignia except by record, and that such record exists only in the College of Arms. Jurisdiction of officers of arms.

(*q*) *E.g.*, Delhi Herald was appointed to act as Herald at the Coronation Durbar held in India in 1911.

(*h*) The practice began in 1545. The Royal commissions were addressed to the kings of arms in respect of their respective provinces. The commissions also gave authority to destroy all representations of coat armour the right to which was not proved.

(*i*) See title EVIDENCE, Vol. XIII., pp. 527, 530.

(*j*) The visitations have often been received in evidence in peerage claims, but on some occasions the commission to hold a visitation has also been required. Contemporaneously with the visitations, there sat in London a court of the Earl Marshal, in which sat originally the Constable of England with the Marshal. In this court, now within the precincts of the College of Arms, or before the Commissioners to exercise the office of Marshal, many claims to dignities were tried, and the decisions are, it is apprehended, judgments of a court of record.

(*k*) As to the unlawful use of the Royal Arms, see titles PATENTS AND INVENTIONS, p. 232, *ante*; TRADE MARKS, TRADE NAMES, AND DESIGNS.

(*l*) See title COURTS, Vol. IX., p. 116.

(*m*) See title NAME AND ARMS, CHANGE OF, Vol. XXI., p. 353, and the cases there cited.

Part V.—Foreign Dignities, Orders, and Decorations.

SECT. 1. Dignities.

SECT. 1.—*Dignities.*

Not recognised in law.

633. Dignities created by foreign Sovereigns are not recognised by law in this country, but the right to bear them may be granted by the King.

A petition stating good reason for leave to bear such a title in England is addressed to the King and sent to the Secretary of State for the Home Department in the same manner as other petitions for warrants of precedency, changes of name etc.

Many foreign dignities confer the title of count or baron on all the children of the grantee, but of late years it has been usual to limit the permission to the eldest sons only in accordance with the English practice.

A foreign title lawfully used in England gives in law no precedence, but it is usually recognised in courtesy.

SECT. 2.—*Orders and Decorations.*

Not recognised in law.

634. Orders and decorations granted by a foreign Sovereign are not recognised in law in this country (*n*).

Regulations for wearing foreign decorations.

635. Regulations, by Royal command, have been issued respecting the wearing of foreign orders and medals (*o*).

(*n*) Ruling in the case of Knights of the Guelphic Order of Hanover, founded in 1815 by George IV. whilst Prince Regent, and not conferred since the death of King William IV. in 1837.

(*o*) See Foreign Office Regulations, 8th May, 1911. The rule is that no subject of His Majesty shall wear the insignia of any foreign order without having previously obtained His Majesty's permission to do so, signified either—(a) by warrant under the Royal Sign Manual, or (b) by private permission conveyed through His Majesty's private secretary (*ibid.*, r. 1) (this rule, although expressed in the form of the King's wish, is of great antiquity and appears to have been observed for centuries).

Permission given by warrant under the Royal Sign Manual will enable the insignia of the foreign order to be worn at all times and without any restriction, but private permission will only enable the insignia to be worn on the occasions specified in the terms of the letter from the King's private secretary conveying the Royal sanction (*ibid.*, r. 2).

The full and unrestricted permission by warrant under the Royal Sign Manual is designed, subject to the exception mentioned in *ibid.*, r 4 (a), *infra*, respecting British naval or military officers during hostilities, to meet cases where the decoration may be said to have been earned by some valuable service rendered to the head of the State conferring it, or to the State itself. The private or restricted permission is contemplated for decorations which are more or less of a complimentary character. In either case the matter will be submitted to the King by His Majesty's Principal Secretary of State for Foreign Affairs (*ibid.*, r. 3).

Full and unrestricted permission by warrant under the Royal Sign Manual is contemplated for a decoration conferred: (a) On an officer in His Majesty's naval or military forces lent to a foreign Government; on an officer in His Majesty's naval or military forces attached by his Government to a foreign navy or army during hostilities; or on any British official lent to a foreign Government and not in receipt of any emoluments

from British public funds during the period of such loan. (b) On any person not at the time in the service of the Crown, who, while himself outside the limits of His Majesty's dominions, has rendered valuable services to the head of the State conferring the order, or to the State itself, within the period of two years immediately preceding the notification of the decoration to His Majesty's Government provided for in Foreign Office Regulations, 8th May, 1911, r. 5, *infra*. The term "service of the Crown" comprises any person holding a Royal Commission, or any person in receipt of a salary from public funds in the United Kingdom, or in any British dominion, colony, or protectorate. (c) On any British subject employed in a foreign embassy or legation in the United Kingdom (*ibid.*, r 4)

The desire of the head of a foreign State to confer upon a British subject the insignia of an order, or the fact that he has done so, must be notified to His Majesty's Principal Secretary of State for Foreign Affairs either through the British diplomatic representative accredited to the head of the foreign State, or through his diplomatic representative at the Court of St. James. His Majesty's Principal Secretary of State for Foreign Affairs shall be under no obligation to consider claims that are not brought to his notice through one of these channels (*ibid.*, r. 5).

When His Majesty's Principal Secretary of State for Foreign Affairs has taken the King's pleasure on any such application, and obtained His Majesty's permission for the person in whose favour it has been made to wear the insignia of a foreign order, he signifies the same to His Majesty's Principal Secretary of State for the Home Department in order that he may cause a warrant, if it be a case for the issue of a warrant as defined in *ibid.*, r. 4, to be prepared for the Royal Sign Manual (*ibid.*, r. 6).

When such warrant has been signed by the King, a notification thereof is inserted in the *Gazette*, stating the service for which the foreign order has been conferred.

The warrant signifying His Majesty's permission may, at the request and at the expense of the person who has obtained it, be registered in the College of Arms. Every such warrant as aforesaid must contain a clause providing that His Majesty's licence and permission does not authorise the assumption of any style, appellation, rank, precedence, or privilege appertaining to a knight bachelor of His Majesty's realms (*ibid.*, r. 6).

When a British subject has received the Royal permission to accept the decoration of a foreign order, he may, at any future time, accept the decoration of a higher class of the same order, to which he may have become eligible by increase of rank in the foreign service, or in the service of his own country; or any other distinctive mark of honour strictly consequent upon the acceptance of the original decoration, and common to every person upon whom such decoration is conferred (*ibid.*, r. 7).

Medals which constitute a particular class of a foreign order are subject in all respects to the above regulations in the same manner as higher grades of the order, except that permission to wear is given by letter and not by Royal warrant. The King's permission must be obtained for any other medal to be worn. No permission is needed to accept a foreign medal if it is not intended to be worn (*ibid.*, r. 8).

Naval and military attachés to His Majesty's missions abroad may, at the termination of their appointments, be given restricted private permission to wear, on certain specific occasions, the insignia of a foreign order conferred upon them by the chief of the State only in which their headquarters were situated (*ibid.*, r. 9).

PENALTIES, RELIEF AGAINST.

See EQUITY; LANDLORD AND TENANT.

PENALTY.

See CRIMINAL LAW AND PROCEDURE; DAMAGES; EQUITY.

PENSIONS.

See CONSTITUTIONAL LAW; POLICE; ROYAL FORCES.

PERCOLATION.

See EASEMENTS AND PROFITS À PRENDRE; MINES, MINERALS, AND QUARRIES; WATERS AND WATERCOURSES.

PERFORMING RIGHTS.

See COPYRIGHT AND LITERARY PROPERTY.

PERJURY.

See CRIMINAL LAW AND PROCEDURE; EVIDENCE.

PERMANENT BUILDING SOCIETY.

See BUILDING SOCIETIES.

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PERPETUITIES.

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Part I. – Introductory.

Public policy as to the alienation of property.

636. The rules of law affecting perpetuities are based upon considerations of public policy (*a*). Such policy requires that,

(*a*) The public policy upon which the rules of law as to perpetuities are founded was stated in *Stanley* v. *Leigh* (1732), 2 P. Wms. 686, *per* JEKYLL, M.R., to be "the mischief that would arise to the public from estates remaining for ever or for a long time inalienable or untransferable from one hand to another, being a damp to industry and prejudice to trade,

although private ownership of property involves a power of disposition of the whole interest of the owner, whether *inter vivos* or on death, such power should not be abused (*b*). Accordingly, the law has from early times discouraged dispositions of property which either (1) impose restrictions on future alienations of that property, or (2) fetter the future devolution or enjoyment of that property to an unreasonable extent (*c*).

Perpetuities.

This title is concerned only with the law which regulates dispositions fettering the future devolution or enjoyment of property (*d*). The law dealing with restrictions upon the future alienation of property is dealt with elsewhere (*e*), and is not the subject of this title.

Rules affecting perpetuities.

Rules against remoteness:

(1) rule against perpetuities;

(2) rule against double possibilities.

637. The law affecting perpetuities as treated in this title is only concerned with interests arising *in futuro*, and not with interests arising *in præsenti*. It comprises two principal rules, which may be termed the rules against remoteness. The first is known as the rule against perpetuities, and is to the effect that every limitation of property, unless it depends upon an estate tail, must, to be valid, vest, if at all, within a life or lives in being, and twenty-one years and a period of gestation afterwards (*f*). The second, which has been sometimes referred to as the rule against double or remote possibilities (*g*), is directed against contingent

to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered"; and see *Norfolk (Duke)* v. *Howard* (1683), 1 Vern. 163, *per* NORTH, Lord Keeper; Fearne, Contingent Remainders, 10th ed., pp. 562 *et seq.*, Butler's note.

(*b*) The principle forbidding abuse of the power of disposition is shortly expressed in the form "the power of alienation must not be exercised to its own destruction" (27 Law Quarterly Review, p. 111; and see *Washborn* v. *Downs* (1671), 1 Cas. in Ch. 213); but it does not appear to be sufficiently so expressed, as the fact that the property is completely alienable does not prevent the principle being infringed (*Re Hargreaves, Midgley* v. *Talley* (1890), 43 Ch. D. 401, 406, C. A.; Gray, Rule against Perpetuities, 2nd ed., s. 269).

(*c*) As to the principle of public policy, see, further, Lewis, Law of Perpetuity, p. 3; *Taylor* d. *Atkyns* v. *Horde* (1757), 1 Burr. 60, *per* Lord MANSFIELD, C.J., at pp. 115, 116; *Marlborough (Duke)* v. *Godolphin (Earl)* (1759), 1 Eden, 404, *per* HENLEY, Lord Keeper, at p. 416; *Re Parry and Daggs* (1885), 31 Ch. D. 130, C. A., *per* FRY, L.J., at p. 134; *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535, *per* FARWELL, J., at p. 542.

(*d*) The principle against perpetuity existed "before and throughout the reign of King Henry VIII." (*Hope* v. *Gloucester Corporation* (1855), 7 De G. M. & G. 647, C. A., *per* KNIGHT-BRUCE, L.J., at p. 658), and was a principle of the common law (2 Preston, Abstracts of Title, p. 145; *Re Nash, Cook* v. *Frederick*, [1910] 1 Ch. 1, 7, C. A.; *Re Stamford and Warrington (Earl), Payne* v. *Grey*, [1912] 1 Ch. 343, 366, 367, C. A.). It existed prior to the introduction of the modern rule against perpetuities (see p. 300, *post*); and perhaps was introduced after the statute of *Quia Emptores*, stat. (1289) 18 Edw. 1, stat. 1, c. 1 (2 Preston on Estates, p. 307).

(*e*) See title GIFTS, Vol. XV., pp. 422 *et seq.*

(*f*) See p. 300, *post*. Objection has been made to the name of the Rule against Perpetuities; see Gray, Rule against Perpetuities, 2nd ed., s. 2; Jarman on Wills, 6th ed. by Sweet, p. 296, n. (v); the name "Rule against Remoteness" is there proposed. In the Conveyancing Act, 1911 (1 & 2 Geo. 5. c. 37), it is termed "the rule of law relating to perpetuities"

(*g*) The rule is now frequently referred to as the rule in *Whitby* v. *Mitchell* (1890), 44 Ch. D. 85, C. A.

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remainders of real estate limited to successive generations of unborn issue (*h*). These two rules, together with the statutory restrictions on accumulations (*i*), constitute the main subject of the law of perpetuities as treated in this title (*j*).

Extended meanings of perpetuity.

638. But although the law of perpetuities as treated in this title is only conversant with future interests, the word "perpetuity" has, in the history of English law (*k*), been sometimes used in a

(*h*) See p. 364, *post*.

(*i*) See p. 370, *post*.

(*j*) Besides the rules against remoteness, future interests are subject to the restraint of certain rules of limitation at common law, *e.g.*, the rule requiring a preceding estate of freehold to support a contingent remainder, and the rule that a limitation *in futuro* is, if possible, construed as a contingent remainder and not as an executory limitation. These common law rules are themselves designed to prevent perpetuity (*Re Nash, Cook* v. *Frederick*, [1910] 1 Ch. 1, 7, C. A.); see title REAL PROPERTY AND CHATTELS REAL. Executory interests in land on failure of issue of a person are also subject to be defeated by the statutory rule made by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 10; see title REAL PROPERTY AND CHATTELS REAL.

(*k*) The origin of the legal term "perpetuity" is not known; the use of the term in the courts does not appear to be reported until *Chudleigh's Case* (1595), 1 Co. Rep. 113 b: it occurs also in *Anon.* (1599), Cary, 8, *per* EGERTON, L.C.; *Corbet's Case* (1600), 1 Co. Rep. 83 b, 84 a, 88 a; *Mildmay's Case* (1605), 6 Co. Rep. 40 a; *Portington's* (*Mary*) *Case* (1613), 10 Co. Rep. 35 b, 42 b; Essay on the Use of the Law (1629), Bacon's Works (Spedding's ed.), Vol. VII., p. 491; and the argument in the Case of Impeachment of Waste, *ibid.*, p. 544. Some learned writers are of opinion that the earliest meaning of the term was an inalienable estate, particularly an estate tail intended to be unbarrable (Jarman on Wills, 6th ed., p. 281; 25 Law Quarterly Review, p. 385; 49 Sol. Jo. 414; Gray, Rule against Perpetuities, 2nd ed., ss. 141, 159). Early definitions of perpetuity, in fact, generally refer to an inalienable estate, as in *Washborn* v. *Downe* (1671), 1 Cas. in Ch. 213 ("a perpetuity is where if all that have interest join and yet cannot bar or pass the estate"); compare *Scatterwood* v. *Edge* (1697), 1 Salk. 229. In *Stanley* v. *Leigh* (1732), 2 P. Wms. JEKYLL, M.R., at p. 686, 688, defined it as "the limiting an estate . . . in such a manner as would render it inalienable longer than for a life or lives in being at the same time and some short or reasonable time after" Lord ST. LEONARDS, in a note to Gilbert on Uses and Trusts, p. 260, defines perpetuity as "such a limitation of property as renders it inalienable beyond the period allowed by law." From early times, however, the test whether a limitation *in futuro* caused a perpetuity appears to have been not so much whether the property was alienable as whether the estate limited was destructible on alienation, as in the case of contingent remainders and remainders after an estate tail (*Howard* v. *Norfolk* (*Duke*) (1681), 2 Swan. 454, *per* Lord NOTTINGHAM, L.C., at p. 460; Termes de la Ley (1708), *sub voce* Perpetuity); and see note (*b*) p. 295, *ante*. Compare Sanders on Uses and Trusts, p. 196, where perpetuity is described as "a future limitation restraining the owner of the estate from aliening the fee simple of the property, discharged of such future use or estate, before the event is determined or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity." This definition was cited with approval in *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, 574, 586, C. A. The reported decisions passed from the consideration of unbarrable entails to that of indestructible executory limitations *in futuro*, which began to be recognised, within restricted limits, both for lands of inheritance (*Pay's Case* (1602), Cro. Eliz. 878; *Pells* v. *Brown* (1620), Cro. Jac. 590; *Snowe* v. *Cuttler* (1664), 1 Lev. 135) and for terms of years (*Anon.* (1573), Dyer,

wider sense, and certain interests arising *in præsenti* have been held void under the name of perpetuities (*l*). Examples of such interests *in præsenti* are:—

Interests *in præsenti* considered to be void.

(1) Estates and interests limited *in præsenti* with an unauthorised mode of devolution, for example, an estate of inheritance not known to the common law (*m*); an unbarrable entail (*n*); an estate in which successive heirs take life estates only (*o*); the attempted entail of a chattel (*p*).

(2) Interests held on perpetual non-charitable trust, where no person or persons can take any benefit (*q*), for example, trusts to keep in repair a tomb not part of the fabric of a church (*r*).

328 b (within a life: the judges differing); *Manning's Case* (1609), 8 Co. Rep. 94 b; *Lampet's Case* (1612) 10 Co. Rep. 46 b); thus giving rise to the modern rule. Definitions under the modern rule are given in note (*m*), p. 301, *post*. At all events there appears to be no doubt that the meaning of the word "perpetuity" was early extended to all devices intended to perpetuate the possession of estates in a prescribed line of succession (*Pearse* v. *Reeve* (1661), Poll. 29, 30; *Humberston* v. *Humberston* (1717), 1 P. Wms 332; *Marlborough (Duke)* v. *Godolphin (Earl)* (1759), 1 Eden, 404, 416; *Smith* d. *Dormer* v. *Packhurst* (1742), 3 Atk. 135, 136, H. L.; *Robinson* v. *Hardcastle* (1786), 2 Bro. C. C. 22, 30 ("extending the estate"); and see the early instances of the popular use of the word collected in the Oxford English Dictionary)

(*l*) The word "perpetuities" in the sense in which it is used in this and the following paragraph, as applied to certain present interests, has no place in the law of perpetuities or the rules of remoteness as treated in the present title, which are concerned with future interests, and with future interests only.

(*m*) *Mildmay's Case* (1605), 6 Co. Rep. 40 a. According to this case, and *Scattergood* v. *Edge* (1699), 12 Mod. Rep. 278, *per* POWELL, J., at p. 282, estates tail, from the time of the statute *De Donis Conditionalibus* (Statute of Westminster, II. (1285), 13 Edw. 1, c. 1), until common recoveries were allowed, were looked upon as perpetuities (Pigott on Common Recoveries, p. 10). A common law fee upon a fee was described as a perpetuity in *Gay* v. *Gay* or *Jay* v. *Jay* (1651), Sty. 258, 274.

(*n*) Gilbert on Uses (Sugden's ed.), p. 260; *Pewterers Co.* v. *Christ's Hospital* (1683), 1 Vern. 161.

(*o*) *Chudleigh's Case* (1595), 1 Co. Rep. 113 b, *per* POPHAM, C.J., at p. 138 a; *Clare* v. *Clare* (1734), Cas. *temp.* Talb. 21, *per* Lord TALBOT, L.C., at p. 26; *Wollen* v. *Andrewes* (1824), 2 Bing. 126, and see *Manning* v. *Andrews* (1576), 1 Leon. 256.

(*p*) *Tatton* v. *Moilineux* (1610), Moore (K. B.), 809; *Ireland* v. *Payne* (1637), Poll. 25; *Apprice* v. *Flower* (1661), Poll. 27; and other early cases concerning limitations of a term on failure of issue.

(*q*) See title CHARITIES, Vol. IV., p. 174. A conveyance of an advowson upon trust, as vacancies occur, to nominate fit persons to the living, where the trust is not for the benefit of a parish or otherwise charitable, and is not for the benefit of any person individually, has been said to be void under the rule against perpetuities (*Re Church Patronage Trust, Laurie* v. *A.-G.*, [1904] 2 Ch. 643, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 648).

(*r*) See titles BURIAL AND CREMATION, Vol. III., p. 433; CHARITIES, Vol. IV., pp. 118, 174. A trust or condition to repair a tomb is not in itself illegal, and it has been held that, if limited within the perpetuity period, in which case no remote future interest will arise on its determination, it may be a valid condition (*Lloyd* v. *Lloyd* (1852), 2 Sim. (N. S.) 255, 264; *Re Dean, Cooper-Dean* v. *Stevens* (1889), 41 Ch. D. 552, 557; *Pirbright* v. *Salwey*, [1896] W. N. 86). The *ratio decidendi* of the two last cited cases is "anomalous and not easy to explain" (Jarman on Wills, 6th ed., p. 279, note (f)). In *Lloyd* v. *Lloyd*, *supra*, there were two trusts for the repair of tombs: one of the inheritance on a trust to

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(3) Gifts to trustees for non-charitable indefinite objects (*s*), or for non-charitable unincorporated institutions or societies which may last for an indefinite time (*t*). But no question of perpetuity can arise when the trust is intended to be one for the benefit of the individual members of such a body at the time when the gift becomes operative, or where the property can be transferred to a common fund held for such a body, and when so transferred will not be subject to any trusts which will prevent the existing members from spending it as they please (*u*).

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repair a tomb, which the court held void as a perpetuity (*Lloyd* v. *Lloyd* (1852), 2 Sim. (N. S.) 255, 266); the other a condition that two annuitants should out of their life estates keep a tomb in repair, which was held binding on the annuitants. KINDERSLEY, V.-C., *ibid.*, at p. 264, said: "I am satisfied that a condition simply for keeping a tomb in repair is not a charitable one, and is not of itself illegal. It may be illegal to vest property in trustees in perpetuity for such a purpose. But the direction that the annuitants shall out of their life interests keep the tomb in repair is quite lawful and they are under an obligation, out of their annuities, to do so according to the direction of the will." Similarly, a trust or condition for maintaining specified animals is not charitable, but, if it does not violate any rule against remoteness, is not in itself unlawful; and see title CHARITIES, Vol. IV., p. 118. The question of its enforceability may depend upon the terms of the instrument and the circumstances of the case. There may be no *cestui que trust* directly interested in seeing to its enforcement; but when a trustee accepts a trust, the execution of which includes a lawful direction, or where an annuitant accepts an annuity subject to a lawful condition, the courts have not abstained from recognising such obligations. In *Pettingall* v. *Pettingall* (1842), 11 L. J. (CH.) 176, the executor was held, upon the construction of the will, to be a beneficial legatee of the surplus of an annual sum, which he was directed to apply to the keeping of a mare. The court enforced the obligation by requiring full information to be given when required respecting the animal, by giving liberty to apply, and by an undertaking to maintain the animal comfortably. In *Mitford* v. *Reynolds* (1848), 16 Sim. 105, 116, 120, there was a charitable bequest, after deducting the annual amount required for the keep of specified horses. The order of the court included provision for the horses. In *Re Dean, Cooper-Dean* v. *Stevens* (1889), 41 Ch. D. 552, a trust annuity for the maintenance of certain horses and dogs was held valid. The latter case has been severely criticised if and in so far as it decided that the life of an animal could be a life for the purpose of the perpetuity period (see p. 308, *post*). A proper way of providing for specified animals has been said to be by giving an annuity to a custodian payable so long as any of them are living (*Re Howard* (1908), *Times*, 30th October).

(*s*) *Thomson* v. *Shakespear* (1860), 1 De G. F. & J. 399, C. A.; *Carne* v. *Long* (1860), 2 De G. F. & J. 75; *Re Jones, Parker* v. *Lethbridge* (1898), 79 L. T. 154; see title CHARITIES, Vol. IV., pp. 117 *et seq.*

(*t*) *Re Dutton* (1878), 4 Ex. D. 54; *Re Clark's Trust* (1875), 1 Ch. D. 497; *Re Swain, Phillips* v. *Poole* (1908), 99 L. T. 604; see, further, title CHARITIES, Vol. IV., p. 119.

(*u*) *Cocks* v. *Manners* (1871), L. R. 12 Eq. 574, 586; *Re Delany's Estate* (1882), 9 L. R. Ir. 226, C. A.; *Re Clarke, Clarke* v. *Clarke*, [1901] 2 Ch. 110. A question may arise whether the body must be and is capable of ascertainment. In *Re Delany's Estate, supra*, DEASY, L.J., at p. 243, pointed out that the body in question in that case was easy of ascertainment. Interests held by or given to a fluctuating body which may last indefinitely may be rendered valid by being statutory (*Prestney* v. *Colchester Corporation and A.-G.* (1882), 21 Ch. D. 111), charitable (*Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633), or derived under a Crown grant to a corporation with a condition in favour of the body or incorporating the body for the purpose (see *Willingale* v. *Maitland* (1866), L. R. 3 Eq. 103,

Interests the perpetual nature of which is not objectionable.

639. The following estates and interests in property may last for an indefinite time, but if created or existing *in præsenti* (*v*), so as to be vested in some person, persons, or corporation, there is no objection to them on any ground of perpetuity (*a*):—

(1) Easements and *profits à prendre* (*b*);

(2) Rentcharges and other similar interests in land lasting indefinitely (*c*), and all remedies to enforce them (*d*);

(3) Restrictive covenants and conditions running with land in equity (*e*);

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109); title CONSTITUTIONAL LAW, Vol. VI., p. 487; but in the latter case there must be evidence of the existence of such a corporation (*Rivers* (*Lord*) v. *Adams* (1878), 3 Ex. D. 361; *Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 397, 423, C. A.; affirmed, [1911] A. C. 623).

(*v*) When created to arise *in futuro*, all these interests referred to in the text, *infra*, except the statutory interests, appear to be subject to the rule against perpetuities; thus, as to the creation of easements *in futuro*, see note (*t*), p. 311, *post*; and as to future gifts to charities, see p. 329, *post*.

(*a*) These interests are also referred to p. 322, *post*, with regard to the application of the rule against perpetuities; but see note (*v*), *supra*.

(*b*) *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, C. A., where JESSEL, M.R., at p. 583, described these interests as exceptions to the rules against remoteness; but see Gray, Rule against Perpetuities, s. 279; and see, generally, title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 233 *et seq.*

(*c*) *Keppell* v. *Bailey* (1834), 2 My. & K. 517, *per* Lord BROUGHAM L.C., at pp. 528, 529; Lewis, Law of Perpetuity, p. 599, where it is pointed out that, although corporeal property is clogged when subjected to these rights and its value may be proportionately decreased, its alienability is unaffected and its aptness for commercial dealings remains (but as to this reason, see *Re Hargreaves, Midgley* v. *Tatley* (1890), 43 Ch. D. 401, C. A.; and see note (*b*), p. 295, *ante*; see, generally, title RENTCHARGES AND ANNUITIES.

(*d*) *Jemott* v. *Cowley* (1667), 1 Saund. 112 c; *Foster* v. *Foster* (1700), 2 Vern. 386, where no question of perpetuity was raised. Such rights of entry pass on an assignment of the rentcharge to the assignee as part of his security (*Havergill* v. *Hare* (1618), Cro. Jac. 510). The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44, confers rights of entry for distress and receipt of rents and profits on the owner of the rentcharge, so far as those remedies might have been conferred by the instrument under which it arises, but not further. The Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 6, to remove doubts, declares that the rule of law relating to perpetuities does not apply to these remedies and like powers and remedies conferred by any instrument for recovering or compelling payment of any annual sum within the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44. The right of entry, in case of a rentcharge, need not be confined to the lands out of which the rent issues (Gilbert, Rents, p. 41), and as between landlord and tenant the right of distress for rent may be extended to lands other than those demised; see title DISTRESS, Vol. XI., p. 156. With regard to the lands demised, the entry under the usual condition is valid by stat. (1540) 32 Hen. 8, c. 34; see title LANDLORD AND TENANT, Vol. XVIII., p. 586.

(*e*) *Mackenzie* v. *Childers* (1889), 43 Ch. D. 265, 279; and see *Coles* v. *Sims* (1854), 5 De G. M. & G. 1, C. A., *per* KNIGHT-BRUCE, L.J., at p. 7. As to the conditions under which such covenants may be binding, see *McLean* v. *McKay* (1873), L. R. 5 P. C. 327; *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, C. A., and, as to restrictions under building schemes, see *Elliston* v. *Reacher*, [1908] 2 Ch. 374, 665, C. A.; *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305, C. A. As between landlord and tenant the question is whether the covenant touches or concerns the land; see *Ricketts* v. *Enfield Churchwardens*, [1909]

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(4) Covenants and conditions running with land at law (*f*);
(5) Customary rights (*g*);
(6) Charities (*h*);
(7) Interests held by corporations (*i*), a check on which is provided by the law of mortmain;
(8) Interests derived under or by virtue of any statute (*k*);

Part II.—The Rule against Perpetuities.

SECT. 1.—*Period allowed for Suspension of Vesting.*

SUB-SECT. 1.—*Statement of the Rule.*

Short statement.

640. The rule against perpetuities (*l*) may be shortly enunciated as follows:—An executory devise or other future limitation to be

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1 Ch. 544, 554, 555; title LANDLORD AND TENANT, Vol. XVIII., p 587, note (*a*). In *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, 405, 406, C. A (adopted in *Muller* v. *Trafford*, [1901] 1 Ch. 54, 61, by FARWELL, J.), COLLINS, L J., said the first point to be determined is whether the covenant or contract in its inception binds the land. In *Sharpe* v. *Durrant* (1911), 55 Sol. Jo. 423, however, an implied covenant not to interfere with a tramway crossing to be constructed *in futuro* was enforced against an assignee of the tramway. As to covenants running with the land at equity, see *Tulk* v. *Moxhay* (1848), 2 Ph. 774; *Formby* v. *Barker*, [1903] 2 Ch. 539, C. A; see also title EQUITY, Vol. XIII., pp. 100 *et seq.*

(*f*) As to covenants running with the land at law, see *Muller* v. *Trafford*, *supra*, at pp. 60, 61. As to covenants running with the land, see, generally, titles LANDLORD AND TENANT, Vol. XVIII., pp 584 *et seq*; REAL PROPERTY AND CHATTELS REAL.

(*g*) See title CUSTOM AND USAGES, Vol. X., pp. 238 *et seq.*; Gray, Rule against Perpetuities, ss. 572—588.

(*h*) *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas 633, 642, 650, 665; *Re Christchurch Inclosure Act*, (1888) 38 Ch. D. 520, 530, 531, 532, C. A.; Lewis, Law of Perpetuity, p. 689; and see title CHARITIES, Vol. IV, pp. 174 *et seq.*

(*i*) See title CORPORATIONS, Vol. VIII, pp. 367 *et seq*; Lewis, Law of Perpetuity, pp. 299, 687.

(*k*) *Prestney* v. *Colchester Corporation and A.-G.* (1882), 21 Ch. D. 111; *Re Christchurch Inclosure Act*, *supra*, at p. 530; and see *Sevenoaks, Maidstone and Tunbridge Rail. Co.* v. *London, Chatham and Dover Rail. Co* (1879), 11 Ch D. 625, *per* JESSEL, M.R., at p. 635; and, as to remoteness in a statutory agreement, see *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352, 359, 360; affirmed, [1901] 2 Ch. 37, 50, C. A.; compare *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426, 429. Accordingly, estates tail may be rendered unbarrable by statute, causing a statutory perpetuity (stat. (1542-3) 34 & 35 Hen. 8, c. 20; Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 18; compare *Re Bolton Estates*, *Russell* v. *Meyrick*, [1903] 2 Ch. 461, C. A.). Powers of destroying such interests for the purpose of alienation in some cases are given by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (i.); and see title REAL PROPERTY AND CHATTELS REAL.

(*l*) The rule arose from the limits fixed for executory devises and bequests, as to the beginning of which see title REAL PROPERTY AND CHATTELS REAL: the basis on which it proceeds, namely, that the validity of an interest depends on the distance in futurity of its vesting, was first

SECT. 1. Period allowed for Suspension of Vesting.

valid must vest, if at all, within a life or lives in being and twenty-one years and a possible period for gestation after; it is not sufficient that it may vest within that period: it must be good in its creation, and, unless it is created in such terms that it cannot vest after the expiration of a life or lives in being and twenty-one years and the period allowed for gestation, it is not valid, and subsequent events cannot make it valid (*m*).

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definitely laid down in *Norfolk's (Duke) Case* (1685), 3 Cas. in Ch. 1, H. L. The necessity of some such rule was made manifest when it was decided that executory devises were sometimes allowable and were indestructible (see *Pells* v. *Brown* (1620), Cro. Jac. 590; *Scattergood* v. *Edge* (1699), 12 Mod. Rep. 278; Lewis, Law of Perpetuity, c. x.). It is generally considered that it was an invention of the chancellors as to trusts and equitable interests (as in *Norfolk's (Duke) Case, supra*; *Chalfont* v. *Okes* (1674), 1 Cas. in Ch. 239; *Lloyd* v. *Carew* (1697), Prec. Ch. 72, H. L.) adopted at common law as to legal rights under uses and executory devises; see *Re Ridley, Buckton* v. *Hay* (1879), 11 Ch. D. 645, *per* JESSEL, M.R., at p. 649; *A.-G.* v. *Cummins* (1895), [1906] 1 I. R. 406, *per* PALLES, C.B., at p. 408. For the history of the rule, see 2 Hargrave, Juridical Arguments (argument in *Thellusson* v. *Woodford*); Lewis, Law of Perpetuity, c. xi; Gray, Rule against Perpetuities, 2nd ed., c. v.

(*m*) *Dungannon (Lord)* v. *Smith* (1846), 12 Cl. & Fin. 546, H. L., *per* CRESWELL, J., at p. 563, adopted by Lord DAVEY in *Hancock* v. *Watson*, [1902] A. C. 14, 17; compare *Re Thompson, Thompson* v. *Thompson*, [1906] 2 Ch. 199, *per* JOYCE, J., at p. 202; 2 Preston, Abstracts of Title, p. 159. For the purpose of this short statement the period of gestation is made a part of the definition; it is better for some purposes to omit it, and to add to the rule "for the purposes of this rule a child *en ventre sa mère* is considered as a life in being," as in Jarman on Wills, 5th ed., p. 216, and Challis, Real Property, 2nd ed., pp. 170, 171, approved in *Re Wilmer's Trusts, Moore* v. *Wingfield*, [1903] 2 Ch. 411, 422, 423, C. A.; and see *Villar* v. *Gilbey*, [1907] A. C. 139, 149. The rule is thus shortly stated by Gray, Rule against Perpetuities, 2nd ed., s. 201: "No interest is good unless it must vest if at all not later than twenty-one years after some life in being at the creation of the interest." Lewis's definition of the word "perpetuity" (Law of Perpetuity, p. 164) is, "a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation." This definition has been accepted in several cases: see *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, 581, C. A.; *Dunn* v. *Flood* (1883), 25 Ch. D. 629, *per* NORTH, J., at p. 633; *Redington* v. *Browne* (1893), 32 L. R. Ir. 347, *per* BEWLEY, J., at p. 355; *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535, 541 (where FARWELL, J., explains the sense in which the word "destructible" is used in this definition); *Re Tyrrell's Estate*, [1907] 1 I. R. 292, 295, C. A. Challis, Real Property, 2nd ed., pp. 170, 171, also separates the statement of the rule from that of the period prescribed by it, and confines it to "all future interests and claims in, to, or upon any specified property, . . . which do not arise under or take effect by virtue of the rules of the common law and are not subsequent to an estate tail [and] with a few exceptions requiring specific mention." In order to avoid the complexity of the expression "vest" which occurs in the definition, the rule has been expressed in the form: "No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within etc."; see 49 Sol. Jo. 360, following Gray, Rule against Perpetuities, 1st ed., s. 201; but this definition needs a peculiar meaning to be given to "condition" (see *ibid.*, 2nd ed.), and takes no notice of the effect of the rule on conditions subsequent. As to vesting, see, further, p. 303, *post*.

SECT. 1.

Period allowed for Suspension of Vesting.

641. The rule stated more fully is as follows:—

Limit on suspension of vesting.

First, subject to the exceptions hereafter mentioned (*n*), every future estate or interest in any kind of property, the rights in which are governed by the law of England (*o*), must be such that, at the time when the instrument creating it comes into operation (*p*), it can be predicated that, if the estate or interest vests at all, it must necessarily vest not later than at the end of a certain period (*q*).

The perpetuity period.

Secondly, this period is the life of a person or the survivor of any number of persons (*r*) in being at the time of creation of such future estate or interest, and ascertained for that purpose by the instrument creating the same, and twenty-one years to be computed from the dropping of such life (*s*); but if no such person or persons are ascertained by the instrument, the period is twenty-one years computed from the time of creation of the future estate or interest (*t*).

In the following paragraphs this period is called "the perpetuity period" (*a*).

Child *en ventre sa mère.*

Thirdly, a child who is *en ventre sa mère* at the time of creation of an estate or interest, and is afterwards born alive, is deemed to be a person in being for the purposes both of the vesting of the estate or interest in him (*b*), and of being a life chosen to form the

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(*n*) See p. 322, *post*.

(*o*) As to the property and interests bound by the rule, see, further, pp. 311, 312, *post*; see also p. 372, *post*.

(*p*) In the case of dispositions by will, see p. 332, *post*; and with regard to the execution of powers, and, generally, as to the circumstances taken into account, see p. 333, *post*.

(*q*) *Norfolk's* (*Duke*) *Case* (1685), 3 Cas. in Ch. 1, H. L. ("The Case of Perpetuities" in Chancery); *Lloyd* v. *Carew* (1698), Show. Parl. Cas. 137, and other cases have merely extended the period: the vesting of an executory limitation was thus allowed to be suspended first for a life (*Pells* v. *Brown* (1620), Cro. Jac. 590; *Norfolk's* (*Duke*) *Case*, *supra*); two lives (*Goring* v. *Bickerstaff* (1662), 1 Cas. in Ch. 4); or any number of concurrent lives (*Low* v. *Burron* (1734), 3 P. Wms. 262); a life and one year (*Lloyd* v. *Carew*, *supra*); or a reasonable time after the life (*Marks* v. *Marks* (1718), 10 Mod. Rep. 419; *Goodtitle* d. *Gurnall* v. *Wood* (1740), 7 Term Rep. 103, n.); or up to twenty-one years (*Stephens* v. *Stephens* (1736), Cas. *temp.* Talb. 228).

(*r*) As to the qualifications necessary for the persons chosen, see p. 308,

(*s*) Compare the definition of the Real Property Commissioners' 3rd Report, pp. 39, 69, which has been adopted, with the reservation of the period there given as alternative to the twenty-one years period, of "the minority of some person *en ventre sa mère* at the dropping of such life, and ascertained for that purpose by such instrument," which perhaps still awaits judicial decision; see note (*l*), p. 310, *post*.

(*t*) *Crooke* v. *De Vandes* (1803), 9 Ves. 197; *Palmer* v. *Holford* (1828), 4 Russ. 403; *Speakman* v. *Speakman* (1850), 8 Hare, 180; Lewis, Law of Perpetuity, p. 172.

(*a*) It is convenient to use this term, as reference is continually made to "the period allowed by law for the vesting of executory interests." The Real Property Commissioners' 3rd Report, at pp. 37, 39, used the term "the period of perpetuity."

(*b*) *Thellusson* v. *Woodford* (1805), 11 Ves. 112, H. L., the second answer of the judges; *Blackburn* v. *Staples* (1814), 2 Ves. & B. 367; *Knapping* v. *Tomlinson* (1864), 10 Jur. (N. S.) 626; *Villar* v. *Gilbey*, [1907] A. C. 139, 149. Lewis, Law of Perpetuity, p. 147, regards *Stephens* v. *Stephens*

perpetuity period (*c*). The perpetuity period may, therefore, be apparently extended by a period or periods for gestation, but only in those cases where gestation actually exists (*d*). This branch of the rule is applied whether it is for the advantage of the unborn child or not (*e*).

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Fourthly, every condition subsequent which but for this rule would render void a validly created estate or interest is to that extent inoperative (*f*).

Conditions subsequent.

Fifthly (*g*), any estate or interest which does not necessarily satisfy the above rule is void from its creation (*h*), and events, subsequent to the date of the instrument which, or subsequent to the death of the testator whose will, created the estate or interest, which in fact make the vesting take place within the perpetuity period, have no effect so as to make the estate or interest valid (*i*).

Subsequent events.

Sixthly, the time of the death of the testator is deemed the time of creation of an estate or interest created by will; and the time of the execution of the instrument creating the power is deemed the time of creation of an estate or interest created by the execution of a power not tantamount to absolute ownership (*j*).

Time of creation.

SUB-SECT. 2.—*Determination of the Time of Vesting.*

642. The rule is directed to ensure that the vesting of estates and interests takes place at a time not too remote. A limitation of

Object of the rule.

(1736), Cas. *temp.* Talb. 228, as the foundation of the rule (as in that case an executory devise to such a son of a living person as should attain twenty-one was held valid) combined with stat. (1698) 10 Will. 3, c. 22, sometimes cited as c. 16, which provided that posthumous children should be able to take under limitations as if born in the lifetime of their parent.

(*c*) *Thellusson* v. *Woodford* (1805), 11 Ves. 112, H. L., the first answer of the judges; *Long* v. *Blackall* (1797), 7 Term Rep. 100; *Re Wilmer's Trusts, Moore* v. *Wingfield*, [1903] 1 Ch. 874, *per* BUCKLEY, J., at p. 879; affirmed, [1903] 2 Ch. 411, C. A., *per* STIRLING, L.J., at p. 422.

(*d*) *Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372, H. L., the second and third answers of the judges.

(*e*) *Re Wilmer's Trusts, Moore* v. *Wingfield*, [1903] 1 Ch. 874, *per* BUCKLEY, J., at p. 888; affirmed, [1903] 2 Ch. 411, C. A., *per* ROMER, L.J., at p. 421.

(*f*) As to invalid gifts over, see p. 350, *post*; as to invalid directions for settlement of valid gifts, see p. 353, *post*; as to the restraint on anticipation of married women's interests, see p. 352, *post*; and as to directions not affecting vesting, see p. 338, *post*.

(*g*) This is properly a corollary from the first rule, but for completeness it is convenient to state it as a co-ordinate separate rule; see *Dungannon* (*Lord*) v. *Smith* (1846), 12 Cl. & Fin. 546, *per* TINDAL, C.J., at p. 612, H. L.; Lewis, Law of Perpetuity, p. 170.

(*h*) It is not, therefore, void only for the excess, even where the excess could be clearly ascertained (*Hancock* v. *Watson*, [1902] A. C. 14, 22, approving *Leake* v. *Robinson* (1817), 2 Mer. 362, 389); Real Property Commissioners' 3rd Report, p. 35.

(*i*) *Jee* v. *Audley* (1787), 1 Cox, Eq. Cas. 324, where KENYON, M.R., said, at p. 326, "the single question is not whether the limitation is good in the events which have happened, but whether it was good in its creation"; and see *Southampton* (*Lord*) v. *Hertford* (*Marquis*) (1813), 2 Ves. & B. 54; *Dungannon* (*Lord*) v. *Smith*, *supra*; *Harding* v. *Nott* (1857), 7 E. & B. 650; and, as to the circumstances taken into account, see, further, p. 333, *post*.

(*j*) Real Property Commissioners' 3rd Report, pp. 40, 69; and as to the date from which the period is reckoned, see, further, p. 332, *post*.

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an estate or interest, and the estate or interest so limited, not vested within the perpetuity period are said to be "too remote," or to be "void for remoteness": if they are immediately vested, or must necessarily vest within the perpetuity period, they are not open to the objection of remoteness (*k*).

Vesting.

643. An estate or interest is or becomes vested (*l*) when, first, the person or persons, corporation, or body to whom or to which it is limited (in this title denoted by the term "the alienee") is or are ascertained and in existence and capable of being an alienee (*m*); secondly, the quantum of the estate and interest is ascertained; and thirdly, all other events have happened to enable the estate or interest to come into possession at once, subject to the determination at any time of the prior estates and interests.

Quantum of interest.

644. Where the interest of the alienee, therefore, may by possibility not be ascertainable until after the perpetuity period, the limitation is void (*n*).

The quantum of interest may be validly ascertained by reference to any property existing at the date of the creation of the limitation or to the value of such property (*o*).

Accumulated property.

645. Where the property is to be increased by accumulation, it is sufficient if within the perpetuity period there is a person in existence entitled to take the property, whatever its value or amount (*p*), that is to say, if the limitation is vested and in possession in other respects.

But where the direction for accumulation forms a condition precedent to the interest of the alienee, and that accumulation may

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(*k*) *Oddie* v. *Brown* (1859), 4 De G. & J. 179, C. A., *per* TURNER, L.J., at p. 196; *Redington* v. *Browne* (1893), 32 L. R. Ir. 347, *per* BEWLEY, J., at p. 356.

(*l*) As to vested and contingent estates generally, see title REAL PROPERTY AND CHATTELS REAL. Gray, Rule against Perpetuities, s. 118, observes that the rule does not concern itself with the secondary meaning of "transmissible" sometimes given to the word "vested."

(*m*) Lewis, Law of Perpetuity, p. 168. The alienee himself may be under disabilities, which are ignored in questions of perpetuity (*Re Stamford and Warrington (Earl), Payne* v. *Grey*, [1912] 1 Ch. 343, C. A., *per* COZENS-HARDY, M.R., at p. 355); *Ferrand* v. *Wilson* (1845), 4 Hare, 344, *per* WIGRAM, V.-C., at p. 374.

(*n*) *Curtis* v. *Lukin* (1842), 5 Beav. 147, 154, 156; *Redington* v. *Browne* (1893), 32 L. R. Ir. 347, 356, 357; *Savill Brothers, Ltd.* v. *Bethell*, [1902] 2 Ch. 523, C. A.; *Re Thompson, Thompson* v. *Thompson*, [1906] 2 Ch. 199, *per* JOYCE, J., at p. 202; and see the cases cited as to classes at p. 343, *post*.

(*o*) *Wood* v. *Drew* (1864), 33 Beav. 610 (where there was a direction to convey freeholds, on the expiration of each of certain leases, to be of equal annual value to the leasehold premises, the term in which had expired; but see Gray, Rule against Perpetuities, s. 205, n.; compare *Re Wood, Tullett* v. *Colville*, [1894] 2 Ch. 310, 316; affirmed, [1894] 3 Ch. 381, 384, C. A.; *Re Coulson's Trusts, Prichard* v. *Coulson* (1907), 97 L. T. 754 (reservation of percentage of excess of proceeds under a future sale over a fixed amount); and see *Re Hurlbatt, Hurlbatt* v. *Hurlbatt*, [1910] 2 Ch. 553, 559.

(*p*) *Oddie* v. *Brown, supra*; compare *Re Swain, Monckton* v. *Hands*, [1905] 1 Ch. 669, C. A.

extend beyond the legal limits, and cannot be stopped and the fund disposed of by the alienee, the direction is void (*q*).

Remoteness in description of alienee or in the contingent events.

646. Assuming the limitation is valid as regards the quantum of interest limited, it may be invalid on either of two grounds (*r*): (1) that the description of the alienee is such that he may not necessarily be in existence and ascertainable within the perpetuity period (*s*); or (2) that, apart from the description of the alienee (who may be a living person in this case) (*t*), the events which must happen in order to render the estate or interest ready to come into possession at once, subject to the determination of prior estates and interests, are such that they may not necessarily happen within the perpetuity period (*u*). The question of uncertainty must be kept distinct from the question of remoteness; for the purpose of testing the question of remoteness, the uncertainty of the alienee existing at

(*q*) As to accumulation, see p. 370, *post*; *Curtis* v. *Lukin* (1842), 5 Beav. 147; *Smith* v. *Cuninghame* (1884), 13 L. R. Ir. 480; compare *Trustees, Executors, and Agency Co.* v. *Bush* (1908), 28 New Zealand Law Reports, 117; *Girard Trust Co.* v. *Russell* (1910), 179 Federal Reporter, 446.

(*r*) See Real Property Commissioners' 3rd Report, p. 40, making a suggestion for legislation validating a limitation in one of these respects.

(*s*) *Proctor* v. *Bath and Wells (Bishop)* (1794), 2 Hy. Bl. 358 (the first son of A., a living person who had no son, that should be bred a clergyman); *Tregonwell* v. *Sydenham* (1815), 3 Dow, 194, H. L. (the tenant in an unbarred entail at a remote event); *Tollemache (Lady)* v. *Coventry (Earl and Countess)* (1834), 2 Cl. & Fin. 611, H. L. (the person from time to time Lord V.); compare *Bacon* v. *Proctor* (1822), Turn. & R. 31, and *Mackworth* v. *Hinxman* (1836), 2 Keen, 658; and see *Ker* v. *Dungannon (Lord)* (1841), 1 Dr. & War. 509; Sugden, Law of Property, p. 330); *Dungannon (Lord)* v. *Smith* (1846), 12 Cl. & Fin. 546, H. L. (the heir male of A. attaining twenty-one); *Ibbetson* v. *Ibbetson* (1840), 5 My. & Cr. 26 (tenant in tail attaining twenty-one); *Wainman* v. *Field* (1854), Kay, 507 (tenant in tail becoming seised in fee simple); *Re Gage, Hill* v. *Gage*, [1898] 1 Ch. 498 (to unborn person on marriage); Real Property Commissioners' 3rd Report, p. 40; Lewis, Law of Perpetuity, p. 464. The description of the alienee (not being a living person) may require him to survive a particular event or to be ascertained at the death of a particular person or class of persons; and the limitation is accordingly invalid if the event will not necessarily happen within the perpetuity period (*Jee* v. *Audley* (1787), 1 Cox, Eq. Cas. 324 (to the daughters of A., and B. his wife, living at the failure of C.'s issue); *Gooding* v. *Read* (1853), 4 De G. M. & G. 510, C. A. (when youngest child of A. attains twenty-five); *Re Bowles, Page* v. *Page*, [1905] 1 Ch. 371 (determination of trusts)); or if the person at whose death the alienee is to be ascertained is unborn, or possibly unborn (*Courtier* v. *Oram* (1855), 21 Beav. 91 (to the testator's grandchildren living at the death of each of his present and future grandchildren); *Gooch* v. *Gooch* (1853), 3 De G. M. & G. 366 (grandchildren); *Hodson* v. *Ball* (1845), 14 Sim. 558; *Lett* v. *Randall, Lett* v. *Dormer* (1855), 3 Sm. & G. 83; *Buchanan* v. *Harrison* (1861), 1 John. & H. 662; *Re Taylor's Trusts, Taylor* v. *Blake*, [1912] 1 I. R. 1 (husbands of children); *Re Bowles, Page* v. *Page, supra*). Thus the survivor of a class comprising unborn persons cannot be a direct alienee; see p. 337, *post*. On the other hand, the limitation is valid where all the persons, at the death of the survivor of whom the alienee is ascertained, are alive or *en ventre sa mère* (*Long* v. *Blackall* (1797), 7 Term Rep. 100; *Thellusson* v. *Woodford* (1805), 11 Ves. 112, H. L.; *Re Roberts, Repington* v. *Roberts-Gawen* (1881), 19 Ch. D. 520, C. A.).

(*t*) *Proctor* v. *Bath and Wells (Bishop), supra*; *Re Brown and Sibly's Contract* (1876), 3 Ch. D. 156; *Re Haigreaves, Midyley* v. *Tatley* (1890), 43 Ch. D. 401, C. A., overruling *Avern* v. *Lloyd* (1868), L. R. 5 Eq. 383.

(*u*) *Proctor* v. *Bath and Wells (Bishop), supra* (if A. should have no son

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all (*a*), or the uncertainty of the other events on which the limitation is contingent happening at all, is immaterial. If existing at all, the alienee must of necessity be ascertained, and, if happening at all, the events must be such as will, of necessity, happen within the perpetuity period (*b*).

Effect of rule on construction.

647. The validity of every limitation, therefore, depends on the time of vesting, which is a matter to be decided on the construction of the words used (*c*).

It the words of the instrument are plain, they are taken and their meaning arrived at (*d*) exactly in the same manner as if there had been no law of remoteness, and as if the whole intention expressed by the words could lawfully take effect (*e*), without regard to the consequences (*f*).

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bred a clergyman); *Cambridge* v. *Rous* (1802), 8 Ves. 12, 24 (if A. leave no children attaining twenty-seven); *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206, *per* Lord SELBORNE, L.C., at p 212 (when land given for almshouse); *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, C. A. (whenever land required for the purpose of an undertaking); *Tyrrell* v. *Naylor* (1892), 11 New Zealand Law Reports, 118 (on property being used for sale of liquors); *Re Bowen, Lloyd Phillips* v. *Davis*, [1893] 2 Ch. 491 (establishment of a Government system); *Re Stratheden and Campbell (Lord), Alt* v. *Stratheden and Campbell (Lord)*, [1894] 3 Ch. 265 (on the appointment of next officer to a corps); *Re Wood, Tullett* v. *Colville*, [1894] 3 Ch. 381, C. A. (when gravel pits worked out); *Kingham* v. *Kingham*, [1897] 1 I. R. 170 (if property sold and money handed over). *Thomas* v. *Thomas* (1902), 87 L. T. 58, C. A., and *Edwards* v. *Edwards*, [1909] A. C. 275 (if minerals worked); *Re Bewick, Ryle* v. *Ryle*, [1911] 1 Ch. 116 (when estate clear of charges). See, further, the cases cited in note (*f*), p. 343, *post*, in which there were gifts over in default of any of classes of unborn issue attaining an age greater than twenty-one.

(*a*) *Thellusson* v. *Woodford* (1799), 4 Ves. 227, 309; Lewis, Law of Perpetuity, p. 173. For the purpose of testing whether a limitation violates the rule, it may be assumed that the alienee is certain or capable of being ascertained (*Smithwick* v. *Hayden* (1887), 19 L. R. Ir. 490, C. A., *per* FITZ-GIBBON, L.J., at p. 495.

(*b*) *Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372, H. L. (the person who would have been entitled, at the expiration of a term of years expiring twenty years after the death of the survivor of twenty-eight persons living at the death of the testator, had the estates been settled in a certain strict settlement).

(*c*) The question of the validity of a limitation may therefore be brought before the court on originating summons (R. S. C., Ord. 54A. r. 1; Ord. 55, r. 3; *Re Hargreaves, Midgley* v. *Tatley* (1890), 43 Ch. D. 401, C. A.).

(*d*) As to the construction of deeds and wills, see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.*; WILLS.

(*e*) *Dungannon (Lord)* v. *Smith* (1846), 12 Cl. & Fin. 546, 588, 599, H. L.; *Catlin* v. *Brown* (1853), 11 Hare, 372, 375 (second rule); *Stuart* v. *Cockerell* (1870), 5 Ch. App. 713; *Pearks* v. *Moseley* (1880), 5 App. Cas. 714, *per* Lord SELBORNE, L.C., at p. 719; *Hutchinson* v. *Tottenham*, [1898] 1 I. R. 403, 418; *Re Wrightson, Battie-Wrightson* v. *Thomas*, [1904] 2 Ch. 95, 106, C. A.; *Edwards* v. *Edwards*, [1909] A. C. 275, 277; *Re Hume Public Trustee* v. *Mabey*, [1912] 1 Ch. 693.

(*f*) *Pearks* v. *Moseley, supra*; *Speakman* v. *Speakman* (1850), 8 Hare, 180, 185; *Re Mervin, Mervin* v. *Crossman*, [1891] 3 Ch. 197; *Whitby* v. *Von Luedecke*, [1906] 1 Ch. 783, 788; *Re Stamford and Warrington (Earl), Payne* v. *Grey*, [1912] 1 Ch. 343, 365, C. A.; and see *Boughton* v. *Boughton* *Boughton* v. *James* (1848), 1 H. L. Cas. 406. Even where a limited and restricted construction of the instrument would have the effect of

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Words cannot be struck out because they offend against the rule (*g*); but the meaning of words, apparently creating a remote limitation, may be controlled by other parts of the instrument, so that taking the instrument as a whole the limitation is valid (*h*).

When meaning controlled.

In dealing, however, with words that are obscure and ambiguous, weight may be given to the consideration that it is better to effectuate than to destroy the intention (*i*), which it is to be assumed was not meant to transgress the law (*k*).

Intention effectuated.

Thus, there may be a particular clause which on one construction appears to offend against the rule against perpetuities; but, if it is fairly capable of another construction which avoids that objection,

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supporting provisions otherwise wholly bad, and even where there is an executory trust, the court will not depart from the meaning of the words in which the court is satisfied they have been used (*Boughton* v. *James* (1844), 1 Coll. 26, *per* KNIGHT-BRUCE, V.-C., at p. 43).

(*g*) *Heasman* v. *Pearse* (1871), 7 Ch. App. 275, 283. Similarly, a gift cannot be split into gifts on several contingencies, unless so expressed; see p. 349, *post*.

(*h*) Thus, a limitation over in itself void may be controlled by the prior provisions of the instrument (*Trickey* v. *Trickey* (1832), 3 My. & K. 560; *Ellicombe* v. *Gompertz* (1837), 3 My. & Cr. 127). A limitation apparently on general failure of issue may be thus confined to a failure of issue previously mentioned (*Blackborn* v. *Edgley* (1720), 1 P. Wms. 600, 606; *Morse* v. *Ormonde* (*Lord*) (1826), 1 Russ. 382; *Malcolm* v. *Taylor* (1831), 2 Russ. & M. 416, 421; *Eno* v. *Eno* (1847), 6 Hare, 171; *Lewis* v. *Templer* (1864), 33 Beav. 625: Lewis, Law of Perpetuity, p. 373). As to void limitations on failure of issue, see note (*k*), *infra*.

(*i*) *Pearks* v. *Moseley* (1880), 5 App. Cas. 713, *per* Lord SELBORNE, L.C., at p. 719, applied in *Re Bevan's Trusts* (1887), 34 Ch. D. 716, 718; *Re Turney*, *Turney* v. *Turney*, [1899] 2 Ch. 739, C. A.; *Re Hobson's Will etc.*, *Hobson* v. *Sharp*, [1907] Victorian Law Reports, 724. In such a case words which might show that a gift is void may be rejected (*Smidmore* v. *Smidmore* (1905), 3 Commonwealth Law Reports, 344).

(*k*) *Leach* v. *Leach* (1843), 2 Y. & C. Ch. Cas. 495, *per* KNIGHT-BRUCE, V.-C., at p. 499. *E.g.*, an executory limitation on failure of issue or heirs of a person, which, according to the context or the construction adopted by the court, (1) may refer to a failure at any indefinitely distant future time, in which case, unless an estate tail to cover all the issue precedes the limitation or is implied, the limitation will be void under the rule (*Davies* v. *Speed* (1692), 2 Salk. 675; affirmed Show. Parl. Cas. 104; *Green* v. *Rod* (1729), Fitz-G. 68; *Lanesborough* (*Lady*) v. *Fox* (1733), Cas. *temp.* Talb. 262; *Clare* v. *Clare* (1734), Cas. *temp.* Talb. 21; *Beauclerk* v. *Dormer* (1724), 2 Atk. 308; *Bodens* v. *Watson* (1764), Amb. 478; *Grey* v. *Montagu* (1770), 3 Bro. Parl. Cas. 314; *A.-G.* v. *Hird* (1782), 1 Bro. C. C. 170; *Bigge* v. *Bensley* (1783), 1 Bro. C. C. 187; *Glover* v. *Strothoff* (1786), 2 Bro. C. C. 33; *Barlow* v. *Salter* (1810), 17 Ves. 479; *Griffiths* v. *Grieve* (1819), 1 Jac. & W. 31; *Bankes* v. *Holme* (1821-1826), 1 Russ. 394, n., H. L.; *Bristow* v. *Boothby* (1826), 2 Sim. & St. 465; *Candy* v. *Campbell* (1834), 2 Cl. & Fin. 421, H. L.; *Malcolm* v. *Taylor* (1832), 2 Russ. & M. 416 (as to plate); *Wells* v. *Malins* (1838), 3 Jur. 36; *A.-G.* v. *Bright* (1836), 2 Keen, 57; *Doe* d. *Todd* v. *Duesbury* (1841), 8 M. & W. 514; *Falkiner* v. *Hornidge* (1858), 8 I. Ch. R. 184, C. A.; *Re Johnson's Trusts* (1866), L. R. 2 Eq. 716; *Dawson* v. *Small* (1874), 9 Ch. App. 651); or (2) may be restricted to a failure before some event connected with the limitations of the instrument, in which case, if that event is within the proper period, the limitation will be valid (Lewis, Law of Perpetuity, c. xv.; *Forth* v. *Chapman* (1720), 1 P. Wms. 663, and the notes thereto (Tudor, L. C. Real Prop., 4th ed., 374); see title WILLS).

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the latter construction is preferred, especially if it is found to be in accordance with the general intention of the will (*l*).

In construing an ambiguous clause which, read in a particular way, offends against the rule, regard may be had to an expressed intention that the limitations shall not be contrary to the rule (*m*).

The circumstance that to hold the limitation void would attribute to the testator an intention of intestacy, is an element which has been taken into consideration (*n*).

SUB SECT. 3.—*The Choice of Period Available.*

Choice of lives.

648. The choice of persons whose lives are chosen for the purposes of the perpetuity period may be quite arbitrary (*o*).

It is immaterial that such persons neither take any interest in the property (*p*) nor are connected with the persons having an interest therein in any way (*q*). There is no limit to their number (*r*).

Essential qualifications.

The qualifications necessary are that they must all be persons (*s*)

(*l*) *Martelli* v. *Holloway* (1872), L. R. 5 H. L. 532, 548; *Re Mortimer, Gray* v. *Gray*, [1905] 2 Ch. 502 506, C. A.; *Re Stamford and Warrington (Earl), Payne* v. *Grey*, [1912] 1 Ch. 343, 365; *Re Hume, Public Trustee* v. *Mabey*, [1912] 1 Ch. 693, *per* PARKER, J., at p. 698.

(*m*) *Martelli* v. *Holloway* (1872), L. R. 5 H. L. 532, *per* Lord CHELMSFORD, at p. 548. As to the effect given to the words "as far as the rules of law will admit," with regard to executory and other gifts, see p. 317, *post*. If a gift is not executory, but direct and unambiguous, and is such as to offend against the rule against perpetuities, these words do not render the gift valid (*Christie* v. *Gosling* (1866), L. R. 1 H. L. 279, 290; *Re Exmouth (Viscount), Exmouth (Viscount)* v. *Praed* (1883), 23 Ch. D. 158; and see *Re Moore, Prior* v. *Moore*, [1901] 1 Ch. 936). In *Re Finch and Chew's Contract*, [1903] 2 Ch. 486, an appointment on the trusts of an antecedent instrument or such of them as were "capable of taking effect" took effect with the trusts excluded which would have been void.

(*n*) *Montgomerie* v. *Woodley* (1800), 5 Ves. 522; *Taylor* v. *Frobisher* (1852), 5 De G. & Sm. 191; *Re Edmondson's Estate* (1868), L. R. 5 Eq. 389 (where in consequence "vested" was construed in a special sense); *Gosling* v. *Gosling* (1859), John. 265, 274; *Re Bevan's Trusts* (1887), 34 Ch. D. 716; and see *Re Wenmoth's Estate, Wenmoth* v. *Wenmoth* (1887), 37 Ch. D. 266, 270, explaining *Elliott* v. *Elliott* (1841), 12 Sim. 276, and *Re Coppard's Estate, Howlett* v. *Hodson* (1887), 35 Ch. D. 350, as decided on this ground. As to severable limitations, see p. 347, *post*.

(*o*) *Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372, H. L.; see the Real Property Commissioners' 3rd Report, p. 38, suggesting a legislative change in this respect; Lewis, Law of Perpetuity, p. 161.

(*p*) *Cadell* v. *Palmer, supra*; compare *Beard* v. *Westcott* (1813), 5 Taunt. 393; *Proctor* v. *Bath and Wells (Bishop)* (1794), 2 Hy. Bl. 358; and see *Hopkins* v. *Hopkins* (1739), 1 Atk. 581, *per* Lord HARDWICKE, L.C., at p. 596.

(*q*) *Cadell* v. *Palmer, supra*.

(*r*) *Thellusson* v. *Woodford* (1805), 11 Ves. 112, H. L. *Goring* v. *Bickerstaff* (1662), 2 Cas. in Ch. 4, established this principle for two lives as to limitations in trust of a term; compare *Lloyd* v. *Carew* (1697), Show. Parl. Cas. 137, as to shifting uses. In *Cadell* v. *Palmer, supra*, the lives were twenty-eight in number; and in *Robinson* v. *Hardcastle* (1786), 2 Bro. C. C. 22, 30, Lord THURLOW, L.C., said that "a man may appoint a hundred or a thousand trustees, and that the survivor of them shall appoint a life estate; that would be within the line of a perpetuity."

(*s*) Having regard to the origin of the rule, allowing a suspense during lives, it has usually been assumed that the lives must be those of human

are or will necessarily (*t*) be ascertainable and in existence, or in gestation (*a*), at the time from which the instrument speaks (*b*), so that their lives are running concurrently (*c*), and that in effect there is but one life to consider, that of the longest liver of them (*d*); and that they must be such that the determination of their lives must be capable of being proved without difficulty (*e*).

Where the persons chosen are not practically ascertainable, the limitation, even though purporting to be confined within proper limits, is void for uncertainty (*f*).

In a will, the persons must be such as must necessarily be in being at the death of the testator (*g*).

Choice of period of twenty-one

649. The period of twenty-one years is a period in gross, without necessary reference to the minority of anyone (*h*). It may be denoted by the minority of any person, who may be the person in

beings. If and in so far as *Re Dean, Cooper-Dean* v. *Stevens* (1898), 41 Ch. D. 552, decided that the lives of animals could be taken for the purpose, it is generally regarded as wrongly decided (see Gray, Rule against Perpetuities, ss. 905, 906; Jarman on Wills, 6th ed., pp. 279, 297).

(*t*) *Gooch* v. *Gooch* (1853), 3 De G. M. & G. 366, 385.

(*a*) In accordance with the second branch of the rule; see p. 302, *ante*.

(*b*) *Thellusson* v. *Woodford* (1805), 11 Ves. 112, H. L.; and see p. 332, *post*.

(*c*) "The candles are all lighted at once" (*Goring* v. *Bickerstaff* (1662), Poll. 31; *Love* v. *Wyndham* (1670), 1 Mod. Rep. 50, *per* TWISDEN, J., at p. 54; *Low* v. *Burron* (1733), 3 P. Wms. 262, *per* Lord TALBOT, L.C., at p. 265; *Gooch* v. *Gooch* (1853), 3 De G. M. & G. 366, *per* Lord CRANWORTH, L.C., at p. 384)

(*d*) "Let the lives be never so many, there must be a survivor, and so it is but the length of that life" (*Scatterwood* v. *Edge* (1697), 1 Salk 229). "The length of time depends not on the number but on the nature of the lives" (*Thellusson* v. *Woodford, supra, per* Lord ELDON, L.C., at p. 145). Accordingly the following large classes of persons have been suggested as validly chosen:—all the members of one of the Houses of Parliament (*Thellusson* v. *Woodford, supra, per* Lord ELDON, L.C., at p. 146); all the members of the universities, or all persons insured in certain insurance societies (see S. C. (1799), 4 Ves. 227, 244, 247); the boys of a named charity or public school (*Pownall* v. *Graham* (1863), 33 Beav. 242, *per* ROMILLY, M.R., at pp 246, 247; and Real Property Commissioners' 3rd Report, p. 38); all His Majesty's soldiers at the time (Lewis, Law of Perpetuity, p. 167); all persons *in esse* capable of succeeding to a named dignity (*Bankes* v. *Le Despencer* (*Baroness*) (1840), 10 Sim. 576, *per* SHADWELL, V.-C.; see *Re Exmouth* (*Viscount*), *Exmouth* (*Viscount*) v. *Praed* (1883), 23 Ch. D. 158); all the living descendants of Her late Majesty Queen Victoria (Encyclopædia of Forms and Precedents, Vol. XII., pp. 630, 638, 644, 654); but see Jarman on Wills, 6th ed., p 297. Caution should, however, be observed in accepting the suggestion that these classes would all now be held to be validly chosen.

(*e*) *Thellusson* v. *Woodford, supra, per* Lord ELDON, L.C., at p. 146, and see *ibid., per* MACDONALD, C.B., at p 136.

(*f*) *Re Exmouth* (*Viscount*), *Exmouth* (*Viscount*) v. *Praed, supra* (all the persons in existence at testator's death and afterwards attaining the title); *Re Moore, Prior* v. *Moore*, [1901] 1 Ch. 936 (all persons living at testatrix's death), see *Pownall* v. *Graham* (1863), 33 Beav. 242.

(*g*) *Gooch* v. *Gooch* (1853), 3 De G. M. & G. 366, 385 (testator's daughter's children, not necessarily born in his lifetime) In accordance with the rule (p. 302, *ante*) they may be children *en ventre sa mère* at his death (*Thellusson* v. *Woodford, supra*).

(*h*) *Cadell* v *Palmer* (1833), 1 Cl. & Fin 372, H L; Lewis, Law of Perpetuity, p. 160.

SECT. 1. **Period allowed for Suspension of Vesting.**

whom the interest is to vest (as in the case of an interest vesting on the majority of the alienee (*i*)), or may be any other person, whether taking an interest in the property (*k*) or not (*l*).

Period for gestation.

650. The period is not an absolute period of twenty-one years and nine months; the addition of a period for gestation is only allowed where gestation exists (*m*).

Period where no lives are chosen.

651. The exact period of twenty-one years is the full extent of the perpetuity period in all cases where the lives of no persons are indicated for the purpose; accordingly, limitations vesting in persons possibly unborn at the end of a specific number of years, more than twenty-one years from the date from which the instrument creating them operates, are invalid (*n*). In certain cases, however, where terms of years exceeding twenty-one years were settled in trust for persons in succession, whose interests under the trusts were valid with respect to the rule, provisions for recouping the beneficiaries in each case, at the end of the term, out of other property for the capital value lost by not selling the term of years, have been treated as valid (*o*).

(*i*) First so held in *Taylor* d. *Smith* v. *Biddall* (1678), 2 Mod. Rep. 289, a case doubted on another point (see *Dungannon* (*Lord*) v. *Smith* (1846), 12 Cl. & Fin. 546, H. L.); followed in *Stephens* v. *Stephens* (1736), Cas *temp.* Talb. 228; and see *Paulet* v. *Dogget* (1688), 2 Vern. 86; *Martin* v. *Long* (1690), 2 Vern. 151; *Thrustout* d. *Small* v. *Denny* (1750), 1 Wils. 270 (see 2 Wils. 337).

(*k*) *Massenburgh* v. *Ash* (1685), 1 Vern. 234, 304; *Maddox* v. *Staines* (1727), 2 P. Wms. 421; *Gulliver* v. *Wickett* (1745), 1 Wils. 105.

(*l*) *Beard* v. *Westcott* (1813), 5 Taunt. 393 (where the person took an interest void under the rule). Thus vesting may take place when the unborn child of a living person attains majority (*Packer* v. *Scott* (1864), 33 Beav. 511, *per* ROMILLY, M.R., at pp. 512, 513); and the period prescribed by a will may extend until the youngest grandchild of the testator attains twenty-one (*Shaw* v. *Rhodes* (1836), 1 My. & Cr. 135, *per* BOSANQUET, J., at p. 154). The inference has been drawn that such a person may be a child *en ventre sa mère* at the commencement of the twenty-one years; see the Real Property Commissioners' 3rd Report, pp. 39, 69, defining the rule (see note (*s*), p. 302, *ante*), and that there may be three periods of gestation—that of the living person, of his child, who is to attain twenty-one, and of the alienee. The question arose, but was not decided, in *Smith* v. *Farr* (1838), 3 Y. & C. (EX.) 328; see the opinions of Lewis (Law of Perpetuity, p. 726 and Supplement, p. 22) and Gray (Rule against Perpetuities, 2nd ed., s. 222) on this case. According to *Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372, H. L., there may be, at all events, two such periods of gestation.

(*m*) *Cadell* v. *Palmer*, *supra*.

(*n*) *Palmer* v. *Holford* (1828), 4 Russ. 403; *Speakman* v. *Speakman* (1850), 8 Hare, 180; and see *Crooke* v. *De Vandes* (1805), 11 Ves. 330; *Baker* v. *Stuart* (1897), 28 Ontario Reports, 439. In *Lachlan* v. *Reynolds* (1852), 9 Hare, 796, the gift was, on the construction adopted, restricted to lives in being. In *Re Daveron*, *Bowen* v. *Churchill*, [1893] 3 Ch. 421, where the beneficiaries under an invalid trust for sale, arising at the expiration of a lease with forty-nine years unexpired, were certain named persons or their issue, the vesting took place within or at the end of lives in being.

(*o*) *Re Gardiner*, *Gardiner* v. *Smith*, [1901] 1 Ch. 697 (provision for keeping on foot a policy of assurance); *Re Hurlbatt*, *Hurlbatt* v. *Hurlbatt*, [1910] 2 Ch. 553 (provision for a reserve fund); see *Wood* v. *Drew* (1864), 33 Beav. 610 (as to which see note (*o*), p. 304, *ante*).

SECT. 2.—*Interests subject to the Rule.*

SUB-SECT. 1.—*Kinds of Property.*

SECT. 2. Interests subject to the Rule.

Property subject to the rule.

652. The rule applies to all private property (*p*) the proprietary rights in which are governed directly by or by reference to the law of England (*q*), including property in colonies into which that law has been introduced (*r*).

Accordingly, real property, including freeholds, copyholds (*s*), and hereditaments, corporeal and incorporeal (*t*), and personal

(*p*) As to the question whether the rule against perpetuities extends to a Crown grant, and whether the Crown can generally, or in the interests of the public, annex to grants in fee conditions against alienation and other conditions which private persons are not competent to annex, see *Cooper* v. *Stuart* (1889), 14 App. Cas. 286, 290, P. C.; *Fowler* v. *Fowler* (1866), 16 I. Ch. R. 507 (where it was held that a grantee from the Crown does not by the grant acquire any particular privilege); *Flower* v. *Hartopp* (1843), 6 Beav. 476, 494; *Anon.* (1506), Y. B. 21 Hen. 7, fos. 7, 8, *per* VAVISOR, J.; Bro. Abr., tit. Prerogative le Roy, pl. 53, 102; Chitty, Prerogatives of the Crown, pp. 386, note (h), 388; 2 Roll. Abr., tit. Prerogative le Roy, p. 164; 6 Bac. Abr., tit. Prerogative (E), 3; *Rangimoeke* v. *Strachan* (1895), 14 New Zealand Law Reports 477; *A.-G.* v. *Cummins* (1895), [1906] 1 I. R. 406. In *Thellusson* v. *Woodford* (1805), 11 Ves. 112, H. L., it was not disputed that the Crown was bound by the rule against perpetuities with regard to a possibly remote limitation of property to the Crown made by the will of a subject; see, generally, title CONSTITUTIONAL LAW, Vol. VI., pp. 486, 487.

(*q*) See title CONFLICT OF LAWS, Vol. VI., pp. 196 *et seq.* In *Raphael* v. *Boehm*, *Cockburn* v. *Raphael* (1852), 22 L. J. (CH.) 299, trusts declared by a testator domiciled abroad of his movable estate, with an express reference to the law of inheritance in Great Britain, were invalid by the rule. Provisions in a will infringing the rule against perpetuities, or the Thellusson Act (see p. 370, *post*), are not rendered valid by execution of the will under the Domicile Act, 1861 (24 & 25 Vict. c. 121) (*Re Grassi*, *Stubberfield* v. *Grassi*, [1905] 1 Ch. 584, *per* BUCKLEY, J., at p. 592 referring to *Freke* v. *Carbery* (*Lord*) (1873), L. R. 16 Eq. 461, a case under the Thellusson Act).

(*r*) *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L. R. 6 P. C. 381, approving *Choa Choon Neoh* v. *Spottiswoode* (1869), Wood's Oriental Cases, Appendix, 1; 1 Kyshe's Reports, 216. As regards the applicability of the rule to an infant colony, see 1 Bl. Com. 107; *Cooper* v. *Stuart* (1889), 14 App. Cas. 286, P. C. (a case of a Crown grant of public property in a young colony, to which the rule was, in the circumstances of that case, held inapplicable); and see title DEPENDENCIES AND COLONIES, Vol. X., pp. 565, 568.

(*s*) *Griffith* v. *Harrison* (1791), 3 Bro. C. C. 410; *Doe* d. *Blesard* v. *Simpson* (1842), 3 Man. & G. 929; *Blagrove* v. *Hancock* (1848), 16 Sim. 371; *Taylor* v. *Frobisher* (1852), 5 De G. & Sm. 191; Gray, Rule against Perpetuities, 2nd ed., s. 318.

(*t*) *E.g.*, rights to minerals (*Thomas* v. *Thomas* (1902), 87 L. T. 58, C. A.), or to royalties thereon (*Edwards* v. *Edwards*, [1909] A. C. 275), or to rents (*Hartopp* v. *Carbery* (*Lord*) (1819), 1 Sanders, Uses and Trusts, 5th ed., p. 205, an executory devise of a rent; see Gray, Rule against Perpetuities, 2nd ed., s. 316, n.). The question whether common law grants of incorporeal hereditaments (which may commence *in futuro*, see Gilbert, Rents, p. 59; Lewis, Law of Perpetuity, pp. 598, 603) are subject to the rule has been frequently discussed. There was no limit fixed by the common law as to the time at which they might commence; see Real Property Commissioners' 3rd Report, p. 29; Lewis, Law of Perpetuity, pp. 603, 619, 620. The decided preponderance of opinion, however, including that of the Real Property Commissioners (see 3rd Report, p. 36), is in favour of the view that the limit fixed by the rule against perpetuities either

SECT. 2. Interests subject to the Rule.

property (*u*), including chattels real and personal (*a*), are alike subject to the rule, in so far as interests of the nature hereinafter described (*b*) are created in them.

Lex loci situs.

653. The rule does not apply to immovable estate in Scotland or foreign countries, or to funds, bequeathed on trust to invest them in the purchase of immovable estates in Scotland or abroad, limited or to be settled in a manner valid by the law of the *lex loci situs*, although invalid by English law (*c*).

SUB-SECT. 2.—*Legal Interests.*

(i.) *Real Estate.*

Interests in real estate.

654. The following legal estates and interests in real estate (*d*) have been held to be subject to the rule:—executory devises (*e*);

does or ought to apply; see Gray, Rule against Perpetuities, 2nd ed., s. 314. In *Ardley* v. *St. Pancras Guardians* (1870), 39 L. J. (CH.) 871, however, objection on this ground seems to have been taken to an easement which would appear to have been invalid, if the rule applied, the above-mentioned passages from Lewis, Law of Perpetuity, and the Real Property Commissioners' 3rd Report, being cited in argument; but the easement was held validly created (see, however, Gray, Rule against Perpetuities, 2nd ed., s. 314). In *Gilbertson* v. *Richards* (1860), 5 H. & N. 453, Ex. Ch., a proviso that a rentcharge (which in that case appears to have been created by way of use) should arise as soon as mortgagees should enter on property was held valid on the ground that it took effect as a restriction on the estate of the mortgagees and was analogous to powers of sale, which are incidental to a mortgagee's estate; the *dictum* of MARTIN, B., S. C. (1859), 4 H. & N. 277, at p. 297, which was adopted and applied in *Birmingham Canal Co.* v. *Cartwright* (1879), 11 Ch. D. 421, 432, to the effect that a rent might be granted to arise in any contingency, however remote, if limited to an existing person capable of alienating it, being dissented from, and the latter case overruled, in *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, 572, 573, 584, 588, C. A. *Sharpe* v. *Durrant* (1911), 55 Sol. Jo. 423; affirmed [1911] W. N. 158, C. A., appears to be a decision that the rule applies to such interests, but the decision is grounded only on the opinion of Lewis, Law of Perpetuity, pp. 603, 619, 620. For the contrary view, see 27 Law Quarterly Review, p. 151; as to the effect of the rule on the grant of an *interesse termini*, compare p. 316, *post*; as to common law assurances in general, see p. 330, *post*; as to vested interests with postponed enjoyment, see p. 338, *post*.

(*u*) The authorities as to the two kinds of property are treated as mutual: "whenever you stop in the limitation of a fee upon a fee, there will we stop in the limitation of a term of years" (*Norfolk's (Duke) Case* (1685), 3 Cas. in Ch. 1, H. L., *per* Lord NOTTINGHAM, L.C., at p. 36); and compare the definition of a perpetuity in *Stanley* v. *Leigh* (1732), 2 P. Wms. 686, *per* JEKYLL, M.R., at p. 687; and the limits stated for personal estate in *Jee* v. *Audley* (1787), 1 Cox, Eq. Cas. 324; Lewis, Law of Perpetuity, p. 169.

(*a*) *Sheffield* v. *Orrery* (*Lord*) (1745), 3 Atk. 282; *Jee* v. *Audley*, *supra*.

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

(*c*) *Fordyce* v. *Bridges* (1847), 2 Ph. 497; see, further, p. 322, *post*.

(*d*) As to legal estates and interests in real estate, see, generally, title REAL PROPERTY AND CHATTELS REAL; see also titles SETTLEMENTS; TRUSTS AND TRUSTEES; WILLS.

(*e*) Lewis, Law of Perpetuity, c. x.; see note (*l*), p. 300, *ante*. The following are examples of executory devises which have been held valid:—after a devise in fee simple, a devise over on a death without issue in the lifetime of a living person (*Pells* v. *Brown* (1620), Cro. Jac. 590; *Roe* d. *Sheers* v. *Jeffery*

springing and shifting uses (*f*); legal contingent remainders (*g*); and certain rights of entry on breach of a condition subsequent (*h*).

SECT. 2. Interests subject to the Rule.

Legal contingent remainders.

655. The applicability of the rule to legal contingent remainders (*i*) has been the subject of much controversy (*k*). In any

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(1798), 7 Term Rep. 589; Lewis, Law of Perpetuity, p. 176); a devise to the eldest male lineal descendant of A. living at the death of the survivor of all male descendants of the testator in being at the testator's death (*Thellusson* v. *Woodford* (1805), 11 Ves. 112, H. L.), or to the person who would have been entitled at the determination of a term expiring twenty years after the death of the survivor of twenty-eight persons living at the testator's decease, had the estate been settled in a certain manner (*Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372, H. L.); a devise to the children of a living person, taking vested interests at birth or at an age under twenty-one (see p. 345, *post*). The following, on the other hand, are examples of executory devises which have been held invalid:—a devise to the first son of A. who should be bred a clergyman (*Proctor* v. *Bath and Wells (Bishop)* (1794), 2 Hy. Bl. 358); to the children of a living person who should attain twenty-two, or any other age greater than twenty-one (*Bull* v. *Pritchard* (1847), 5 Hare, 567; argued as an executory devise, see *Re Finch, Abbiss* v. *Burney* (1881), 17 Ch. D. 211, C. A., *per* MALINS, V.-C., at p. 221); a devise in strict settlement, with a provision that no devisee should have a vested interest until the age of twenty-four, so as to create an executory devise (*Re Wrightson, Battie-Wrightson* v. *Thomas*, [1904] 2 Ch. 95, C. A., explained in *White* v. *Summers*, [1908] 2 Ch. 256, 267, 269); a devise of unworked minerals under certain lands on being worked (*Thomas* v. *Thomas* (1902), 87 L. T. 58, C. A.; see *Edwards* v. *Edwards*, [1909] A. C. 275).

(*f*) *Davies* v. *Speed* (1692), 2 Salk. 675, *per* HOLT, C.J.; *Lloyd* v. *Carew* (1697), Show. Parl. Cas. 137; *Roe* d. *Wilkinson* v. *Tranmer* (1757), 2 Wils. 75; *Carwardine* v. *Carwardine* (1758), 1 Eden, 27, 34; Lewis, Law of Perpetuity, p. 149; *Blandford* v. *Thackerell* (1793), 2 Ves. 238, 241, 242; *Savill Brothers, Ltd.* v. *Bethell*, [1902] 2 Ch. 523, C. A. A shifting clause to take effect upon an estate in fee simple must be framed to do so within the proper limits (*Bennett* v. *Bennett* (1864), 2 Drew. & Sm. 266, 276 Real Property Commissioners' 3rd Report, p. 36).

(*g*) *Re Frost, Frost* v. *Frost* (1889), 43 Ch. D. 246, *per* KAY, J., at p. 253; *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535; and see *Whitby* v. *Von Luedecke*, [1906] 1 Ch. 783: in each of these cases the remainder was created by will, or by way of use.

(*h*) See p. 314, *post*

(*i*) See note (*g*), *supra*.

(*k*) The majority of text-writers, including Mr. Fearne, considered that legal remainders were governed by the old rule against remote possibilities, also now known as the rule in *Whitby* v. *Mitchell* (1890), 44 Ch. D. 85, C. A., rather than by the modern rule against perpetuities; see 49 Sol. Jo. 414 (where a number of such opinions of text-writers are collected). Others were of opinion that the modern rule applied or should be applied to them, and some even denied the existence of the old rule. *Whitby* v. *Mitchell*, *supra*, has established that the old rule is in force and that it applies to legal remainders; *Re Frost, Frost* v. *Frost*, *supra*, and *Re Ashforth, Sibley* v. *Ashforth*, *supra*, have decided that the modern rule applies to them. The result of these authorities appears to be that legal remainders are subject to both rules. Professional opinion is, however, still divided on the subject, and the controversy has not been set at rest; see Jarman on Wills, 6th ed., pp. 368—373, and the notes thereto; Challis, Real Property, 3rd ed., p. 273. As to the observations of SUGDEN, L.C., in *Cole* v. *Sewell* (1843), 4 Dr. & War. 1, to the effect that remoteness was out of the question in case of a remainder, see Lewis, Law of Perpetuity, Supplement, pp. 97 *et seq.*; Gray, Rule against Perpetuities, 2nd ed., s. 287; *Re Ashforth, Sibley* v. *Ashforth*, *supra*, *per* FARWELL, J., at p. 540.

case, a legal contingent remainder, where the particular estate is limited to a person or persons in being, may be valid whatever the contingency on which it depends, though it might be invalid if limited as an executory devise (*l*). In such a case, the nature of a remainder affords a guarantee against remoteness, because the remainder, unless ready to take effect *eo instanti* on the determination of the particular estate, can never take effect at all as a remainder (*m*). As regards such a remainder limited by will, however, there is a doubt as to the effect thereon of the Land Transfer Act, 1897 (*n*).

By statute a legal contingent remainder, limited on a contingency not too remote under the rule, which would therefore be valid if limited as an executory devise, may take effect notwithstanding the determination of the particular estate before the contingent remainder vests (*o*).

Common law conditions.

656. Rights of entry by a grantor or his heirs (*p*), under or on breach of a common law condition subsequent, have been held to be subject to the rule, at all events in cases where the legal estate

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(*l*) *Jack* d. *Westby* v. *Fetherstone* (1829), 2 Hud. & B. 320; *Doe* d. *Winter* v. *Perratt* (1843), 9 Cl. & Fin. 606, H. L.; *Cole* v. *Sewell* (1848), 2 H. L. Cas. 186; *Symes* v. *Symes*, [1896] 1 Ch. 272.

(*m*) This rule does not apply if the determination of the particular estate is caused by forfeiture, surrender, or merger: see Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 8; title REAL PROPERTY AND CHATTELS REAL.

(*n*) 60 & 61 Vict. c. 65, ss. 1, 2; see 49 Sol. Jo. 379. If the estate conferred by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), on personal representatives is sufficient to satisfy the feudal rule prohibiting abeyance of the seisin, and to prevent the application of the common law rule that a contingent remainder must be ready to take effect in possession *eo instanti* on the determination of the particular estate (as to which compare *Marshall* v. *Gingell* (1882), 21 Ch. D. 790, 796; *Re Brooke, Brooke* v. *Brooke*, [1894] 1 Ch. 43), then it may be held that there is no reason against such a remainder in a will affected by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), taking effect according to the intention, although not ready to come into possession on the termination of prior estates. Such, it has been decided, is the effect of similar enactments in other jurisdictions where the English common law is in force (*Re Beavis, Beavis* v. *Beavis* (1906), 7 New South Wales State Reports, 66; *Re Campion*, [1908] South Australian Law Reports, 1). But it may result that there will be nothing to save such limitations from the objection, if any, of remoteness; compare *Re Finch, Abbiss* v. *Burney* (1881), 17 Ch. D. 211, C. A. It may, therefore, have to be decided whether an interest limited as a legal contingent remainder, on a contingency too remote under the rule, in a will of a testator dying on or after the 1st January, 1898, is void, notwithstanding that it is ready to come into possession on the termination of preceding life estates.

(*o*) Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), s. 1.

(*p*) "The difference between a condition, properly so called, and a conditional limitation or executory devise is that in the case of a condition, the estate is to revert to the grantor or his heirs; in the other cases it is limited over to other persons" (*Re Dugdale, Dugdale* v. *Dugdale* (1888), 38 Ch. D. 176, *per* KAY, J., at p. 179; Fearne, Contingent Remainders, p. 15). In the case of conditional limitations and executory devises no difficulty arises in applying the rule against perpetuities. Where a shifting use, not a right of entry, is adopted, the rule directly applies (Real Property Commissioners' 3rd Report, p. 37; see note (*f*), p. 313, *ante*).

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to be defeated by the right arises either in a will or by virtue of the Statute of Uses (*q*); but the question has occasioned much difference of opinion (*r*). Rights of entry or of re-entry in leases,

(*q*) 27 Hen. 8, c. 10; see *Re Macleay* (1875), L. R. 20 Eq. 186, 187, 188 (devise on condition not to sell out of the family); *Dunn* v. *Flood* (1883), 25 Ch. D. 629, *per* NORTH, J., at pp. 632, 633 (a right of entry on breach of restrictive covenant); and see S. C. (1885), 28 Ch. D. 586, C. A., *per* BAGGALLAY, L.J., at p. 592; *Re Hollis' Hospital* (*Trustees*) *and Hague's Contract*, [1899] 2 Ch. 540, 557, 555 (proviso for reverter on premises being employed or converted to uses other than those mentioned in the deed of lease and release); approved in *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535, 545, 546; and applied in *Re Da Costa, Clarke* v. *Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337 (devise construed to be an absolute gift, with condition as to publishing annual accounts of payments and receipts of a charity). It cannot be affirmed, however, that the question of the applicability of the rule against perpetuities to common law conditions has been finally discussed or settled in all its bearings. It has been pointed out that the references to the subject in *Re Macleay*, *supra*, and *Re Ashforth, Sibley* v. *Ashforth*, *supra*, were *dicta*. According to the report in *Dunn* v. *Flood* (1883), 25 Ch. D. 629, the power of entry was created by covenant only and in favour of the vendors, without mentioning their heirs and assigns. In *Re Hollis' Hospital* (*Trustees*) *and Hague's Contract*, *supra*, BYRNE, J., while expressing a decided opinion that the condition was void, abstained from forcing the title on an unwilling purchaser: the gift in question was to a charity, and was decided on the law of charities before the Charitable Uses Act, 1736 (9 Geo. 2, c. 36). As to the present law, see the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (4). *Re Da Costa, Clarke* v. *Church of England Collegiate School of St. Peter*, *supra*, seems the only case where the heir of the grantor, or persons claiming through the grantor, were represented. The reasoning (following that of the Real Property Commissioners' 3rd Report, p. 30) of PALLES, C.B., in *A.-G.* v. *Cummins* (1895), [1906] 1 I. R. 406 (which was a case of a condition determining a determinable fee, upon payment of a sum of money by the Crown, in a grant operating at common law, independently of the Statute of Uses), does not seem to be altogether consistent with the cases above referred to. It is submitted that the decision in *A.-G.* v. *Cummins*, *supra*, can stand consistently with those cases. If there be such an estate as a determinable fee, it would appear to follow that there may be a valid condition determining the fee at an indefinite future time. In America, conditions violating the rule against perpetuities have been frequently upheld. In *Cooper* v. *Stuart* (1889), 14 App. Cas. 286, 287, P. C., the question was raised, but was not decided apart from the circumstances of that case, where the grant was a Crown grant in a young colony (see note (*r*), p. 311, *ante*; see also Gray, Rule against Perpetuities, ss. 305, 312). The trend of modern authority is, however, decidedly in favour of applying the rule to common law conditions subsequent; and Mr. Gray has expressed the opinion that "rights of entry for conditions broken are within both the letter and the spirit of the rule" (Gray, Rule against Perpetuities, 2nd ed., s. 304).

(*r*) The Real Property Commissioners (see 3rd Report, p. 30) instanced a devise on condition of taking and continuing "name and arms," and reported that such rights, having been uninfluenced by the Statute of Uses, 27 Hen. 8, c. 10, or by the doctrine of trusts or devises, had never been considered to be subject to the rule. They appear to have recommended that the rule should be applied to them by legislation. The text-writers are divided on the subject—1 Sanders, Uses and Trusts, p. 199; Lewis, Law of Perpetuity, p. 616; and Gray, Rule against Perpetuities, 2nd ed., s. 300 a, favour their inclusion; while others, including Challis, Real Property, 3rd ed., p. 187; Sweet (note to Challis, Real Property, 3rd ed., p. 207; and Jarman on Wills, 6th ed., pp. 374—376, consider the rule inapplicable, and the *dicta* and decisions cited in note (*q*) *supra*, erroneous.

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necessarily incidental to and co-extensive with estates which are themselves unaffected by the rule, must be excepted from the rule (*s*).

(ii.) *Personal Estate.*

Executory bequests.

657. Executory limitations of personal estate are subject to the rule (*t*).

Interesse termini.

658. The *interesse termini*, created by the grant to a living person of a lease to commence at a fixed or ascertainable date *in futuro*, appears to be treated as a valid interest, although the date of commencement of the lease is fixed at a time too remote if the rule were applicable (*a*).

Future goods.

659. The rule against perpetuities has also never been applied to assignments of future goods, the property in which at law passes on appropriation, which may take place at a possibly remote period (*b*): a present sale of such goods operates merely as an agreement for sale (*c*).

(*s*) See p. 331, *post*.

(*t*) *Maddox* v. *Staines* (1727), 2 P. Wms. 422; *Brooks* v. *Taylor* (1729), Mos. 188; *Beauclerk* v. *Dormer* (1742), 2 Atk. 308; *Sheffield* v. *Orrery* (*Lord*) (1745), 3 Atk. 282, 287; *Butterfield* v. *Butterfield* (1748), 1 Ves. Sen. 133, 154; *Griffiths* v. *Grieve* (1819), 1 Jac. & W. 31; *Lepine* v. *Ferard* (1831), 2 Russ. & M. 378; *A.-G.* v. *Bright* (1836), 2 Keen, 57. The rule was established as to personal property with reference to bequests of future interests in terms of years (*Sanders* v. *Cornish* (1631, Cro. Car. 230; *Lamb* v. *Archer* (1694), 1 Salk. 225, not following *Child* v. *Baylie* (1618), Cro. Jac. 459; *Fletcher's Case* (1709), 1 Eq. Cas. Abr. 193); and see 1 Eq. Cas. Abr. 190, n. As regards the creation of future interests in chattels personal by will, see title WILLS; Jarman on Wills, 6th ed., pp. 1453 *et seq.* As regards the creation of future interests in chattels personal by deed, see title PERSONAL PROPERTY; Gray, Rule against Perpetuities, 2nd ed., Appendix F, s. 829.

(*a*) *Smith* v. *Day* (1834), 2 M. & W. 684; *Knight* v. *City of London Brewery Co.*, [1912] 1 K. B. 10; although in neither of these cases was any question of perpetuity raised. Such interests appear to be treated as vested interests, to which the rule does not apply; see *Redington* v. *Browne* (1893), 32 L. R. Ir. 347, *per* BEWLEY, J., at p. 356. In *Norfolk's Case* (*Duke*) (1685), 3 Cas. in Ch. 1, H. L., both PEMBERTON, C.J. (*ibid.*, at p. 23), and Lord Keeper NORTH (S. C. (1683) 1 Vern. 164), considered that a new term might have been created, valid both at law and in equity, to commence on the contingency which, in that case, as applied to the trust of an existing term, they considered too remote; compare *Warman* v. *Seaman* (1675), Poll. 112 (term created after the death of the lessor and of any wife of his). 1 Sanders, Uses and Trusts, p. 199; the Real Property Commissioners' 3rd Report, p. 29; and Lewis, Law of Perpetuity, pp. 613, 620, advocated the application of the rule to these interests. There must at common law be no uncertainty as to when the term commences or whether or not it shall commence at all (*Green* v. *Edwards* (1591), Cro. Eliz. 216); and see, generally, title LANDLORD AND TENANT, Vol. XVIII., p. 405.

(*b*) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 5; *Clements* v. *Matthews* (1883), 11 Q. B. D. 808, C. A. Until appropriation, the grantee has only an equitable interest (*Joseph* v. *Lyons* (1884), 15 Q. B. D. 280, C. A.; *Hallas* v. *Robinson* (1885), 15 Q. B. D. 288, C. A.); see, further, title SALE OF GOODS.

(*c*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 5 (3).

SUB-SECT. 3.—*Equitable Interests.*

SECT. 2. **Interests subject to the Rule.**

Equitable interests generally.

660. Equitable estates and interests (*d*) of all descriptions, including contingent remainders of equitable estates (*e*), are subject to the rule. The mode in which the estate or interest is created, whether by devise, gift *inter vivos*, or contract, is immaterial (*f*).

Executory trusts.

661. Executory trusts are subject to the rule in common with other trusts (*g*); but they are executed by the court in such a way as to preclude the objection arising from the rule and moulded so as to carry out the intention of the testator as far as the rules of law admit (*h*). Any provisions which offend against the rule are omitted (*i*), modified (*k*), or confined within the perpetuity period (*l*), unless the creator of the trust has specifically or by necessary implication directed their inclusion (*m*), or the trust is wholly incapable of being executed so as to avoid the objection (*n*).

Construction.

Construction of qualifying words in executory trusts.

662. Where property is settled or directed to be settled in a particular course of succession, as far as the rules of law will admit (*o*), or with any other qualifying words to the like effect, then, according to the intention shown, the qualification may refer either to the quality of the property, to which the course of succession may be inapt (as in the case of personal property settled to follow real estate)—this being the ordinary sense of the words in such a case (*p*)—or to the length of time that the property is to be tied up, having regard to the rule against perpetuities.

In the first case, no executory trust is necessarily created, nor

(*d*) *Massenburgh* v. *Ash* (1685), 1 Vern. 234, 304; *Norfolk's* (*Duke*) *Case* (1685), 3 Cas. in Ch. 1, H. L.; *Dungannon* (*Lord*) v. *Smith* (1846), 12 Cl. & Fin. 546, H. L.

(*e*) *Re Finch, Abbiss* v. *Burney* (1881), 17 Ch. D. 211, C. A.; *Re Wilmer's Trusts, Moore* v. *Wingfield*, [1903] 1 Ch. 874, 879; affirmed, [1903] 2 Ch. 411, C. A.; *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535.

(*f*) *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, C. A., *per* JESSEL, M.R., at p. 581, C. A.

(*g*) *Gower* v. *Grosvenor* (1740), 5 Madd. 337; *Marlborough* (*Duke*) v. *Godolphin* (*Earl*) (1759), 1 Eden, 404, 422; *Blackburn* v. *Stables* (1811), 2 Ves. & B. 367; Lewis, Law of Perpetuity, p. 574.

(*h*) *Christie* v. *Gosling* (1866), L. R. 1 H. L. 279, 290.

(*i*) *Miles* v. *Harford* (1879), 12 Ch. D. 691.

(*k*) *Dorchester* (*Lord*) v. *Effingham* (*Earl*) (1813), 10 Sim. 537, n.; *Woolmore* v. *Burrows* (1827), 1 Sim. 512.

(*l*) *Newcastle* (*Duke*) v. *Lincoln* (*Countess*) (1797), 3 Ves. 387; on appeal (1806), 12 Ves. 218, H. L.; *Bankes* v. *Le Despencer* (*Baroness*) (1840), 10 Sim. 576 (for the order, see S. C. (1843), 11 Sim. 508; Lewis, Law of Perpetuity, Appendix III.); *Lyddon* v. *Ellison* (1854), 19 Beav. 565; *Shelley* v. *Shelley* (1868), L. R. 6 Eq. 540.

(*m*) *Sackville-West* v. *Holmesdale* (*Viscount*) (1870), L. R. 4 H. L. 543.

(*n*) *Tregonwell* v. *Sydenham* (1815), 3 Dow, 194, H. L. (where a term was validly created, but the trusts declared of the term were incapable of execution, and there was a resulting trust to the heir; see Sugden Property, p. 326; Gray, Rule against Perpetuities, 2nd ed., s. 419, on this case); Lewis, Law of Perpetuity, p. 584.

(*o*) As to such words, see also note (*m*), p. 308, *ante*.

(*p*) *Vaughan* v. *Burslem* (1790), 3 Bro. C. C. 101; *Lincoln* (*Countess*) v. *Newcastle* (*Duke*) (1806), 12 Ves. 218, H. L.; *Gosling* v. *Gosling* (1862), 1 De G. J. & Sm. 1; affirmed *sub nom. Christie* v. *Gosling* (1866), L. R. 1 H. L. 279; and see Gray, Rule against Perpetuities, 2nd ed., ss. 364, 365.

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are the interests deemed to be settled to the limits of time allowed by the rule (*q*).

In the second case, if the intention is that the property is to be tied up as long as possible, then an executory trust may be created; but such trust must be executed by prolonging the settlement, not to the furthest limit possible in any event under the rules, but to that convenient limit which will enable the primary purpose of the instrument to be carried out (*r*). In such a case the court inclines to give life interests only to all persons, becoming entitled under the limitations, who are in existence at the date of the instrument, or the death of the testator, creating the limitations (*s*).

Trusts for sale.

663. A trust for sale arising at a time beyond the perpetuity period is invalid (*t*); but, where the trust for sale is mere machinery for facilitating a division between the persons for whom the property is destined, effect will be given to the equitable interests as if the trust for sale were omitted (*a*). Where, therefore, the vesting of these equitable interests is within the perpetuity period, they are not rendered invalid by the failure of the trust for sale (*b*), but devolve as if the property were unaffected by the trust for sale (*c*); but where the vesting of these equitable interests may not be within the perpetuity period, they are invalid (*d*).

On the other hand, an estate in trustees may be validly created although the beneficial interests are void for remoteness (*e*).

(*q*) See the cases cited in note (*p*), p. 317, *ante*; *Deerhurst* (*Lord*) v. *St. Albans* (*Duke*) (1820), 5 Madd. 232 (where, however, the order made was reversed on appeal); *Tollemache* (*Lady*) v. *Coventry* (*Earl and Countess*) (1834), 2 Cl. & Fin. 611, H. L.) (see the argument in *Tollemache* (*Lady*) v. *Coventry* (*Earl and Countess*), *supra*, of Sir C. PEPYS, S.-G., and Mr. PRESTON, which is referred to in *Re Hill*, *Hill* v. *Hill*, [1902] 1 Ch. 807, 813, 814, C. A., as containing the *ratio decidendi* of the decision in *Tollemache* (*Lady*) v. *Coventry* (*Earl and Countess*), *supra*); *Gosling* v. *Gosling* (1862), 1 De G. J. & Sm. 1, 14. *Gower* v. *Grosvenor* (1740), 5 Madd. 337, and *Trafford* v. *Trafford* (1746), 3 Atk. 347, are not law on this point; see, further, title REAL PROPERTY AND CHATTELS REAL.

(*r*) *Lincoln* (*Countess*) v. *Newcastle* (*Duke*) (1806), 12 Ves. 218, 236, H. L., *per* Lord ELDON dissenting; *Williams* v. *Teale* (1847), 6 Hare, 239; *Shelley* v. *Shelley* (1868), L. R 6 Eq. 540.

(*s*) *Woolmore* v. *Burrows* (1827), 1 Sim. 512, *per* HART, V.-C., at p. 526, adopted in *Banks* v. *Le Despencer* (*Baroness*) (1840), 10 Sim. 576, 591, 594, *per* SHADWELL, V.-C.; *Williams* v. *Teale* (1847), 6 Hare, 239, 255; and see *Pownall* v. *Graham* (1863), 33 Beav. 242.

(*t*) *Hale* v. *Pew* (1858), 25 Beav 335; *Re Wood*, *Tullett* v. *Colville*, [1894] 3 Ch. 381, C. A.; *Re Davies and Kent's Contract*, [1910] 2 Ch. 35, C. A.; *Re Bewick*, *Ryle* v *Ryle*, [1911] 1 Ch. 116.

(*a*) *Goodier* v. *Edmunds*, [1893] 3 Ch. 455, following *Goodier* v. *Johnson* (1881), 18 Ch. D. 441, C. A., *per* JESSEL, M.R., at p. 446; followed in *Re Daveron*, *Bowen* v. *Churchill*, [1893] 3 Ch. 421; and approved in *Re Appleby*, *Walker* v. *Lever*, *Walker* v. *Nisbet*, [1903] 1 Ch. 565, C. A.

(*b*) *Goodier* v. *Edmunds*, *supra*; *Re Daveron*, *Bowen* v. *Churchill*, *supra*; *Re Appleby*, *Walker* v. *Lever*, *Walker* v. *Nisbet*, *supra*.

(*c*) *Goodier* v. *Edmunds*, *supra*; *Re Appleby*, *Walker* v. *Lever*, *Walker* v. *Nisbet*, *supra*.

(*d*) As in case of a gift to a class living or ascertainable at the time of sale (*Read* v. *Gooding* (1856), 21 Beav. 478; *Blight* v. *Hartnoll* (1881), 19 Ch. D. 294; *Re Bewick*, *Ryle* v. *Ryle*, [1911] 1 Ch. 116).

(*e*) *Tregonwell* v. *Sydenham* (1815), 3 Dow, 194, H. L.; *Newman* v.

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664. The rule does not affect validly created trusts lasting a possibly indefinite period where the interests are vested and the beneficiaries may therefore, apart from disability, put an end to the trust (*f*), but an indefinite trust where the interests may not be vested within the perpetuity period, and the trust is therefore not so determinable, does not escape the rule (*g*).

Trusts of indefinite duration.

A discretionary trust, therefore, of the income of a fund for the maintenance of a class of persons, some unborn, which may possibly last longer than the perpetuity period, is void (*h*). On the other hand, a trust of income, not discretionary, for the maintenance of the children of a living person, in equal shares, where the interest of each child is fixed, is not void, even although the trust may terminate after the perpetuity period (*i*).

SUB-SECT. 4.—*Interests under Contracts.*

665. The rule against perpetuities is not concerned with contracts as such, or with contractual rights and obligations as such. A contract to pay a sum of money, with interest in the meantime, although unlimited in point of time, is not, on that account, invalid (*k*). A contract may have reference to or be

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Newman (1839), 10 Sim. 51; in both of which cases the beneficial interest went to the heir-at-law.

(*f*) See pp. 326, 327, *post;* and see title TRUSTS AND TRUSTEES.

(*g*) *Mainwaring* v. *Baxter* (1800), 5 Ves. 458 (restraining disentail); *Thomson* v. *Shakespear* (1860), 1 De G. F. & J. 399, C. A. (to an official for the time being); *Smith* v. *Cuninghame* (1884), 13 L. R. Ir. 480; *Trustees, Executors, and Agency Co.* v. *Bush* (1908), 28 New Zealand Law Reports, 117; *Girard Trust Co.* v. *Russell* (1910), 179 Federal Reporter, 446; and see p. 297, *ante;* and as to limitations to a series, see p. 347, *post.* As to gifts to the survivors of a class of unborn persons, see p. 337, *post.*

(*h*) *Re Blew, Blew* v. *Gunner*, [1906] 1 Ch. 624, not following *Re Wise, Jackson* v. *Parratt*, [1896] 1 Ch. 281, and *Re Watson, Cox* v. *Watson*, [1892] W. N. 192. In *Longfield* v. *Bantry* (1885), 15 L. R. Ir. 101, a trust of a residue to apply the income on improvement of two estates at discretion was held to be confined to a reasonable time.

(*i*) *Gooding* v. *Read* (1853), 4 De G. M. & G. 510, C. A.; explained and distinguished in *Re Blew, Blew* v. *Gunner, supra;* see also *Patching* v. *Barnett* (1881), 51 L. J. (CH.) 74, C. A. In *Re O'Brien's Estate, Prytz* v. *Trustees, Executors and Agency Co., Ltd.* (1898), 24 Victorian Law Reports, 360, the same rule was applied, the shares of the children being fixed, but a discretion being given as to the part of the share applied for maintenance. In *Pickford* v. *Brown, Brown* v *Brown* (1856), 2 K. & J. 426, the discretionary trust was treated as a part of the void gift to the class and therefore itself void.

(*k*) *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, 576, 580, C. A.; *Walsh* v. *Secretary of State for India* (1863), 10 H. L. Cas. 376; *Witham* v. *Vane* (1883), Challis, Real Property, Appendix V., H L; and as to a covenant to pay a sum of money on an indefinite failure of issue of a person, see *Pinbury* v. *Elkin* (1719), 1 P. Wms. 563, *per* PARKER, L.C., at p. 566; *Pleydell* v. *Pleydell* (1721), 1 P. Wms. 748, 750. A mere personal contract relating to land would not be enforceable against an assignee of the land unless it ran in equity with the land under the doctrine of *Tulk* v. *Moxhay* (1848), 2 Ph. 774; see p. 299, *ante; London and South Western Rail. Co.* v. *Gomm, supra,* at p. 582. Contracts running with the land in equity are an exception to the rule, either on the analogy of a covenant running with the land at law or of an easement (*ibid.*, at

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connected with land, for example, an ordinary contract for the sale or purchase of land, and yet, although unlimited in point of time, may be a mere personal contract unaffected by the rule (*l*).

Contracts creating limitations of property.

666. But when a contract creates a right of property to arise *in futuro*, or in other words a limitation of property, the rule applies (*m*). What the rule applies to is not the contract, which in itself is not illegal, but the right of property or limitation which arises from the contract (*n*). An equitable estate or interest to arise *in futuro*, under a contract, is also within the rule (*o*). Although a contract is not within the rule, a transfer of a contract may be within it (*p*).

Construction of contract.

A contract relating to a right of or equitable interest in property *in futuro* may be intended to create a limitation of land only, in which case, if the limitation is to take effect beyond the perpetuity period, the contract is wholly void and unenforceable (*q*); or the contract may, upon its true construction, be a personal contract only, in which case the rule does not apply to it (*r*); or it may, upon its true construction, be, as regards the original covenantor, both a personal contract and a contract attempting to create a remote limitation, in which case the limitation will be bad for perpetuity, but the personal contract will be enforceable, if the case otherwise admits, against the promisor by specific performance or by damages (*s*), or against his personal representatives in damages only (*t*). In all cases it is a question of construction whether the contract is intended to create a limitation of property only, or a personal obligation only, or both.

Options to purchase.

667. A common example of an equitable interest to arise *in futuro* under a contract is an option to purchase or a right of pre-emption or repurchase in or collateral to a conveyance or to a lease for a term of more than twenty-one years (*u*). On the other hand,

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p. 583). As to covenants running with the land at law, see p. 300, *ante*; p. 323, *post*. As to restrictive covenants binding the land, see p. 299, *ante*.

(*l*) *South Eastern Railway* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.*, [1910] 1 Ch. 12, C. A., *per* FARWELL, L.J., at p. 33; compare *Re Doyle's Estate*, [1907] 1 I. R. 204, 211.

(*m*) *South Eastern Railway* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.*, *supra*, at pp. 33, 34; *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, *per* JESSEL, M.R., at p. 582.

(*n*) *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532, 538, 539.

(*o*) *London and South Western Rail. Co.* v. *Gomm*, *supra*, *per* JESSEL, M.R., at p. 581.

(*p*) See Gray, Rule against Perpetuities, 2nd ed., s. 329, n.

(*q*) *London and South Western Rail. Co.* v. *Gomm*, *supra*, at p. 580; see *Starcher Brothers* v. *Duty* (1907), 123 American State Reports, 990.

(*r*) *Stocker* v. *Dean* (1852), 16 Beav. 161; compare *Re Cousins*, *Alexander* v. *Cross* (1885), 30 Ch. D. 203, C. A. (devise, giving an option of purchase on death of annuitants).

(*s*) *South Eastern Railway* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.*, *supra*, at p. 33.

(*t*) *Worthing Corporation* v. *Heather*, *supra*.

(*u*) *London and South Western Rail. Co.* v. *Gomm*, *supra*; *Worthing Corporation* v. *Heather*, *supra*; *Woodall* v. *Clifton*, [1905] 2 Ch. 257, C. A.; and see titles LANDLORD AND TENANT, Vol. XVIII., p. 301; SALE OF

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such an option, confined to the lives of the parties and not more than twenty-one years after, is valid (*a*); it is not sufficient, however, to confine it to the period of continuance of a strict settlement, which may last an indefinite period (*b*). An option taken by a railway company may be valid if limited to the period within which the company has authority to take land (*c*).

Rights of pre-emption.

An option to arise on any intended sale or other particular kind of alienation by the owner, *e.g.*, a right of pre-emption or first refusal, is subject to the rules (*d*), and, to bind the land or property, must comply with it, unless the right is conferred by statute (*e*). It may be entirely void, even where limited to a proper period, if intended merely as a total check on alienation by the owner (*f*).

Rights of repurchase.

669. The same rule applies to covenants to reconvey (*g*) and provisoes for repurchase (*h*), but not where such a covenant or proviso does not express the true nature of the transaction, as where the instrument is really a lease (*i*) or mortgage (*k*).

Covenants for grant or renewal of leases.

670. Such covenants or contracts to grant or renew leases (*l*) of land as do not run with the land are subject to the rule, and

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LAND. In *Re Adams and Kensington Vestry* (1884), 27 Ch. D. 394, C. A., the option had been exercised without question.

(*a*) *Lloyd* v. *Carew* (1697), Prec. Ch. 72, H. L.; *Marks* v. *Marks* (1718), 10 Mod. Rep. 419.

(*b*) *Trevelyan* v. *Trevelyan* (1885), 53 L. T. 853.

(*c*) *Kemp* v. *South Eastern Rail. Co.* (1872), 7 Ch. App. 364; *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, 585, C. A.; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 59, 63 *et seq.*

(*d*) *London and South Western Rail. Co.* v. *Gomm, supra,* overruling *Birmingham Canal Co.* v. *Cartwright* (1879), 11 Ch. D. 421. In *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37, C. A., however, the Court of Appeal held that an agreement conferring such a right did not create an interest in the land in that case. *Collison* v. *Lettsom* (1815), 6 Taunt. 224, was an action for damages on a covenant giving such an option in a lease for twenty-eight years.

(*e*) The statutory right conferred by the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 128, is unlimited; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 28; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352; affirmed, [1901] 2 Ch. 37, C. A.

(*f*) *Re Rosher, Rosher* v. *Rosher* (1884), 26 Ch. D. 801; compare *Re Dugdale, Dugdale* v. *Dugdale* (1888), 38 Ch. D. 176; and see title GIFTS, Vol. XV., pp. 422, 423.

(*g*) *London and South Western Rail. Co.* v. *Gomm, supra*; *Trevelyan* v. *Trevelyan, supra.*

(*h*) *Re Tyrrell's Estate*, [1907] 1 I. R. 292, C. A., overruling *Switzer & Co.* v. *Rochford*, [1906] 1 I. R. 399; see *Re Donoughmore's (Earl) Estate*, [1911] 1 I. R. 211 (redemption of rentcharges); *Northumberland (Duke)* v. *Percy*, [1893] 1 Ch. 298 (where the power to redeem was in fact severable).

(*i*) *District Land Registrar* v. *Kauri Timber Co.* (1902), 22 New Zealand Law Reports, 260, C. A.

(*k*) As to mortgages, see p. 362, *post*; and see title MORTGAGE, Vol. XXI., pp. 72, 139; and, as to sinking funds, see Gray, Rule against Perpetuities, c. xvi.

(*l*) See *Muller* v. *Trafford*, [1901] 1 Ch. 54, 61; title LANDLORD AND

SECT. 2. Interests subject to the Rule.

therefore, if the grant is to be at a remote period, or the term of the lease cannot be ascertained until a remote period, the interest in the land created by the covenant is void (*m*).

Articles of a company.

671. The articles of association of a company under the Companies (Consolidation) Act, 1908 (*n*), take effect by way of contract between the members; and, accordingly, provisions in such articles restricting transfers of shares and enabling the directors to call for a transfer from a shareholder (*o*), or subjecting the shares of any shareholder to a lien for debts due to the company to arise at any time while he is registered as shareholder (*p*), are valid.

SUB-SECT. 5.—*Possible Extensions of the Rule.*

Application to other interests.

672. As to the application of the rule to other interests, or in new cases and circumstances, it has been said that the range of interests to which the rule applies may be extended from time to time as the necessity arises (*q*), and that the court proceeds on the principle that the rule is to be applied where no other sufficient protection against remoteness is attainable (*r*).

SECT. 3.—*Interests to which the Rule does not Apply.*

SUB-SECT. 1.—*Present Interests and Vested Future Interests.*

Present perpetual interests.

673. Certain perpetual interests are sometimes described as exceptions to the rule against perpetuities; it is perhaps more correct to say that, when they are created *in præsenti*, the rule has no application to them (*s*).

Examples of such interests are — easements and *profits à prendre* (*t*); rentcharges and other similar interests in land lasting indefinitely and all remedies to enforce them (*t*); covenants and

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TENANT, Vol. XVIII., p. 463; and, as to covenants running with the land, see note (*n*), p. 323, *post*.

(*m*) *Hope* v. *Gloucester Corporation* (1805), 7 De G. M. & G. 647, C. A.; *Redington* v. *Browne* (1893), 32 L. R. Ir. 347; see *A.-G.* v. *Greenhill* (1803), 33 Beav. 193; *A.-G.* v. *Catherine Hall* (*Master etc.*) (1820), Jac. 381, 395 (a devise, with a condition that the rent should remain unaltered). As to the *interesse termini* on an actual grant to a living person, see p. 316, *ante*.

(*n*) 8 Edw. 7, c. 69; see title COMPANIES, Vol. V., pp. 1 *et seq.* As to debentures, see p. 364, *post*.

(*o*) *Borland's Trustee* v. *Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279; compare *A.-G.* v. *Jameson*, [1904] 2 I. R. 644, 669, 679, 691; [1905] 2 I. R. 218, 225, 235, C. A.

(*p*) See *New London and Brazilian Bank* v. *Brocklebank* (1882), 21 Ch. D. 302, C. A.; *Bradford Banking Co.* v. *Briggs* (1886), 12 App. Cas. 29; compare *Rearden* v. *Provincial Bank of Ireland*, [1896] 1 I. R. 532.

(*q*) See *Re Hollis' Hospital* (*Trustees*) *and Hague's Contract*, [1899] 2 Ch. 540, *per* BYRNE, J., at p. 552 (common law condition).

(*r*) *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535, *per* FARWELL, J., at p. 545 (legal contingent remainder); see Challis, Real Property, 3rd ed., pp. 207—217; Jarman on Wills, 6th ed., pp. 375—376, where the cases in this note and note (*q*), *supra*, are criticised; compare *A.-G.* v. *Cummins* (1895), [1906] 1 I. R. 406.

(*s*) As to exceptions arising from the *lex loci situs*, see p. 312, *ante*.

(*t*) As to these interests, see p. 299, *ante*.

conditions binding land at law (*u*) or in equity (*v*); customary rights (*w*); charities (*w*); and interests held by corporations (*w*).

SECT. 3. Interests to which the Rule does not Apply.

674. All vested (*a*) interests are also outside the rule, even where they come into possession at any time *in futuro* (*b*).

Vested interests.

SUB-SECT. 2.—*Certain Destructible Interests.*

(i.) *In General.*

675. Certain estates or interests which would otherwise be too remote are not considered as such, on account of their destructibility at the will of the owner of another estate to whom the right to destroy them is given by operation of law (*c*).

Destructible interests generally.

The mere fact of destructibility by the owner himself is not sufficient to prevent an estate or interest from being too remote (*d*); a right in a living person to an interest which may vest at a time beyond the legal limit is not made valid by the fact that the person in whose favour it is made may release it (*e*).

(ii.) *Limitations Defeasible by Disentail.*

676. Limitations taking effect on the determination or in

Limitations not considered too remote.

(*u*) *Muller* v. *Trafford*, [1901] 1 Ch. 54, 60; see p. 300, *ante*. The exception is statutory; see stat. (1540) 32 Hen. 8, c. 34. In a lease, therefore, conditions as between landlord and tenant in defeasance of the term are not invalid under the rule (*Re Tyrrell's Estate*, [1907] 1 I. R. 292, C. A., *per* WALKER, L.C., at p. 298). As to the remarks of BULLER, J., in *Roe* d. *Hunter* v. *Galliers* (1787), 2 Term Rep. 133, in reference to covenants against assignment, see Challis, Real Property, 3rd ed., p. 186. Covenants for the renewal of a lease to the tenant for the time being are valid under the rule (*Pollock* v. *Booth* (1875), 9 I. R. Eq. 229, 607, C. A.; *Hare* v. *Burges* (1857), 4 K. & J. 45, *per* PAGE WOOD, V.-C., at p. 57; see *Re Tyrrell's Estate, supra*; *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, 579, C. A.; *Bridges* v. *Hitchcock* (1715), 5 Bro. Parl. Cas. 6). The fact that the covenant is for renewal on notice only does not appear to affect the present character of the right; but see 42 Sol. Jo. 628. The court, however, leans against perpetual renewal unless the covenant is clear; see title LANDLORD AND TENANT, Vol. XVIII., pp. 458, 461, 463. As to invalid covenants for renewal or grant of leases, see p. 321, *ante*.

(*v*) See p. 299, *ante*.

(*w*) See p. 300, *ante*. As to future gifts to charities, see p. 329, *post*.

(*a*) As to the meaning of "vested," see p. 304, *ante*.

(*b*) *E.g.*, vested remainders and reversions. As to these interests, see title REAL PROPERTY AND CHATTELS REAL.

(*c*) Lewis, Law of Perpetuity, p. 164, defining perpetuity (see p. 301, *ante*); explained in *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535, *per* FARWELL, J., at p. 544, by reference to remainders after an estate tail. As to mortgages, see, further, p. 362, *post*.

(*d*) *Cochrane* v. *Cochrane* (1883), 11 L. R. Ir. 361, 368.

(*e*) *Re Hargreaves, Midgley* v. *Talley* (1890), 43 Ch. D. 401, C. A.; and see *London and South Western Rail. Co.* v. *Gomm, supra, per* KAY, J., at p. 572; Sanders on Uses and Trusts, 5th ed., p. 503. *Avern* v. *Lloyd* (1868), L. R. 5 Eq. 383, and *Birmingham Canal Co.* v. *Cartwright* (1879), 11 Ch. D. 421, must be considered overruled; as must also the remarks of Lord BROUGHAM, L.C., in *Keppell* v. *Bailey* (1834), 2 My. & K. 517, at p. 527, in so far as they depend on the contrary principle; compare Challis, Real Property, 3rd ed., p. 184.

SECT. 3. **Interests to which the Rule does not Apply.**

defeasance of an estate tail, itself validly created, are not considered too remote, because of the right of the tenant in tail at common law, and now by statute, to destroy such limitations by barring the entail (*f*).

Limitations taking effect on determination of estate tail.

Accordingly, a charge of a specific sum (*g*), a power of appointment (*h*), and a term of years to secure contingent legacies (*i*), to arise, upon the contingency of failure of issue in tail, in favour of persons ascertainable on or before such failure of issue, are valid; and similarly a gift may be made to a class of issue to be ascertained at the determination of the estate tail, whether the gift is direct, or is to a trustee for the class, or upon trust to sell and divide the produce among the class (*k*).

Limitations in defeasance of estate tail.

Limitations in defeasance of an estate tail, which in their nature must take effect during the continuance of the estate tail, need not be confined to any limit of time: names and arms clauses and shifting clauses operating on the succession to family estates are valid though extended to all the issue in tail (*l*).

Application of exception to rule.

The exception, however, only applies to such limitations as can be barred by a tenant in tail; estates and interests prior to the estate tail and estates not arising on the determination or in

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(*f*) *Nicolls* v. *Sheffield* (1787), 2 Bro. C. C. 215; *Heasman* v. *Pearse* (1871), 7 Ch. App. 275; *Van Grutten* v. *Foxwell*, *Foxwell* v. *Van Grutten*, [1897] A. C. 658, *per* Lord MACNAGHTEN, at p. 679; Lewis, Law of Perpetuity, p. 664; and see *Jack* d. *Westby* v. *Fetherstone* (1829), 2 Hud. & B. 320; *Cole* v. *Sewell* (1848), 2 H. L. Cas. 186 (where limitations in general default of issue took effect as contingent remainders after estates tail and were not too remote). The barrable nature of estates tail renders them free from objection notwithstanding the possible infancy of tenants in tail (*Re Stamford and Warrington (Earl)*, *Payne* v. *Grey*, [1912] 1 Ch. 343, 355, 366, C. A.). As to estates tail, see title REAL PROPERTY AND CHATTELS REAL.

(*g*) *Faulkner* v. *Daniel* (1843) 3 Hare, 199.

(*h*) *Bandon (Earl)* v. *Moreland*, [1910] 1 I. R. 220, 227.

(*i*) Morse v. *Ormonde (Marquis)* (1820), 5 Madd. 99; *Goodwin* v. *Clark* (1661), 1 Lev. 35; *sub nom. Goodiar* v. *Clark* (1663), 1 Sid. 102.

(*k*) *Heasman* v. *Pearse* (1871), 7 Ch. App. 275, where JAMES, L.J., said, at pp. 282, 283: "No limitation after estates tail is . . . too remote; and it appears to us clear that whether the limitation be directly to a class of issue to be ascertained at the determination of the estate tail, or a gift to a trustee for such class, or upon trust to convey to such class, or to sell and to divide the proceeds amongst such class, is wholly immaterial, if the legal and beneficial interests should be both ascertainable at the moment of the determination of the estate tail"; and see *Doe* d. *Winter* v. *Perratt* (1843), 9 Cl. & Fin. 606, H. L.; *Goodier* v. *Edmunds*, [1893] 3 Ch. 455, *per* STIRLING, J., at p. 462; *Re Haygarth*, *Wickham* v. *Holmes*, [1912] 1 Ch. 510, 518.

(*l*) *St. George* v. *St. George* (1767), Gilbert on Uses and Trusts (by Sugden), p. 157, H. L.; *Nicolls* v. *Sheffield* (1787), 2 Bro. C. C. 215; *Doe* d. *Heneage* v. *Heneage* (1790), 4 Term Rep. 13; *Carr* v. *Erroll (Earl)* (1805), 6 East, 58; *Harrison* v. *Round* (1852), 2 De G. M. & G. 190, 201; *Re Stamford and Warrington (Earl)*, *Payne* v. *Grey*, *supra*, *per* FLETCHER MOULTON, L.J., at p. 363; compare *Stanley* v. *Stanley* (1809), 16 Ves. 491; *Bennett* v. *Bennett* (1864), 2 Drew. & Sm. 266; see, accordingly, Encyclopædia of Forms and Precedents, Vol. XIII., pp. 622, 626. It was at one time the practice to confine these clauses within lives in being; see Butler's note to Co. Litt. 327 a.

SECT. 3.
Interests to which the Rule does not Apply.

Limitations not protected.

defeasance of the estate tail (*m*) are not protected from becoming void under the rule (*n*).

The exception has not been held to protect any limitation which cannot vest until a time after the natural determination of the estate tail, or is to vest on a possibly remote contingent event which may not happen during the continuance of the estate tail and operate in defeasance of it (*o*). A limitation, after an estate in tail female or in tail male, on general failure of issue of the progenitor of the issue in tail, is void (*p*), except where it is, and takes effect as, a valid legal contingent remainder (*q*).

(*m*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 15; and see *Doe* d. *Lumley* v. *Scarborough* (*Earl*) (1836), 3 Ad. & El. 2, 897, Ex. Ch.; explained in *Milbank* v. *Vane*, [1893] 3 Ch. 79, C. A.; and, as to the effect of disentail, see, generally, title REAL PROPERTY AND CHATTELS REAL.

(*n*) *Case* v. *Drosier* (1839), 5 My. & Cr. 246; *Scarisbrick* v. *Skelmersdale* (1850), 17 Sim. 187; *Floyer* v. *Bankes* (1869), L. R. 8 Eq. 115; *Sykes* v. *Sykes* (1871), L. R. 13 Eq. 56. The decision in the latter case has been criticised (see Gray, Rule against Perpetuities, 2nd ed., ss. 469—472; but see Jarman on Wills, 6th ed., p. 315, note (z)).

(*o*) Lewis, Law of Perpetuity, p. 669; Powell, Devises (Jarman's ed.), p. 408; Marsden, Rule against Perpetuities, p. 147; see *Hartopp* v. *Carbery* (*Lord*) (1819), cited in 1 Sanders on Uses and Trusts, 5th ed., p. 205, which was a case of a limitation by way of use to arise after failure of issue not taking any estate in the settled property; it was held by the Court of King's Bench in Ireland that the limitation was void for remoteness. Lewis, Law of Perpetuity, p. 669, gives, as an example of the first kind of limitation mentioned in the text, *supra*, one to A. and the heirs of his body, and, after the expiration of two years from failure of the issue of A., to B. and his heirs. With regard to the second kind of limitation, doubts have been expressed whether these limitations are wholly invalid, or invalid only so far as they may be capable of arising after the determination of the estate tail; it is contended by those who take the latter view that the limitations might take effect as an executory limitation of the fee simple in the event of the happening of the contingency prior to the exhaustion of the estate tail without the estate tail being barred (Lewis, Law of Perpetuity, p. 672; Marsden, Rule against Perpetuities, p. 147). In *Re Haygarth*, *Wickham* v. *Holmes*, [1912] 1 Ch. 510, the vesting of the limitation was confined to a proper period.

(*p*) *Bristow* v. *Boothby* (1826), 2 Sim. & St. 465 (affirmed (1829) by Lord LYNDHURST, L.C.: see 3 My. & Cr. 151). Most of the cases of this class have been cases of devises by will of a reversion expectant upon an estate tail to which a testator was entitled under his marriage settlement or other instrument. In such cases, where the devise is expressed to take effect upon failure of issue, it is bad for remoteness unless the issue referred to in the devise can be construed to be the same as the issue inheritable under the entail. The court leans to that construction; but it is a question of construction in every case. The issue contemplated by the devise and the entail were held to be the same in *Badger* v. *Lloyd* (1700), 1 Ld. Raym. 523; *Lytton* v. *Lytton* (1793), 4 Bro. C. C. 441; *Egerton* v. *Jones* (1830), 3 Sim. 409; *Eno* v. *Eno* (1847), 6 Hare, 171; *Lewis* v. *Templer* (1864), 33 Beav. 625; compare *Morse* v. *Ormonde* (*Lord*) (1826), 1 Russ. 382 (a remainder); *Sanford* v. *Irby* (1828), 3 B. & Ald. 654; *Ellicombe* v. *Gomperts* (1837), 3 My. & Cr. 127. In the following cases it was held that the issue contemplated in the devise were not the same as the issue inheritable in the entail, and the devises were consequently bad for remoteness:—*Lanesborough* (*Lady*) v. *Fox* (1733), Cas. *temp.* Talb. 262; *Bankes* v. *Holme* (1891), 1 Russ. 394, n., H. L.; *Jones* v. *Morgan* (1774), 3 Bro. Parl. Cas. 323. As to estates tail implied from gift over on failure of issue, see title WILLS.

(*q*) See note (*l*), p. 314, *ante*.

SECT. 3. **Interests to which the Rule does not Apply.**

Trusts and powers.

677. Similar considerations apply to trusts and powers given to trustees on a strict settlement of real estate; if these trusts and powers are barrable by a disentail, they may be limited to continue throughout the estate tail and to be exercised on the failure of issue in tail (*r*). On the other hand, trusts which, though limited after an estate tail, are annexed to unbarrable prior limitations, as in the case of a minority clause providing for entry and receipt of rents by trustees during the minority of equitable tenants in tail (*s*), must be confined to the perpetuity period (*t*); it is immaterial what is the destination of the fund derived under the trust (*u*).

(iii.) *Trusts Defeasible by Beneficiaries whose Interests must Vest within the Perpetuity Period.*

Trusts determinable by beneficiaries.

678. A trust is determinable by beneficiaries, apart from disabilities on their part (*v*), when all the beneficial interests become vested (*a*). Accordingly, a trust, which is necessarily so determin-

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(*r*) *Biddle* v. *Perkins* (1829), 4 Sim. 135; *Wallis* v. *Freestone* (1839), 10 Sim. 225; *Briggs* v. *Oxford (Earl)* (1852), 1 De G. M. & G. 363, C. A.; *Lantsbery* v. *Collier* (1856), 2 K. & J. 709; *Re Stamford and Warrington (Earl)*, *Payne* v. *Grey*, [1912] 1 Ch. 343, C. A.; see, further, p. 362, *post*.

(*s*) See *Marshall* v. *Holloway* (1820), 2 Swan. 432; *Re Stamford and Warrington (Earl)*, *Payne* v. *Grey*, [1911] 1 Ch. 255, *per* WARRINGTON, J., at p. 267.

(*t*) *Lade* v. *Holford* (1763), 1 Wm. Bl. 428 (see Gray, Rule against Perpetuities, 2nd ed., s. 464, note (2)); *Browne* v. *Stoughton* (1846), 14 Sim. 369; *sub nom. Browne* v. *Houghton*, 15 L. J. (CH.) 391; *Turvin* v. *Newcome* (1856), 3 K. & J. 16; *Re Stamford and Warrington (Earl)*, *Payne* v. *Grey*, *supra*, *per* WARRINGTON, J.; reversed [1912] 1 Ch. 343, C. A., on the ground that no legal estate in the trustees anterior to the estate tail was to be implied; see Lewis. Law of Perpetuity, Supplement, p. 176; Gray, Rule against Perpetuities, 2nd ed., s. 372; 3 Jur. (N. S.), Part 2, 181; 27 Law Quarterly Review, p. 156. In *Scarisbrick* v. *Skelmersdale*, (1850), 17 Sim. 187 (see Gray, Rule against Perpetuities, 2nd ed., s. 467, note (5)), and *Floyer* v. *Bankes* (1869), L. R. 8 Eq. 115, similar powers were attached to a term prior to the estate tail, and were held void. In *Crosse* v. *Glennie* (1843), 2 Y. & C. Ch. Cas. 237, the question was not argued; see Gray, Rule against Perpetuities, 2nd ed., s. 465. The statutory minority clause in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42 (see title INFANTS AND CHILDREN, Vol. XVII., p. 87), is not subject to the limit imposed by the rule (see note (*k*), p. 300, *ante*), and confers powers wider than could be created by deed or by will, since it extends over the minority of a tenant in tail by descent, which in a deed or will would ordinarily be void (see Encyclopædia of Forms and Precedents, Vol. XIII., p. 235, and the form given, *ibid.*, p. 327; compare *Re Glover*, [1899] 1 I. R. 337; *Re Cowley*, [1901] 1 Ch. 38).

(*u*) *Browne* v. *Stoughton*, *supra*, *per* SHADWELL, V.-C., at p. 378; *Re Stamford and Warrington (Earl)*, *Payne* v. *Grey*, [1911] 1 Ch. 255, 276. In *Marshall* v. *Holloway*, *supra*, Lord ELDON, L.C., held that, although the destination of the accumulated fund was not too remote, being held on the same trusts as those of the testator's personal estate, which were valid, yet the gift of the accumulated fund was void, because the accumulation which was a condition precedent to the gift might extend beyond the perpetuity period; see Gray, Rule against Perpetuities, 2nd ed., s. 674; Jarman on Wills, 6th ed., 313, note (r).

(*v*) Such disabilities are ignored in questions of perpetuity; see note (*m*), p. 304, *ante*.

(*a*) See title TRUSTS AND TRUSTEES.

able within the perpetuity period, is not obnoxious to the rule on the ground that it may continue for an indefinite period (*b*).

SECT. 3. **Interests to which the Rule does not Apply.**

The contingency on which the trust arises must, however, be such as will necessarily occur within the perpetuity period (*c*); and the mere possibility of the trust being so determined is not sufficient (*d*).

Accumulation for a particular person.

A trust for accumulation for any period for the benefit of any person is not therefore invalid if the person has a vested interest, in which case he is not bound to wait until the expiration of the fixed period, but may stop the accumulation and require payment the moment he is competent to give a valid discharge (*e*); and this is so in the case of trusts for accumulation for charities (*f*); but this is not the case where the interest of the person or charity in the accumulated sums is not absolute and free from conditions precedent extending beyond the perpetuity period (*g*).

(iv.) *Provisions for Raising Debts and Incumbrances.*

Trusts to pay debts.

679. A trust of the income of any property to be accumulated or applied for the purpose of paying incumbrances or debts of the settlor or testator or of any other person, or any similar provision for such debts or incumbrances, where the accumulation for a period invalid under the rule is not made a condition precedent to the employment of the property for that purpose, is not invalid, although it may last for an indefinite period (*h*).

(*b*) *Silvester* v. *Bradley* (1842), 13 Sim. 75; *Oddie* v. *Brown* (1859), 4 De G. & J. 179, C. A.; *Longfield* v. *Bantry* (1885), 15 L. R. Ir. 101, following (and citing) *Clements* v. *Leitrim (Earl)*, otherwise unreported; and as to trusts for sale, see *Re Tweedie and Miles* (1884), 27 Ch. D. 315; *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296, 313. In *Tregonwell* v. *Sydenham* (1815), 3 Dow, 194, H. L., where a trust was declared of a term to accumulate the rents of the one estate to raise a certain sum and from time to time, as sums of £2,500 were raised, to invest in land to be settled on the person then in possession of another estate, the beneficial interest was held to result to the heir-at-law; but the term was held to be well created, and, apparently, the administrative trusts of the term also, the heir being entitled until the total sum was raised; compare *Smith* v. *Cuninghame* (1884), 13 L. R. Ir. 480 (where the trust was not determinable).

(*c*) See p. 317, *ante*.

(*d*) *Cochrane* v. *Cochrane* (1883), 11 L. R. Ir. 361.

(*e*) *Saunders* v. *Vautier* (1841), Cr. & Ph. 240; *Gosling* v. *Gosling* (1859), John. 265; *Coventry* v. *Coventry* (1865), 2 Drew. & Sm. 470; and compare *Re Couturier, Couturier* v. *Shea*, [1907] 1 Ch. 470; *Smidmore* v. *Makinson* (1908), 6 Commonwealth Law Reports, 243; and see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 264; TRUSTS AND TRUSTEES; and compare note (*p*), p. 339, *post*.

(*f*) *Wharton* v. *Masterman*, [1895] A. C. 186; *Re Swain, Monckton* v. *Hands*, [1905] 1 Ch. 669, C. A.; and see title CHARITIES, Vol. IV., p. 157.

(*g*) *Marshall* v. *Holloway* (1820), 2 Swan. 432 (see note (*u*), p. 326, *ante*); *Smith* v. *Cuninghame* (1884), 13 L. R. Ir. 480; *Trustees, Executors, and Agency Co.* v. *Bush* (1908), 28 New Zealand Law Reports, 117.

(*h*) *Southampton (Lord)* v. *Hertford (Marquis)* (1813), 2 Ves. & B. 54, 65, followed in *Re Stamford and Warrington (Earl)*, *Payne* v. *Grey*, [1912] 1 Ch. 343, 355, C. A.; *Bacon* v. *Proctor* (1822), Turn. & R. 31 (where GRAHAM, B., grounded his decision on the reason that the enjoyment, not the property, was tied up, and the estate vested in the same manner as if the testator had created a term for payment of his debts); *Bateman* v. *Hotchkin* (1847), 10 Beav. 426. In *Re Stamford and Warrington (Earl)*, *Payne* v. *Grey*, [1911]

SECT. 3. **Interests to which the Rule does not Apply.**

Interests subject to such trusts.

The same rule appears to apply to provisions for indemnity or exoneration (*i*).

A trust for payment of debts does not in general prevent the vesting of interests created subject to the trust (*j*); and such interests will be vested in spite of a declaration that the beneficiaries are not to be entitled until the debts are paid (*k*); but, where the directions of the will suspend all vesting until payment of the debts or until the fund is equal to the debts, the interests so suspended are invalid (*l*).

In a will, provision may be made for payment of a legacy to an existing person or persons ascertainable within the perpetuity period

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1 Ch. 255, WARRINGTON, J., at p. 276, said that all that these two last cases (*Bacon* v. *Proctor* (1822), Turn. & R. 31, and *Bateman* v. *Hotchkin* (1847), 10 Beav. 426) decided was that where the purpose of a trust for accumulation, not in itself obnoxious to the rule against perpetuities, was the payment of charges on the estate the rents of which were being accumulated, that was a legal purpose. In *Briggs* v. *Oxford* (*Earl*) (1852), 1 De G. M. & G. 363, C. A., a power to cut timber and apply the proceeds towards payment of incumbrances was held good on the ground that it could be barred by the tenant in tail, and also, by Lord CRANWORTH, L.J., on the ground that the contract between the parties that an incumbrance should be liquidated in a particular mode might extend over any time. The reason which is most easily understood for this exception from the application of the rule is that such trusts are not against public policy and are destructible on payment of the debts by the beneficiaries entitled subject thereto, whose interests are treated as vested; see *Tewart* v. *Lawson* (1874), L. R. 18 Eq. 490; *Norton* v. *Johnstone* (1885), 30 Ch. D. 649; *Re Stamford and Warrington* (*Earl*), *Payne* v. *Grey*, [1912] 1 Ch. 343, C. A., *per* FARWELL, L.J., at p. 368 (where the reason of the validity of such trust is stated). In *Scarisbrick* v. *Skelmersdale* (1850), 17 Sim. 187, a trust for accumulation to pay debts was held void, the trust to pay debts out of the proceeds arising only at the end of the void period. See also p. 376, *post*.

(*i*) In *Massy* v. *O'Dell* (1859), 10 I. Ch. R. 22, a trust of lands conveyed by deed to indemnify a purchaser of other lands from certain rents was held valid on the analogy of trusts for payment of debts; the case is doubted, however, by Gray, Rule against Perpetuities, 2nd ed., s. 417. In *Morland* v. *Cook* (1868), L. R. 6 Eq. 252, as explained in *Austerberry* v. *Oldham Corporation* (1885), 29 Ch. D. 750, C. A., a covenant, made by co-owners on partition, for repair of a sea wall and charging their respective parts of the expenses on the lands allotted to them by way of rentcharge, was held valid without discussion on the point of perpetuity. In *Cassamajor* v. *Strode* (1821), Jac. 630, affirming S. C. (1819), 2 Swan. 347, a trust deed of indemnity against a perpetual rentcharge was also held valid without discussion of any question of perpetuity; and see Encyclopædia of Forms and Precedents, Vol. VI., p. 487. As to rentcharges, see title RENTCHARGES AND ANNUITIES.

(*j*) *Marshall* v. *Holloway* (1820), 2 Swan. 432, *per* Lord ELDON, L.C., at p. 446; *Bacon* v. *Proctor* (1822), Turn. & R. 31; and see *Carter* v. *Barnadiston* (1718), 1 P. Wms. 505; *Bennett* v. *Wyndham* (1857), 23 Beav. 521.

(*k*) *Tewart* v. *Lawson*, *supra*; compare *Collier* v. *Walters* (1873), L. R. 17 Eq. 252, and *Strong* v. *Teatt* (1760), 2 Burr. 901 (estates declared in lands unsold under trust for sale to pay debts), affirmed *Teatt* v. *Strong* (1760), 3 Bro. Parl. Cas. 219.

(*l*) *Bagshaw* v. *Spencer* (1748), 1 Ves. Sen. 142, *per* Lord HARDWICKE, L.C., at p. 144; *Re Bewick*, *Ryle* v. *Ryle*, [1911] 1 Ch. 116 (trust to pay debts); *Tewart* v. *Lawson*, *supra*, *per* HALL, V.-C., at p. 495 (trust to raise funds equal in amount to debts); *Girard Trust Co.* v. *Russell* (1910), 179 Federal Reporter, 446 (trust to raise funds equal in amount to debts of a State).

by means of a trust for accumulation which may exceed the perpetuity period (*m*), but not where the legacies are only contingently payable out of accumulations on a remote event (*n*).

SECT. 3. Interests to which the Rule does not Apply.

680. If the debts or incumbrances are paid otherwise than under the trust for accumulation, as by the creditors enforcing their rights against the estate to be paid in a different way, or being paid off in administration by the court, any express or implied right in any beneficiary to have the estate administered and the accumulation continued, so as to recoup him, must be confined to the proper period (*o*).

Accumulation for recoupment.

SUB-SECT. 3.—*Certain Charitable Gifts arising in futuro.*

681. A gift over, on a possibly too remote event, from one charity to another has been held to be not invalid under the rule if the gift to the first charity is valid under the rule (*p*).

Certain gifts over.

(*m*) *Williams* v. *Lewis* (1859), 6 H. L. Cas. 1013; *Oddie* v. *Brown* (1859), 4 De G. & J. 179, C. A.; see also *Bateman* v. *Hotchkin* (1847), 10 Beav. 426.

(*n*) *Smith* v. *Cuninghame* (1884), 13 L. R. Ir. 480, distinguishing *Williams* v. *Lewis*, *supra*; *Oddie* v. *Brown*, *supra*. In *Smith* v. *Cuninghame*, *supra*, at p. 486, CHATTERTON, V.-C., explains *Williams* v. *Lewis*, *supra*, as being a case of "nothing more than a charge of £600 and a term to secure it: which was clearly free from objection for remoteness."

(*o*) As to such rights, see *Tewart* v. *Lawson* (1871), L. R. 18 Eq. 490, applied in *Re Heathcote*, *Heathcote* v. *Trench*, [1904] 1 Ch. 826 (a decision under the Thellusson Act; see p. 370, *post*); *Norton* v. *Johnstone* (1885), 30 Ch. D. 649; *Re Green*, *Baldock* v. *Green* (1888), 40 Ch. D. 610 (where no such right was implied); and see pp. 376, 377, *post*. In *Biggar* v. *Eastwood* (1886), 19 L. R. Ir. 49, C. A.; *Re Heathcote*, *Heathcote* v. *Trench*, *supra*; and *Re Webster*, *Thompson* v. *Thompson* (1910), 102 L. T. 905, 907, the right of recoupment was expressly or impliedly given and was confined to the period proper in each case.

(*p*) *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460; *Re Tyler*, *Tyler* v. *Tyler*, [1891] 3 Ch. 252, C. A. The old case of *St. Bartholomew* (*Prior*) v. *St. Paul's* (*Dean and Chapter*) (1537), 1 Dyer, fol. 33, pl. 12, is to the contrary, but was prior to the recognition of executory limitations; see Gray, Rule against Perpetuities, 2nd ed., s. 124, note 5; Lewis, Law of Perpetuity, pp. 77, 78. In *London Corporation* v. *Alford* (1640), Cro. Car. 576, such a gift over was held void under the old doctrine against a possibility upon a possibility; see note (*g*), p. 364, *post*. In *Society for the Propagation of the Gospel in Foreign Parts* v. *A.-G.* (1826), 3 Russ. 142, there was a gift to a charity, where the fund could not be immediately applied to the purpose, and a subsequently expressed gift to another charity pending the application of the fund to the first charity; the question of the rule against perpetuities was not discussed, and perhaps did not in fact arise. As to such immediate gifts to charities, where the particular application of the fund may not of necessity take effect within any assignable limit of time or may never take effect at all except on uncertain events, see title CHARITIES, Vol. IV., pp. 157, 175. In *Christ's Hospital* v. *Grainger*, *supra*, the event upon which the gift over was to take effect was neglect for one year by the trustee to perform the charitable directions contained in the will in favour of the first charity; the *ratio decidendi* (S. C., 1 Mac. & G. 464, and, in the court below (1848), 16 Sim. 83, 100) was that the property was not less alienable on account of the gift over; this is not now considered a sufficient reason (*London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, C. A.; *Re Hargreaves*, *Midgley* v. *Tatley* (1890), 43 Ch. D. 401, 406, C. A.). In *Re Tyler*, *Tyler* v. *Tyler*, *supra*, the event upon which the gift over was to take effect was failure to keep the testator's family vault in good repair and rebuild when

SECT. 3. **Interests to which the Rule does not Apply.**

Future gifts to charities are in other respects subject to the rule, as are gifts over to persons after gifts to charities (*q*).

SUB-SECT. 4.—*Interests under Common Law Assurances.*

Common law assurances.

682. Legal estates and interests created by common law assurances and not derived under the operation of the Statute of Uses (*r*) were until recently considered to be exempt from the rule. But modern decisions have departed from this in certain cases in relation to common law conditions and some contingent remainders (*s*).

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it should require; the question was whether the first charity was bound by the condition, not whether the gift over was valid, but the decision went on this ground. This decision has been severely criticised by text-writers; see Jarman on Wills, 6th ed., pp. 212, note (g), 280, note (u); Juridical Review, July, 1906; Gray, Rule against Perpetuities, 2nd ed., ss. 603c, 603d. It is to be observed that in *Re Tyler, Tyler* v. *Tyler*, [1891] 3 Ch. 352, C. A., the court pointed out that a trust or power to apply part of the money to the repair of the vault would probably have been void, but held that a condition merely creating a perpetual inducement to do what was a lawful act was not void. A case resting upon such a fine distinction will probably not be incautiously applied or extended; see *Re Bowen, Lloyd Phillips* v. *Davis*, [1893] 2 Ch. 491, where STIRLING, J., at p. 494, said: "The principle of these decisions [*i.e., Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460, and *Re Tyler, Tyler* v. *Tyler, supra*] does not extend in my opinion to cases where (1) an immediate gift in favour of individuals is followed by an executory gift in favour of a charity, or (2) an immediate gift in favour of a charity is followed by an executory gift in favour of private individuals." Compare *Charitable Donations and Bequests (Commissioners)* v. *De Clifford (Baroness)* (1841), 1 Dr. & War. 245, *per* SUGDEN, L.C., at p. 254; *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532; *Re Baillie, Faithful* v. *Sydney Industrial Blind Institution* (1907), 7 New South Wales State Reports, 265. The principle of *Christ's Hospital* v. *Grainger, supra*, further does not apply where an immediate gift in favour of a charity is followed by an executory gift over to such purposes as a charity or public body shall direct (*Re Friends' Free School, Clibborn* v. *O'Brien*, [1909] 2 Ch. 675; *Re Da Costa, Clarke* v. *Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337); see also *Re Beard's Trusts, Butlen* v. *Harris*, [1904] 1 Ch. 270 (where on construction it was held that there had been no forfeiture under the gift over); Lewis, Law of Perpetuity, p. 481. There appears to be no similar exception in the case of a gift to a corporation followed by an executory gift over to another corporation; see *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352, 360; affirmed, [1901] 2 Ch. 37, C. A. (agreement for a perpetual right of pre-emption between two companies). It has been held that where a gift to a charity is conditional on the performance of acts (not relating to the subject-matter of the gift) extending to a possibly remote period, the charity is not bound by the condition, and is entitled to a clean conveyance, free from the condition, unless there is a gift over to another charity (*Re Da Costa, Clarke* v. *Church of England Collegiate School of St. Peter, supra; Re Tyler, Tyler* v. *Tyler, supra*). As regards the ordinary rule that gifts subject to a condition must be accepted *cum onere*, see *A.-G.* v. *Christ's Hospital* (1790), 3 Bro. C. C. 165; *A.-G.* v. *Christ's Hospital* (1830), 1 Russ. & M. 626, 628; *Gregg* v. *Coates, Hodgson* v. *Coates* (1856), 23 Beav. 33, 38.

(*q*) See title CHARITIES, Vol. IV., p. 175.

(*r*) 27 Hen. 8, c. 10.

(*s*) *A.-G.* v. *Cummins* (1895), [1906] 1 I. R. 406, where PALLES, C.B., at p. 410, said, "but for the Statute of Uses, the rule against perpetuities would, until the present, have had no relation to estates created by deed; and as to other estates would have remained a purely equitable doctrine"; and see *Re Tyrrell's Estate*, [1907] 1 I. R. 292, C. A., *per* WALKER, L.C., at p. 299; *Re Stamford and Warrington (Earl), Payne* v.

SUB-SECT. 5.—*Contracts, as Binding the Person.*

SECT. 3. Interests to which the Rule does not Apply.

683. Contracts, in so far as they are merely personal, are outside the rule altogether (*t*).

Contracts.

SUB-SECT. 6.—*Interests given by Operation of Law.*

684. Interests given by operation of law (*u*), for example, resulting uses and trusts (*a*); rights of escheat (*b*); and such rights of reverter as are conferred by operation of law (*c*), are not subject to the rule.

Interests given by law.

SUB-SECT. 7.—*Certain Rights of Entry.*

685. Rights of entry (*d*) or of re-entry in leases (*e*) necessarily incidental to and co-extensive with legal estates and interests

Certain rights of entry.

Grey, [1912] 1 Ch. 343, C. A., *per* FARWELL, L.J., at p. 366; Challis, Real Property, 3rd ed., p. 180; and as to Crown grants, see note (*p*), p. 311, *ante*. In *Savill Brothers, Ltd.* v. *Bethell*, [1902] 2 Ch. 523, 540, C. A., an exception in a conveyance was held void, if operating at common law, as creating a freehold *in futuro*, and if operating under the Statute of Uses, as invalid under the rule against perpetuities. The converse proposition was stated in *Thellusson* v. *Woodford* (1799), 4 Ves. 227, *per* BULLER, J., at pp. 327, 328. As to interests under such common law assurances, the common law rules of limitation may in general be sufficient protection against perpetuity. The rule has recently, however, been extended to certain rights of entry on common law conditions and certain legal contingent remainders; see p. 313, *ante*; and as to the grant of incorporeal hereditaments *in futuro* by an assurance at common law, see p. 311, *ante*. As to the creation of an *interesse termini*, see p. 316, *ante*.

(*t*) *Walsh* v. *Secretary of State for India* (1863), 10 H. L. Cas. 376; *Witham* v. *Vane* (1883), Challis, Real Property, Appendix V., H. L.; *Borland's Trustee* v. *Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279; *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532; *South Eastern Railway* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.*, [1910] 1 Ch. 12, C. A.; see *Re Stamford and Warrington* (*Earl*), *Payne* v. *Grey*, [1912] 1 Ch. 343, C. A.; and see p. 319, *ante*.

(*u*) *Re Blunt's Trusts, Wigan* v. *Clinch*, [1904] 2 Ch. 767; and as to statutory interests, see note (*k*), p. 300, *ante*.

(*a*) Thus, where a testator makes a charitable trust determinable in favour of the person to whom the property would by law result upon failure of the trust, the rule is not infringed (*Re Randell, Randell* v. *Dixon* (1888), 38 Ch. D. 213; *Re Blunt's Trusts, Wigan* v. *Clinch, supra*).

(*b*) Gray, Rule against Perpetuities, 2nd ed., ss. 204, 205, n.; see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 23 *et seq.*

(*c*) *A.-G.* v. *Cummins* (1895), [1906] 1 I. R. 406 (reverter on a determinable fee created by a Crown grant). As to reverter on the dissolution of a corporation, see Lewis, Law of Perpetuity, p. 621; titles COMPANIES, Vol. V., p. 568; CORPORATIONS, Vol. VIII., p. 401; DESCENT AND DISTRIBUTION, Vol. XI., p. 25. For examples of statutory rights of reverter on failure of a disposition in mortmain, see the School Sites Act, 1841 (4 & 5 Vict. c. 38), s. 2; *A.-G.* v. *Shadwell*, [1910] 1 Ch. 92; title EDUCATION, Vol. XII., p. 119; Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 4; title LITERARY AND SCIENTIFIC INSTITUTIONS, Vol. XIX., p. 201; and see title CHARITIES, Vol. IV., p. 180, note (*m*). Such rights have statutory validity.

(*d*) *E.g.*, a grant of a rentcharge with a right of entry for satisfying the rent in arrear (Real Property Commissioners' 3rd Report, p. 37; Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 6; see p. 299, *ante*; title RENTCHARGES AND ANNUITIES), or a condition in a Crown grant determining a determinable fee (*A.-G.* v. *Cummins* (1895), [1906] 1 I. R. 406).

(*e*) *Re Tyrrell's Estate*, [1907] 1 I. R. 292, C. A., *per* WALKER, L.C., at p. 298; see note (*u*), p. 323, *ante*; and see title LANDLORD AND TENANT, Vol. XVIII., pp. 530 *et seq.*

SECT. 3. **Interests to which the Rule does not Apply.**

which themselves are unaffected by or not obnoxious to the rule, are exempt from the rule.

SUB-SECT. 3.—*Interests the Nature of which is a Guarantee against Perpetuity.*

Certain legal contingent remainders.

686. A limitation, which would be void as an executory devise, may be valid as a legal contingent remainder limited after life interests which must expire within the perpetuity period; a limitation may therefore be preserved from remoteness by the rules of the common law that a future limitation shall if possible be construed as a contingent remainder rather than as an executory devise, and that a contingent remainder must be ready to come into possession *eo instanti* that the particular estate determines (*f*).

Interests ending within the period.

687. Where the property limited is a term for an existing life or for existing lives or for not more than twenty-one years, or other interest of finite duration which must necessarily end within the perpetuity period, no limitation of that property can be void (*g*). In creating limitations out of an estate in fee simple, therefore, a term of years to cease within the proper limit may be created, and interests in that term may be limited, which could not be limited in the fee simple itself (*h*).

SECT. 4.—*Application of the Rule in General.*

SUB-SECT. 1.—*Date from which the Period is Reckoned.*

Date from which the period is reckoned.

688. The date from which the perpetuity period is reckoned is the date from which the limitation operates as made by a person having a power of disposition equivalent to that of ownership (*i*).

Thus, for a limitation in a will, the period runs from the testator's

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(*f*) *Jack* d. *Westby* v. *Fetherstone* (1820), 2 Hud. & B. 320; *Cole* v. *Sewell* (1848), 2 H. L. Cas. 186: *Symes* v. *Symes*, [1896] 1 Ch. 272, 276. As to legal contingent remainders, see p. 313, *ante*.

(*g*) *Low* v. *Burron* (1734), 3 P. Wms. 262 (lease for three lives. "Here can be no danger of a perpetuity, for all these estates will determine on the expiration of the three lives," *ibid.*, *per* Lord TALBOT, L.C., at p. 264); *Wastneys* v. *Chappell* (1714), 3 Bro. Parl. Cas. 50 (lease for three lives); *Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372, H. L. As to *Love* v. *Windham* (1670), 1 Lev. 290, see Lewis, Law of Perpetuity, pp. 675, 676. In *King* v. *Cotton* (1732), 2 P. Wms. 674, no opinion was given by the court. In *Mogg* v. *Mogg* (1815), 1 Mer. 654, the rule of *cy-près* was applied to limitations of renewable leaseholds held for lives (Lewis, Law of Perpetuity, p. 673); see also *Saltern* v. *Saltern* (1742), 2 Atk. 376 (limitation of lease for lives on failure of issue); Butler, note to Fearne, Contingent Remainders, p. 500.

(*h*) Lewis, Law of Perpetuity, p. 678; *Cadell* v. *Palmer*, *supra*; see Real Property Commissioners' 3rd Report, p. 38, suggesting a legislative amendment.

(*i*) *Rous* v. *Jackson* (1885), 29 Ch. D. 521, not following *Re Powell's Trusts* (1869), 39 L. J. (CH.) 188; compare *Re Flower, Edmonds* v. *Edmonds* (1885), 55 L. J. (CH.) 200; *Stuart* v. *Babington* (1891), 27 L. R. Ir. 551. In *Cooke* v. *Cooke* (1887), 38 Ch. D. 202, an ante-nuptial settlement by an infant contained a covenant for the settlement of her real estate. It was held that the period should be calculated from the date of this instrument and not from the date of the actual conveyance to the uses of the settlement executed by her on attaining twenty-one.

death, and in a deed or non-testamentary instrument from the date of the instrument (*k*), provided that in each case the testator or the grantor or settlor has a full power of disposition by that kind of instrument, whether as owner or under a general power of appointment (*l*).

SECT. 4. Application of the Rule in General.

For a limitation in exercise of a special power of appointment the period runs from the creation of the power, that is to say, from the death of the testator whose will, or the date of the non-testamentary instrument which, created that power—these dates being the times from which the appointment operates when regarded as a disposition by way of delegation from the creator of the power (*m*).

Exercise of special power.

SUB-SECT. 2.—*Circumstances taken into Account.*

689. The time for ascertaining the facts in applying the rule against perpetuities is the date of the death of the testator in the case of a limitation by will, and the date of the instrument in the case of limitation in a non-testamentary instrument (*n*). This is so even where the will or instrument creating the limitation is an appointment under a power; thus, in the case of an appointment under a power, the time for ascertaining the facts is the time of the execution, not of the creation of the power (*o*). After that date,

Time for ascertaining the facts.

(*k*) *Long* v. *Blackall* (1797), 7 Term Rep. 100; *Thellusson* v. *Woodford* (1805), 11 Ves. 112, 138, H. L.; *Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372, H. L.; Lewis, Law of Perpetuity, p. 171; Gray, Rule against Perpetuities, 2nd ed., s. 231.

(*l*) A general power of appointment is where the donee can appoint to anyone—a special power, where the objects are confined to a particular class; see title POWERS. The distinction depends upon whether the objects are general or special; it does not depend upon whether the donee can exercise the power by deed or will, or by will only or by deed only (*Stuart* v. *Babington* (1891), 27 L. R. Ir. 551, *per* CHATTERTON, V.-C., at p. 556); see title POWERS

(*m*) *Re Thompson, Thompson* v. *Thompson*, [1906] 2 Ch. 199, *per* JOYCE, J., at p. 202. "Where a will is made in exercise of a special power of appointment, the question whether an estate or interest appointed by it be too remote depends upon its distance from the creation, not from the exercise of the power" (Tudor, L. C. Real Prop., 4th ed., p. 595; Lewis, Law of Perpetuity, Supplement, p. 27). As to special powers, see p. 356, *post*; and see, generally, title POWERS.

(*n*) *Vanderplank* v. *King* (1843), 3 Hare, 1, *per* WIGRAM, V.-C., at p. 17 ("To determine the validity of a given set of limitations, the will must be applied to the facts of that particular case as they stood at the death of the testator, and not as they stood at the date of the will"); *Faulkner* v. *Daniel* (1843), 3 Hare, 199, 216; *Ferrand* v. *Wilson* (1845), 4 Hare, 344, 377; *Dungannon* (*Lord*) v. *Smith* (1846), 12 Cl. & Fin. 546, H. L.; *Williams* v. *Teale* (1847), 6 Hare, 239, *per* WIGRAM, V.-C., at p. 251 (in considering the validity of limitations in a will, with reference to the state of the testator's family, "the state of the family must be looked to as it existed at the time of the death of the testator, and not as it existed at the date of the will"); *Re Mervin, Mervin* v. *Crossman*, [1891] 3 Ch. 197, 204; Lewis, Law of Perpetuity, Supplement, pp. 27, 64.

(*o*) Appointees under a special power must be persons competent to have taken directly under the deed or will creating the power. But "if the appointment is made by will, it does not, owing to the ambulatory nature of the instrument, take effect until the testator's death, and it follows that the persons intended to take under the appointment are not ascertained until that time" (Jarman on Wills, 6th ed., p. 318). If a separate sum is appointed to each member of the class independently of the others, the

SECT. 4. **Application of the Rule in General.**

regard must, as a general rule (*p*), be had, not to the events which have actually happened, but to the events which might have happened. If the limitations are such that in a possible event the rules as to remoteness would have been infringed, then the limitations fail, although in the events which actually happened the legal period was not exceeded (*q*).

Admissibility of evidence.

690. In considering the validity of any limitation the court can look at evidence of facts existing when the instrument came into

appointment may be good as to some and bad as to others (Jarman on Wills, 6th ed., p. 319). See *Peard* v. *Kekewich* (1852), 15 Beav. 166 (a case of a devise to A. for life, remainder to A.'s children as he should appoint. A. by his will directed the rents to be accumulated until his son B. or other sons should attain twenty-three. Direction held not remote as to B., who was unborn at date of will but three years of age at date of death of the original testator); *Morgan* v. *Gronow* (1873), L. R. 16 Eq. 1 (where the fact of the marriage of a daughter affected an appointment); *Wilkinson* v. *Duncan* (1861), 30 Beav. 111 (appointment by will under a special power to a class of daughters as and when they should attain twenty-four years of age, held valid as to those who attained those years at the appointor's death, and void as to the others); compare *Von Brockdorff* v. *Malcolm* (1885), 30 Ch. D. 172; *Re Hallinan's Trusts*, [1904] 1 I. R. 452 (appointment by will, under special power conferred by settlement, to a daughter on attaining twenty-five; appointee was fifteen at date of testator's death; appointment held not void for remoteness); *Re Thompson, Thompson* v. *Thompson*, [1906] 2 Ch. 199 (appointment by will, under a special power, to C. T. for life and after her death for all her children who had attained or should attain twenty-five if born in testatrix's lifetime, or twenty-one if born after her decease. Held valid, because at the date of testatrix's decease, it was certain that the persons to take could be ascertained, their interests vested, and the amount of their shares fixed within the perpetuity period); see also *White* v. *Stamps Commissioner* (1908), 8 New South Wales State Reports, 287. As to *Re Wright, Whitworth* v. *Wright*, [1906] 2 Ch. 288, the case is said to depend on circumstances not reported; see 23 Law Quarterly Review, p. 9, and Jarman on Wills, 6th ed., p. 318, n.

(*p*) As regards taking subsequent events into consideration in case of a limitation with double aspect, see p. 348, *post*.

(*q*) *Re Wilmer's Trusts, Moore* v. *Wingfield*, [1903] 1 Ch. 874, *per* BUCKLEY, J., at p. 879, approved S. C., [1903] 2 Ch. 411, 422, C. A. (where it was held that in the case of a child *en ventre sa mère*, as soon as the child is born, his life is retrospectively treated as a life in being; "the moment the child has been born . . . you must treat that event . . . for all purposes with reference to the rule against perpetuities as having become a fact prior to the death of the testatrix" (*ibid.*, at p. 420)); *Jee* v. *Audley* (1787), 1 Cox, Eq. Cas. 324, 326 (to daughters of A. living at a remote period); *Proctor* v. *Bath and Wells* (*Bishop*) (1794), 2 Hy. Bl. 358 (gift over on A. having no son bred a clergyman, when A. had no son at all); *Hodson* v. *Ball* (1845), 14 Sim. 558 (gift over of child's share on failure of issue during life of child's husband or wife. Held void, because child's husband or wife might not be born at testator's death and might survive child for more than twenty-one years); *Dungannon* (*Lord*) v. *Smith* (1846), 12 Cl. & Fin. 546, H. L., *per* CRESSWELL, J., at p. 563 ("Unless it [an executory devise] is created in such terms that it cannot vest after 'the perpetuity period,' it is not valid, and subsequent events cannot make it so"); *Harding* v. *Nott* (1857), 7 E. & B. 650, 657, 658 (where the limitation in fact was capable of taking effect within the perpetuity period; but it was held that that event could not affect the question whether the limitation was in its creation too remote): *Re Lowman, Devenish* v. *Pester*, [1895] 2 Ch. 348, 365, 367, C. A.; *Re Beales' Settlement, Barrett* v. *Beales*, [1905] 1 Ch. 256 (appointment to a class of children who in fact were all born in the life of the appointor).

operation (*r*), but not at evidence of what actually took place after that time, or at evidence of opinion or probability of even the highest degree (*a*). Accordingly, no evidence can be given that a woman is past child-bearing; nor does the court draw such an inference, however advanced her age (*b*).

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SUB-SECT. 3.—*Duration of Limitations and Postponement of Enjoyment.*

691. The rule against perpetuities does not affect remoteness in the cesser of limitations (*c*); it is the vesting of the interest that is considered, not its duration. Accordingly, an interest may be

Duration of limitations.

(*r*) *Re Wood, Tullett* v. *Colville*, [1894] 3 Ch. 381, 387, C. A., *per* DAVEY, L.J., at p. 387 (trust to work out gravel pits and then sell; "It might have been in the highest degree probable at the time of testator's death that the gravel pits would be worked out within the legal period; but as I understand the law, the court cannot look at evidence of that kind"); *Re Thompson, Thompson* v. *Thompson*, [1906] 2 Ch. 199; *Vanderplank* v. *King* (1843), 3 Hare, 1, *per* WIGRAM, V.-C., at p. 13 (devise to a class of the children of the unborn children of testator's daughter K.; "It is clear that for the purpose of determining whether the whole of that class can take, I must look at the events as they existed at the death of the testator. I cannot wait for subsequent events, so as to see whether a difficulty will be created by the birth of other children of J."); *Southern* v. *Wollaston* (1852), 16 Beav. 276 (gift to A. for life, remainder to A.'s children who shall attain twenty-five as tenants in common. Void for remoteness if A. survives the testator, but good if A. predeceases testator, because it must in that case vest if at all within lives in being); *Re Dawson, Johnston* v. *Hill* (1888), 39 Ch. D. 155, *per* CHITTY, J., at p. 159 ("The court does not merely allow evidence that a person mentioned in the will predeceased testator, but will allow evidence to show that the death of the person occurred at such a time before testator's death as rendered the gift valid"); *Re Russell, Dorrell* v. *Dorrell*, [1895] 2 Ch. 698, C. A. (residuary gift in trust, after death of M. and her husband, for all the daughters of M. who should attain twenty-one or marry under that age, with proviso for settlement of their shares on their children. Proviso held separable, void in case of daughters born after testator's death, and good in case of a daughter born before testator's death). Evidence will be allowed of the fact that a person was *en ventre sa mère* at the death of the testator (*Thellusson* v. *Woodford* (1805), 11 Ves. 112, H. L.; *Blackburn* v. *Stables* (1814), 2 Ves. & B. 367; *Storrs* v. *Benbow* (1853), 3 De G. M. & G. 390 (a gift of a sum of money "to each child that may be born to either of the children of either of my brothers lawfully begotten")); or the fact that the whole of a class of issue were then ascertained (*Southern* v. *Wollaston, supra*; *Re Thompson, Thompson* v. *Thompson, supra*); or that a line of issue had then failed (*Faulkner* v. *Daniel* (1843), 3 Hare, 199).

(*a*) *Jee* v. *Audley* (1787), 1 Cox, Eq. Cas. 324 (where KENYON, M.R., refused to assume that it was impossible for persons of seventy years of age to have children); *Re Wood, Tullett* v. *Colville*, [1894] 3 Ch. 381, 387, C. A. (see note (*r*), *supra*); *Re Bewick, Ryle* v. *Ryle*, [1911] 1 Ch. 116.

(*b*) *Jee* v. *Audley, supra*; *Re Sayer's Trusts* (1868), L. R. 6 Eq. 319 (woman sixty-two at testator's death); *Re Dawson, Johnston* v. *Hill, supra* (woman over sixty at testator's death), where *Cooper* v. *Laroche* (1881), 17 Ch. D. 368, to the contrary effect, was explained.

(*c*) "The remoteness against which the rule for the prevention of perpetuities is directed, is remoteness in the commencement, or first taking effect, of limitations, and not in the cesser or determination of them" (Lewis, Law of Perpetuity, p. 173; adopted in *Wainwright* v. *Miller*, [1897] 2 Ch. 255, 261); *Charitable Donations and Bequests (Commissioners)* v. *De Clifford (Baroness)* (1841), 1 Dr. & War. 245 (a devise of a "qualified fee with gift over; gift over held to be void for remoteness); *Re Randell*,

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given to an unborn person for life (*d*), or until marriage (*e*), or until any other event (*f*), provided it must vest, if at all, within the proper period; or, so far as the rule against perpetuities alone is concerned, to a succession of unborn persons whose interests are vested within the proper period (*g*); or to a number of unborn persons for life as tenants in common (*h*). In each of these cases

Randell v. *Dixon* (1888), 38 Ch. D. 213 (charitable trust to pay income for particular purpose, without limit as to time. Held that when purpose at an end, the trust ceased and property fell into residue); *Re Blunt's Trusts, Wigan* v. *Clinch*, [1904] 2 Ch. 767 (bequest of a charitable trust annuity to be void in certain events without limit of time; on happening of event trust annuity held to be at an end and to fall into residue); *Douglin* v. *Brownlee* (1884), 3 New Zealand Law Reports, 57, 63, C. A. (easement, where the cesser was introduced by a proviso, subsequent to the grant).

(*d*) Examples of, or references to, gifts of life interests to unborn persons are to be found in many cases, *e.g.*, *Cotton* v. *Heath* (1638), 1 Roll. Abr. 612; *Marlborough* (*Duke*) v. *Godolphin* (*Earl*) (1759), 1 Eden, 404, *per* HENLEY, Lord Keeper, at p. 415; *Hay* v. *Coventry* (*Earl*) (1789), 3 Term Rep. 83, 86; *Routledge* v. *Dorril* (1794), 2 Ves. 357, 366; *Williams* v. *Teale* (1847), 6 Hare, 239, 250; *Catlin* v. *Brown* (1853), 11 Hare, 372; *Gooch* v. *Gooch* (1853), 3 De G. M. & G. 366; *Stuart* v. *Cockerell* (1870), 5 Ch. App. 713; *Hampton* v. *Holman* (1877), 5 Ch. D. 183; *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535, 540. A life estate may therefore be given to the husband or wife of a living unmarried person, though such husband or wife is possibly unborn at the date of the gift; compare *Congreve* v. *Harrison* (1847), cited in *Buchanan* v. *Harrison* (1861), 1 John. & H. 662; *Re Merricks' Trusts* (1866), L. R. 1 Eq. 551 (life estate given, after testator's son's death, to any wife he might marry and leave him surviving); *Re Harvey, Peek* v. *Savory* (1888), 39 Ch. D. 289, C. A. (life estate to two daughters' possibly unborn husbands good, but gifts over, on failure of class to be ascertained at the death of the survivor of the daughters and their husbands, bad for remoteness).

(*e*) *Re Gage, Hill* v. *Gage*, [1898] 1 Ch. 498 (appointment in exercise of special power, contained in appointee's marriage settlement, to daughters until marriage, with gifts over to a class to be then ascertained; the appointment to daughters held good, because it commenced within the proper period, although it might extend beyond it; gift over held void for remoteness being in favour of a class who might not be ascertained until after the proper period); *Re Crichton's Settlement, Sweetman* v. *Batty* (1912), 106 L. T. 588 (appointment under special power to a daughter while unmarried).

(*f*) *Wainwright* v. *Miller*, [1897] 2 Ch. 255; and see *Boughton* v. *James* (1844), 1 Coll. 26, 46; *Gooding* v. *Read* (1853), 4 De G. M. & G. 510, C. A. "An estate that is to arise within the prescribed period, may be so limited as to determine on the happening of any event, however remote, as, for example, the indefinite failure of issue of a person, which . . . is too remote a contingency for the commencement of limitations. But an estate can only be made to determine upon an event thus remote, when by its original form and limitation, it will regularly cease by the happening of the contingency, as the term of the duration of the estate; for . . . a power reserved to a person to determine the limitation on such remote event, would be void" (Lewis, Law of Perpetuity, p. 173, quoted in *Wainwright* v. *Miller, supra, per* BYRNE, J., at p. 261).

(*g*) *Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372, H. L.; *Garland* v. *Brown* (1864), 10 L. T. 292; *Re Hargreaves, Midgley* v. *Tatley* (1890), 43 Ch. D. 401, C. A., *per* COTTON, L.J., at p. 405 (devises in trust of a series of life estates to sisters and sisters' children held good; but power of appointment given to the last survivor of the sisters and their children held void for remoteness). As to the possible invalidity of such a limitation under another rule, see p. 365, *post*.

(*h*) *Williams* v. *Teale* (1847), 6 Hare, 239, 250; *Gooch* v. *Gooch* (1853), 3 De G. M. & G. 366 (in this case a gift to children for their lives was assumed to include unborn children).

the limitation is valid without reference to the validity of the subsequent limitation (*i*). But no limitation can be made directly to the survivor of a number of unborn persons (*k*).

(*i*) *Hampton* v. *Holman* (1877), 5 Ch. D. 183, where JESSEL, M.R., said, at p. 188, "You might always give a life interest to an unborn person being a child of a person in being, and it did not matter what the gift over was after the death of such unborn child; it did not affect his interest"; see *Re Roberts, Repington* v. *Roberts-Gawen* (1881), 19 Ch. D. 520, C. A. LEACH'S, M.R., decision in *Hayes* v. *Hayes* (1828), 4 Russ. 311, to the effect that an estate for life to an unborn child is bad, unless followed by a vested interest, is regarded as a "slip" of that learned judge, and is not law; *Boughton* v. *James* (1844), 1 Coll. 26, 37; *Williams* v. *Teale* (1847), 6 Hare, 239, 250. The statements in *Hay* v. *Coventry (Earl)* (1789), 3 Term Rep. 83, 86, *Evans* v. *Walker* (1876), 3 Ch. D. 211, 213, and *Tregonwell* v. *Sydenham* (1815), 3 Dow, 194, II. L., *per* Lord REDESDALE, at p. 207, are ambiguous in this respect. Such an estate for life may, however, be affected by the *cy-près* doctrine; see p. 367, *post*.

(*k*) *Courtier* v. *Oram* (1855), 21 Beav. 91; *Garland* v. *Brown* (1864), 10 L. T. 292; see Gray, Rule against Perpetuities, 2nd ed., s. 277; *Re Hargreaves, Midgley* v. *Talley* (1890), 43 Ch. D. 401, C. A. (limitation to a named person and her children); *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535 (an estate tail limited to the survivor of unborn persons held void for remoteness, whether regarded as an equitable limitation or as a legal contingent remainder); *Whitby* v. *Von Luedecke*, [1906] 1 Ch. 783 (appointment, in exercise of a special power conferred by appointor's marriage settlement, to children for life, with ultimate gift to survivor. Held void for remoteness, because the survivor might be a person not ascertainable within twenty-one years from the death of the appointor); *Re Crichton's Settlement, Sweetman* v. *Batty* (1912), 106 L. T. 558 (appointment to surviving daughter in case one dies in the lifetime of the other without leaving issue). *Avern* v. *Lloyd* (1868), L. R. 5 Eq. 383, suggesting the validity of such a gift on the ground of the power of alienation of each person over the contingent right, is overruled on this point by *Re Hargreaves, Midgley* v. *Tatley, supra*. In *Ashley* v. *Ashley* (1833), 6 Sim. 358. SHADWELL, V.-C., construed a will as giving a life estate to A., remainder to A.'s children (unborn) for life as tenants in common, with cross-remainders for life to the children of A., which were assumed valid without discussion. This decision was criticised in *Stuart* v. *Cockerell* (1869), L. R. 7 Eq. 363, by MALINS, V.-C., at p. 370, and by Marsden, Rule against Perpetuities, p. 177. On the other hand, Gray (Rule against Perpetuities, 2nd ed., s. 207) defends the decision on the ground that the cross-remainders all vested on the death of A. As to whether *Cooke* v. *Bowler* (1836), 2 Keen, 54, can be considered an authority for their invalidity, see Marsden, Rule against Perpetuities, p. 179; Gray, Rule against Perpetuities, 2nd ed., ss. 207a, 251 *et seq.*; and see *Whitby* v. *Von Luedecke, supra*. As to a limitation to a number of unborn persons for their lives "with benefit of survivorship," the law is perhaps not settled, and the effect of the limitation appears to be a question of construction. In *Gooch* v. *Gooch* (1853), 3 De G. M. & G. 366, 383, there is a *dictum* of Lord CRANWORTH, L.C., that such a limitation is valid, on the ground that the unborn persons, together with the persons who had the fee, could convey the fee; but it is explained in *Re Ashforth, Sibley* v. *Ashforth, supra*, by FARWELL, J., at p. 541, that the Lord Chancellor was really thinking of a joint tenancy, and not of a gift to a number with a contingent limitation to the survivor of them; and that the reasons given are not easy to reconcile with *Re Hargreaves, Midgley* v. *Talley, supra*, and *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, C. A. In *Whitby* v. *Von Luedecke, supra*, BUCKLEY, J., at p. 788, said: "There is a difference . . . between these two things—a vested estate for life" [*i.e.*, in each unborn person] "which may fail to fall into possession . . . and the gift of a contingent estate for life. What I have here is a gift under which, as I understand the language, only the survivor

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692. Similarly, the rule against perpetuities does not prescribe any limit within which estates and interests must come into possession; the rule does not concern itself with provisions postponing the enjoyment of estates and interests, if those estates and interests must be vested within the proper limits (*l*).

Postponement of possession.

A limitation subsequent to an estate for life to an unborn person is not invalid under the rule against perpetuities so long as the vesting is not unduly postponed (*m*); thus, the contingency on which vesting is to take place must not depend on the death of the unborn tenant for life (*n*).

Effect on vesting.

693. A direction that an unborn devisee or alienee shall not be entitled to possession of his estate until either attaining a certain age greater than twenty-one or other remote event, or the condition making a gift to an individual or class dependent upon the attaining of such an age or upon the happening of such an event, may be either a condition precedent to the vesting of the estate, and in that case may render the limitation void under the rule (*o*),

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. . . will be entitled to some estate"; and accordingly the limitation in the latter case was held void.

(*l*) Lewis, Law of Perpetuity, c. xxii.; *Montgomerie* v. *Woodley* (1800), 5 Ves. 522 (devises of real estate, with a direction postponing devisees' possession until twenty-five); *Dennis* v. *Frend* (1863), 14 I. Ch. R. 271 (devise giving vested estate at testator's death, with attempted postponement of possession until twenty-three); and see Tudor, L. C. Real Prop., 4th ed., p. 612.

(*m*) *Evans* v. *Walker* (1876), 3 Ch. D. 211; compare *Mogg* v. *Mogg* (1815), 1 Mer. 654, where Preston, at p. 664, *arguendo*, said: "A gift to an unborn child for life is good, if it stops there; but if a remainder is added to his children or issue as purchasers, it is not good, unless there be a limitation of time within which it is to take effect": this statement of the law was adopted by WOOD, V.-C., in *Cattlin* v. *Brown* (1853), 11 Hare, 372, 375, but it is correct only so far as the rule against perpetuities alone is concerned; see note (*k*), p. 365, *post*; *Re Norton, Norton* v. *Norton*, [1911] 2 Ch. 27. As to whether the subsequent limitation can be void under another rule, see *Honywood* v. *Honywood* (1905), 92 L. T. 814, H. L., *per* Lord DAVEY, at p. 815; and see p. 365, *post*.

(*n*) See note (*s*), p. 305, *ante*; *Re Merricks' Trusts* (1866), L. R. 1 Eq. 551, 558 (bequest of a fund after the death of testator's daughter, and any husband she might have surviving her, to four persons by name who should then be living, or to the lawful issue of such of them as should be then dead: held that it was not necessary for the "issue," construed as "children," to survive the possible husband of testator's daughter, but that it was the possession only, and not the vesting of the remainder to the issue, which was postponed to the death of the possible husband); see also *Re Norton, Norton* v. *Norton*, *supra*.

(*o*) *Boughton* v. *Boughton, Boughton* v. *James* (1848), 1 H. L. Cas. 406, 433 (limitation of real and personal estates upon trust to accumulate income, with a direction to divide the whole property with accumulations among a class consisting of all sons of testator's nephews living, until a son first attained twenty-five; held that the gift was in the direction and was void for remoteness); *Re Wrightson, Battie-Wrightson* v. *Thomas*, [1904] 2 Ch. 95, C. A. (direction in a codicil that no devisee under the will should have a vested interest or be entitled to possession until he attained twenty-four; held that the effect of the codicil was to make the limitations in the will executory devises, and, as such, void for remoteness: and see the explanation of this case in *White* v. *Summers*, [1908] 2 Ch. 256, *per* PARKER, J., at p. 267). For the rules as to vesting, see, generally, title REAL PROPERTY AND CHATTELS REAL; compare note (*p*), p. 339, *post*, and *Edmunds* v. *Waugh* (1858), 4 Drew. 275 (where a clause

or it may be merely a direction or condition postponing the enjoyment, the right to the estate being vested at birth or at some other time independent of the age or event concerned, in which case the limitation is not rendered invalid (*p*). A gift over on the devisee not attaining the required age is then construed as a limitation divesting the previous vested gift, and only the gift over is void (*q*). A provision, however, that the interest of an alienee is not to be "vested" until, or is to be "vested" at, such an age, is generally too strong to allow a construction rendering the gift valid (*a*), unless "vested" can be construed to mean "indefeasibly vested" (*b*). If interest is given for maintenance in

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directing investment "within three months after my decease" was treated as merely parenthetical and indicating an intention as to the period of investment, and not as imposing a condition precedent).

(*p*) If there is a clear immediate gift, vesting is not postponed by subsequent equivocal words purporting to defer possession, or to suspend the beneficial use (*Dodson* v. *Hay* (1791), 3 Bro. C. C. 405; *Montgomerie* v. *Woodley* (1800), 5 Ves. 522 (see note (*l*), p. 338, *ante*); *Bingley* v. *Broadhead* (1803), 8 Ves. 415), or to defer payment (*Blease* v. *Burgh* (1840), 2 Beav. 221; *Saumarez* v. *Saumarez* (1865), 34 Beav. 432; see Lewis, Law of Perpetuity, p. 511, and Supplement, p. 170). The terms of a gift over may show that the previous gift confers a vested interest before the specified age (*Bland* v. *Williams* (1834), 3 My. & K. 411 (gift over if previous donee should die under the specified age and without issue); and see note (*q*), *infra*). The fact that the fund given is to be separated at once or at the death of a tenant for life may be sufficient to cause the interests in the fund to vest at that period (*Greet* v. *Greet* (1842), 5 Beav. 123; *Harrison* v. *Grimwood* (1849), 12 Beav. 192). The direction for postponement in all cases where interests are previously vested is not effective after the alienee has become entitled to give a receipt, and has no effect on devolution of the property on death before twenty-one; and compare p. 327, *ante*.

(*q*) *Bland* v. *Williams* (1834), 3 My. & K. 411 (gift over if any child should die under specified age and without issue); *Davies* v. *Fisher* (1842), 5 Beav. 501 (gift over if no child attain the specified age); *Harrison* v. *Grimwood* (1849), 12 Beav. 192 (gift over in case of death under specified age without issue); *Taylor* v. *Frobisher* (1852), 5 De G. & Sm. 191 (gift over of shares of those dying under the specified age to the survivors); *Hobbs* v. *Parson* (1854), 2 Sm. & G. 212 (gift over to the survivors of shares of those dying under the specified age); *Re Edmondson's Estate* (1868), L. R. 5 Eq. 389, *per* PAGE WOOD, V.-C., at p. 398 (gift over on death of children under the specified age).

(*a*) *Griffith* v. *Blunt* (1841), 4 Beav. 248 (shares of sons "to be vested at" twenty-five, and of daughters at twenty-five or marriage, and, if one child only, to be paid at twenty-five or marriage; *Comport* v. *Austen* (1841), 12 Sim. 218 ("to become vested interests" at twenty-five); *Re Morse's Settlement* (1855), 21 Beav. 174 ("to be a vested interest in, and to be paid, transferred or assigned to" sons at twenty-five, and daughters at twenty-five or marriage, with benefit of survivorship in case of death at twenty-five, and as to daughters in case of being unmarried: as to this case, which was a case of a deed, see Jarman on Wills, 6th ed., p. 1355, note (e)); *Rowland* v. *Tawney* (1858), 26 Beav. 67 ("to be considered as a vested interest" at the age of twenty-five); *Re Wrightson, Battie-Wrightson* v. *Thomas*, [1904] 2 Ch. 95, C. A.).

(*b*) As in *Berkeley* v. *Swinburne* (1848), 16 Sim. 275, 281, 282 (gift over treating children's shares as original gifts to them, belonging to them from the death of the tenant for life, followed by clauses for their maintenance and advancement); *Taylor* v. *Frobisher* (1852), 5 De G. & Sm. 191 (gift over if the child died without issue before the specified period. In this case PARKER V.-C., said, at p. 199: "The conclusion appears to me

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the meantime, the gift may admit of being construed as vested at an earlier date, and not void (*c*), even where there is a discretion conferred on trustees to apply less than the whole income (*d*), but not where the alienees form a contingent class, or where an aliquot share is not appropriated to each legatee, or where the surplus income is to be accumulated (*e*). Where there is no gift except in a direction to pay, and the date of payment is too remote, the gift itself is too remote (*f*), but, where there is a valid gift with an independent and distinct direction to pay at a remote period, the latter direction does not affect the vesting or the validity of the gift (*g*). It is a matter of construction in each case.

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irresistible that the testatrix intended the child so dying and leaving issue to retain his share as an interest transmissible to his representatives and considered that he would do so by force of the original gift"); *Re Baxter's Trusts* (1864), 10 Jur. (N. S.) 845; *Re Edmondson's Estate* (1868), L. R. 5 Eq. 389 (where PAGE WOOD, V.-C., found two things in the will showing an intention not to postpone vesting. If a child's share was construed to be contingent (1) an accruer clause would have become useless and unnecessary; and (2) there would have been an intestacy as regards the share of a child dying under twenty-five leaving issue).

(*c*) *Jackson* v. *Marjoribanks* (1841), 12 Sim. 93; *Davies* v. *Fisher* (1842), 5 Beav. 201 (payment postponed to twenty-five, with an express direction to apply interest for maintenance during minority); *Bell* v. *Cade* (1861), 2 John. & H. 122; *Tatham* v. *Vernon* (1861), 29 Beav. 604 (gift to daughters for life, and afterwards to pay and divide among their issue (children) then living, at twenty-five, the whole interest being given in the meantime for their maintenance during minority). There are *dicta* in *Pearson* v. *Dolman* (1866), L. R. 3 Eq. 315, *per* PAGE WOOD, V.-C., at p. 321, and in *Thomas* v. *Wilberforce* (1862), 31 Beav. 299, *per* Lord ROMILLY, M.R., at p. 302, to the effect that where there is a "gap" or "chasm" between the direction as to interest during minority and as to principal at a subsequent age, there is a difficulty in holding that vesting is not postponed to the subsequent age; see also *Doe* d. *Dolley* v. *Ward* (1839), 9 Ad. & El. 582; *Willson* v. *Cobley*, [1870] W. N. 46.

(*d*) *Fox* v. *Fox* (1875), L. R. 19 Eq. 286. This case may, however, have to be applied with caution: it was doubted in *Dewar* v. *Brooke* (1880), 14 Ch. D. 529, and dissented from in *Re Wintle, Tucker* v. *Wintle*, [1896] 2 Ch. 711, but not disapproved by LINDLEY, M.R., and JEUNE, P., in *Re Turney, Turney* v. *Turney*, [1899] 2 Ch. 739, C. A.; see also *Hardcastle* v. *Hardcastle* (1862), 1 Hem. & M. 405, *per* PAGE WOOD, V.-C., at p. 410. The construction which was applied by JESSEL, M.R., in *Fox* v. *Fox, supra*, was aided by a gift over. As to the effect of a gift over in aiding the construction in such a case, see *dicta* of JESSEL, M.R., in *Re Parker, Barker* v. *Barker* (1880), 16 Ch. D. 44, 46, and NEVILLE, J., in *Re Williams, Williams* v. *Williams*, [1907] 1 Ch. 180, 185; and Jarman on Wills, 6th ed., pp. 1411—1414, where it is suggested that *Fox* v. *Fox, supra*, and *Re Wintle, Tucker* v. *Wintle, supra*, can be distinguished and reconciled on this ground; see also *Re Levy, Cohen* v. *Cohen* (1907), 7 New South Wales State Reports, 835.

(*e*) *Re Thatcher's Trusts* (1859), 26 Beav. 365; *Re Parker, Barker* v. *Barker, supra*: *Re Ricketts, Ricketts* v. *Ricketts* (1910), 103 L. T. 278; *Re Hume, Public Trustee* v. *Mabey*, [1912] 1 Ch. 693.

(*f*) *Leake* v. *Robinson* (1817), 2 Mer. 363, where GRANT, M.R., said, at p. 385: "It is not the enjoyment which is postponed; for there is no antecedent gift . . . of which the enjoyment could be postponed. The direction to pay is the gift"; *Chance* v. *Chance* (1853), 16 Beav. 572; *Merlin* v. *Blagrave* (1858), 25 Beav. 125.

(*g*) *Farmer* v. *Francis* (1824), 2 Bing. 151 (vested estates after death of A. for all her children, with a direction to postpone division until they attain twenty-four); *Kevern* v. *Williams* (1832), 5 Sim. 171 (vested estates after death of A. to the grandchildren of B. living at the death of A., with a

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694. A limitation to a class is governed by the same principles as other limitations with respect to the rule, but the effect of the rule needs a separate statement. By a limitation to a class is meant (*h*) a limitation to a number of devisees or alienees, uncertain in number at the time of the gift, to be ascertained at a future time, all or some of whom (*i*) come within a certain category or description, defined by a general or collective formula (*k*), or within a number of such categories or descriptions (*l*), who, if they are to take at all, are to take one divisible subject in certain proportionate shares (*m*). In the case of such a limitation, all the interests of the members of the class must vest at the same time (*n*), but the total and ultimate amount to be taken by any one donee cannot be ascertained until all the persons who are to take, and the ultimate proportions in which they are to take, are ascertained (*o*).

Class gifts.

Period of vesting is determining factor.

In all cases it is the period of vesting, and not merely the description of the donees or the wide or indefinite character of the class, that produces the invalidity, if any, of the limitation (*p*). The ordinary rules of construction as to ascertainment of a class may prevent the limitation from being void (*q*).

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direction to postpone payment until the children attain twenty-five; *Harrison* v. *Grimwood* (1849), 12 Beav. 192; *Hodson* v. *Micklethwaite* (1854), 2 Drew. 294; see *Leeming* v. *Sherratt* (1842), 2 Hare, 14, 21).

(*h*) See, generally, as to class gifts, title WILLS. In *Kingsbury* v. *Walter*, [1901] A. C. 187, Lord HALSBURY, L.C., at p. 188, pointed out the danger of indulging in abstract propositions when it is a question of construing a particular will. In that case the Court of Appeal and House of Lords came to the conclusion, looking at the situation of the family and condition of things which in fact existed at the time when testator composed his will, that he intended to make a class properly so called, although it was not so described in words.

(*i*) A gift to a class must be a gift to them as a class of persons having some common attribute, and not a gift to them as individuals (*Re Chaplin's Trust* (1863), 12 W. R. 147, *per* PAGE WOOD, V.-C.; *Re Jackson, Shiers* v. *Ashworth* (1883), 25 Ch. D. 162, *per* CHITTY, J., at p. 165). "But it may be none the less a class because some of the individuals of the class are named, *e.g.*, to A. and all other my nephews and nieces" (*Kingsbury* v. *Walter, supra, per* Lord DAVEY, at p. 192). A gift to A. and all the children of B. is *primâ facie* not a class gift, but may be so if there is a context showing that testator intended it to be so (*ibid.*, at p. 193); and see *Kekewich* v. *Barker* (1903), 88 L. T. 130, H. L.

(*k*) See the definitions in *Pearks* v. *Moseley* (1880), 5 App. Cas. 714, *per* Lord SELBORNE, L.C., at p. 723; in *Re Chaplin's Trust, supra, per* WOOD, V.-C., summarised in *Kingsbury* v. *Walter, supra, per* Lord DAVEY, at p. 193, as follows:—"*Primâ facie* a class gift is a gift to a class consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator."

(*l*) As in the case of a class composed of children and grandchildren, or a composite class composed of the children of A. and the children of B.

(*m*) *Pearks* v. *Moseley* (1880), 5 App. Cas. 714, 723.

(*n*) *Kingsbury* v. *Walter, supra, per* Lord DAVEY, at p. 194.

(*o*) *Bentinck* v. *Portland* (*Duke*) (1877), 7 Ch. D. 693, *per* FRY, J., at p. 698.

(*p*) *Leake* v. *Robinson* (1817), 2 Mer. 363, *per* GRANT, M.R. at p. 388: "It is the period of the vesting, and not the description of the legatees, that produces the incapacity."

(*q*) *E.g.*, where upon the construction of the particular will the class is

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Class living at remote event.

695. A limitation to such members of a class as are living at a possibly remote event, where the class consists partly of possibly unborn persons, is void (*a*).

On the other hand, a limitation to such of a class entirely composed of living persons, who survive a certain event, must vest during the lifetime of one of them, if the limitation is to take effect at all, and is accordingly valid (*b*).

Class ascertained by description of members.

696. A limitation to a class of persons answering a given description, of which class any member may possibly have to be ascertained or be ascertainable for the first time at a period exceeding the perpetuity period, is wholly void, even as to those members of the class who are ascertainable within that period (*c*),

ascertained at the date of the will or at the death of the testator or of the tenant for life (*Harvey* v. *Harvey* (1842), 5 Beav. 134 ("grandchildren etc. of A. not from time to time in receipt of rents," construed with the aid of a codicil to mean those living at the death of the tenant for life); *Leach* v. *Leach* (1843), 2 Y. & C. Ch. Cas. 495 (E. and the other children of J. construed to mean the children living at the date of the will); *Re Payne* (1858), 25 Beav. 556 (to children of A. and their issue); *Wetherell* v. *Wetherell* (1863), 1 De G. J. & Sm. 134 (to the grandchildren and great-grandchildren of A.; held vested at the death of the testator); *Re Powell, Crosland* v. *Holliday*, [1898] 1 Ch. 227 (children of A. for life, and then to their children, confined to children of A. born at testator's death)); and see title WILLS.

(*a*) *Jee* v. *Audley* (1787), 1 Cox, Eq. Cas. 324 (to the daughters of A. and B. his wife living at the failure of C.'s issue); *Palmer* v. *Holford* (1828), 4 Russ. 403 (bequest upon trust to accumulate and transfer the fund and accumulations to the children of a living person who should be living at the expiration of twenty-eight years from testator's death other than an eldest or only son); *Dodd* v. *Wake* (1837), 8 Sim. 615 (where SHADWELL, V.-C., said, at p. 616: "The testator appears clearly to have intended that only those children of his daughter should take who should be alive when the eldest child for the time being should attain the age of twenty-four, and therefore the bequest is void for remoteness"); *Speakman* v. *Speakman* (1850), 8 Hare, 180 (class to be ascertained fifty years after the testator's death, consisting of children of the testator, their children, and remoter issue); *Lett* v. *Randall, Lett* v. *Dormer* (1855), 3 Sm. & G. 83 (to the children of A., a spinster, living at the death of the survivor of A. and her future husband); *Stuart* v. *Cockerell* (1870), 5 Ch. App. 713 (to the children of E., then a bachelor, living at the death of his eldest son, and the children *per stirpes* of such of the children of E. as are then dead); *Re Harvey, Peek* v. *Savory* (1888), 39 Ch. D. 289, C. A. (a gift over on failure of a class to be ascertained at the death of the survivor of testatrix's daughters and their husbands, present or future); *Re Bence, Smith* v. *Bence*, [1891] 3 Ch. 242, C. A. (gift to a class which included such of the children of any child of testator's daughter M. who might die under twenty-one, as should attain twenty-one or, being a daughter, be married); and see *Gooding* v. *Read* (1853), 4 De G. M. & G. 510, C. A.; *Goodier* v. *Johnson* (1881), 18 Ch. D. 441, C. A.

(*b*) *Lachlan* v. *Reynolds* (1852), 9 Hare, 796 (gift to such of a number of persons *in esse* at the time of testator's death as should be living thirty years after his death); *Re Watkins, James* v. *Cordey* (1889), 37 W. R. 609 C. A. (gift to testator's grandchildren, living at his decease, at twenty-one, with substitutionary gift over of the shares of grandchildren dying under twenty-one).

(*c*) *Jee* v. *Audley, supra* (to the daughters of A. and B. his wife living at the failure of C.'s issue; referred to afterwards by PAGE WOOD, V.-C., as "a strong case of that class," because "all the children *in esse* might have taken and it was only the possibility that there

since the quantum of interest of each member is not so ascertainable (*d*).

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Where the class is defined as a part of a super-class (as in the case where the class is those of the children of a named person who attain a certain age, or survive a certain event, or satisfy any other condition or description), it is of no avail that the super-class (the whole number of children) is wholly ascertainable within the perpetuity period, and the minimum interest of a member of the class ascertained in consequence (*e*).

Class taking at an age greater than twenty-one.

A limitation, therefore, to a class consisting of or including the unborn children of a living person who attain an age greater than twenty-one is wholly void for remoteness, as to every member of the class (*f*), except in cases where the limitation is, and

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must have been incapable children which excluded those who were capable"); *Leake* v. *Robinson* (1817), 2 Mer. 363; *Catlin* v. *Brown* (1853), 11 Hare, 372 (the fourth rule, where PAGE WOOD, V.-C., at p. 377, stated the reason of the rule as follows:—"You cannot give the whole property to those who are in fact ascertained within the period, and might have taken if the gift had been to them *nominatim*, because they were intended to take in shares to be regulated in amount, augmented or diminished according to the number of the other members of the class, and not to take exclusively of those other members"); *Read* v. *Gooding* (1856), 21 Beav. 478 (to the children of A. living when the youngest attains twenty-five and the issue of children of A. then dead); *Hancock* v. *Watson*, [1902] A. C. 14 (an executory limitation in default of children of S., whether born before or after the testator's death, who should attain twenty-five, if sons, or twenty-one or be married, if daughters); and see the cases cited in note (*f*), *infra*.

(*d*) See p. 304, *ante*.

(*e*) *Smith* v. *Smith* (1870), 5 Ch. App. 342; *Hale* v. *Hale* (1876), 3 Ch. D. 643, 646; approved in *Pearks* v. *Moseley* (1880), 5 App. Cas. 714; overruling *Re Moseley's Trusts* (1871), L. R. 11 Eq. 499, 502, where, as pointed out in *Hale* v. *Hale*, *supra*, the fact that the class might diminish was overlooked.

(*f*) *Leake* v. *Robinson*, *supra* (where GRANT, M.R., said, at p. 390, "The bequests in question are not made to individuals but to classes; and what I have to determine is whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class"); *Judd* v. *Judd* (1830), 3 Sim. 525, *sub nom. Judd* v. *Hobbs*, 8 L. J. (O. S.) (CH.) 119; reconsidered in *Hunter* v. *Judd* (1833), 4 Sim. 455; *Vawdrey* v. *Geddes* (1830), 1 Russ. & M. 203; *Porter* v. *Fox* (1834), 6 Sim. 485; *Cromek* v. *Lumb* (1839), 3 Y. & C. (EX.) 565; *Newman* v. *Newman* (1839), 10 Sim. 51; *Ring* v. *Hardwick* (1840), 2 Beav. 352; *Comport* v. *Austen* (1841), 12 Sim. 218; *Griffith* v. *Blunt* (1841), 4 Beav. 248; *Massey* v. *Barton* (1844), 7 I. Eq. R. 95; *Bull* v. *Pritchard* (1826), 1 Russ. 213 (personal estate), and S. C. (1847), 5 Hare, 567 (real estate); *Bute* (*Marquis*) v. *Harman* (1846), 9 Beav. 320, corrected from registrar's book in *Southern* v. *Wollaston* (1852), 16 Beav. 166, 168, note (b); *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; *Boreham* v. *Bignall* (1850), 8 Hare, 131; *Chance* v. *Chance* (1853), 16 Beav. 572; *Re Morse's Settlement* (1855), 21 Beav. 174; *Re Blakemore's Settlement* (1855), 20 Beav. 214; *Cam* v. *Salmon* (1856), 5 W. R. 31; *Pickford* v. *Brown*, *Brown* v. *Brown* (1856), 2 K. & J. 426; *Merlin* v. *Blagrave* (1858), 25 Beav. 125; *Rowland* v. *Tawney* (1858), 26 Beav. 67; *Re Thatcher's Trusts* (1859), 26 Beav. 365; *Wilkinson* v. *Duncan* (1861), 30 Beav. 111; *Thomas* v. *Wilberforce* (1862), 31 Beav. 299; *Re Bulley's Estate* (1865), 11 Jur. (N. S.) 847, C. A.; *Willson* v. *Cobley*, [1870] W. N. 46; *Bowyer* v. *West* (1871), 24 L. T. 414; *Re Slark's Trusts* (1872), 21 W. R. 165; *Von Brockdorff* v. *Malcolm* (1885), 30 Ch. D. 172; *Re Warden*, *Re Gilbart's Settlement*, *Browell* v. *Warden*, [1887] W. N.

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takes effect as a valid contingent remainder (*g*). But where, on the true construction of the gift, the class is entirely ascertained at or by reference to the death of the testator whose will contained the limitation (*h*) or at the period of distribution which is on an event not too remote (*i*), so that the attainment of the age is not a condition precedent to vesting, but a direction for divesting or for the postponement of enjoyment only (*k*), the limitation is valid.

24; *Re Whitten, King* v. *Whitten* (1890), 62 L. T. 391; *Willerton* v. *Stocks*, [1892] W. N. 29; *Re Watson, Cox* v. *Watson*, [1892] W. N. 192; *Re Wise, Jackson* v. *Parrott*, [1896] 1 Ch. 281; *Trustees, Executors and Agency Co., Ltd.* v. *Jenner* (1897), 22 Victorian Law Reports, 584; *Re O'Brien's Estate, Pryts* v. *Trustees, Executors and Agency Co., Ltd.* (1899), 24 Victorian Law Reports, 360; *Re Ricketts, Ricketts* v. *Ricketts* (1910), 130 L. T. 278; *Re Hume, Public Trustee* v. *Mabey*, [1912] 1 Ch. 693. Similarly, where the class is of children only, males taking at twenty-five, or other age greater than twenty-one, and females at twenty-one, or marriage (*Evers* v. *Challis* (1859), 7 H. L. Cas. 531 (where a gift over took effect as a valid contingent remainder); *Ker* v. *Hamilton* (1880), 6 Victorian Law Reports, Equity Cases, 172; *Hancock* v. *Watson*, [1902] A. C. 14; *White* v. *Stamps Commissioner* (1908), 8 New South Wales State Reports, 287).

(*g*) *Evers* v. *Challis, supra*; *Symes* v. *Symes*, [1896] 1 Ch. 272: *Re Wrightson, Battie-Wrightson* v. *Thomas*, [1904] 2 Ch. 95, C. A.; explained in *White* v. *Summers*, [1908] 2 Ch. 256, *per* PARKER, J., at pp. 267, 268; see the remarks in *Re Finch, Abbiss* v. *Burney* (1881), 17 Ch. D. 211, C. A., *per* MALINS, V.-C., at p. 221, on *Bull* v. *Pritchard* (1847), 5 Hare, 567; *Brackenbury* v. *Gibbons* (1876), 2 Ch. D. 417. The latter case, however, does not appear to be correctly decided; see *Re Lechmere and Lloyd* (1881), 18 Ch. D. 524; *Miles* v. *Jarvis* (1883), 24 Ch. D. 633; *Dean* v. *Dean*, [1891] 3 Ch. 150, in which cases the limitation could not be a contingent remainder.

(*h*) *Elliott* v. *Elliott* (1841), 12 Sim. 276, followed in *Re Coppard's Estate, Howlett* v. *Hodson* (1887), 35 Ch. D. 350 (where it seems the construction was adopted to prevent an intestacy); see observations on *Elliott* v. *Elliott, supra*, in Gray, Rule against Perpetuities, 2nd ed., s. 640, and Jarman on Wills, 6th ed., p. 1679; *Re Wenmoth's Estate, Wenmoth* v. *Wenmoth* (1887), 37 Ch. D. 266; and see *Re Mervin, Mervin* v. *Crossman*, [1891] 3 Ch. 197, 204, and *Re Barker, Capon* v. *Flick* (1905), 92 L. T. 831, for other explanations of these cases. A gift by will to the children of the testator himself may vest at any age, his children being necessarily lives in being at his death (*Lachlan* v. *Reynolds* (1852), 9 Hare, 796).

(*i*) The rule in *Andrews* v. *Partington* (1791), 3 Bro. C. C. 401, may operate in favour of the validity of such gifts. That rule is to the effect that when a gift to a class on reaching a certain age is accompanied by a valid gift over on failure of any member of the class to reach that age, all members of the class coming into existence before the eldest reaches the required age are allowed to share (*Picken* v. *Matthews* (1878), 10 Ch. D. 264; see *Re Barker, Capon* v. *Flick, supra*); but where no member of the class has attained the age, greater than twenty-one, at the death of the testator, the gift is void, since all those then living might have died without attaining the required age, and in that case the class would have to be ascertained at a period too remote (*Re Mervin, Mervin* v. *Crossman, supra*). So where the time of distribution is the death of a tenant for life, the gift may be valid (*Kevern* v. *Williams* (1832), 5 Sim. 171); see Gray, Rule against Perpetuities, 2nd ed., ss. 638, 639 aa; compare *Barnet* v. *Barnet* (1861), 29 Beav. 239).

(*k*) *Dodson* v. *Hay* (1791), 3 Bro. C. C. 405; *Kevern* v. *Williams, supra*; *Blease* v. *Burgh* (1840), 2 Beav. 221; *Hodson* v. *Micklethwaite* (1854), 2 Drew. 294; *Grogan* v. *Dopping* (1856), 6 I. Ch. R. 265; *Bell* v. *Cade* (1861), 2 John. & H. 122; *Hardcastle* v. *Hardcastle* (1862), 1 Hem. & M. 405; *Dennis* v. *Frend* (1863), 14 I. Ch. R. 271; *Re Baxter's Trusts* (1864), 10 Jur. (N. S.) 845; *Saumarez* v. *Saumarez* (1865), 34 Beav.

The court cannot remodel the gift and treat some of the class as entitled at any other age or time (*l*).

Class attaining twenty-one.

697. A limitation can be well made to such of the unborn children of a living person as attain twenty-one (*m*), and this limitation may be extended to include in the class the children of any child who should die under twenty-one leaving issue at death (*n*), so that their interests would arise at birth, and all the shares would necessarily be ascertained within due limits of time. But this further addition of grandchildren cannot be made when the grandchildren are only to take if they attain twenty-one, so that the condition of attaining that age is to apply to both children and grandchildren forming the composite class (*o*). In this case the gift to the children cannot be severed from that to the grandchildren. Nor can a limitation be made generally to children of children of a living person whenever born. The limitation is valid, however, in a will where the class of children is expressly or impliedly closed at the death of the testator (*p*).

Individual gift to each member of a class.

698. Where there is a gift or devise of a given sum of money or amount of property to each member of a class, and the gift to each is wholly independent of the similar gift to every other member of the class, and can be neither augmented nor diminished, whatever the number of the other members may turn out to be, then the gift or devise may be good as to those members in fact ascertained within the limits of the perpetuity period (*a*). In cases of this kind

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432; *England* v. *England* (1869), 20 L. T. 648; *Knox* v. *Wells* (1864), 2 Hem. & M. 674; *Southern* v. *Wollaston* (1852), 16 Beav. 166; *Re Turney, Turney* v. *Turney*, [1899] 2 Ch. 739, C. A. (grandchildren held to take immediate vested interests subject to being divested in case they did not attain twenty-five); see p. 338, *ante*.

(*l*) *Leake* v. *Robinson* (1817), 2 Mer. 363, 389; *Ker* v. *Hamilton* (1880), 6 Victorian Law Reports, Equity Cases, 172, 175. The Real Property Commissioners' 3rd Report, p. 41, suggested a legislative amendment in this respect.

(*m*) *Knapping* v. *Tomlinson* (1864), 10 Jur. (N. S.) 626. So where the gift is to children of a class of persons all ascertained at the death of the testator on attaining twenty-one, the gift is valid (*Re Chinnery's Estate* (1877), 1 L. R. Ir. 296, C. A.; *Re Hobson's Will, etc., Hobson* v. *Sharp*, [1907] Victorian Law Reports, 724). This is the limit in a settlement, or in a will where the living person is not the testator himself.

(*n*) *Pearks* v. *Moseley* (1880), 5 App. Cas. 714, *per* Lord SELBORNE, L.C., at p. 719.

(*o*) *Seaman* v. *Wood* (1856), 22 Beav. 591; *Webster* v. *Boddington* (1858), 26 Beav. 128; *Re Moseley's Trusts* (1879), 11 Ch. D. 555, C. A.; affirmed *sub nom. Pearks* v. *Moseley* (1880), 5 App. Cas. 714; *Re Moseley's Trusts* (1871), L. R. 11 Eq. 499, being overruled. So, also, where the age to be attained in this case is any other than twenty-one (*Smith* v. *Smith* (1870), 5 Ch. App. 342; *Hale* v. *Hale* (1876), 3 Ch. D. 643; approved in *Pearks* v. *Moseley, supra*).

(*p*) *Re Watkins, James* v. *Cordey* (1889), 37 W. R. 609; *Re Powell, Crosland* v. *Holliday*, [1898] 1 Ch. 227; and see note (*q*), p. 341, *ante*. The context may show that the children of named persons only are intended (*Re Hobson's Will, etc., Hobson* v. *Sharp, supra*; or that the class of descendants is ascertained at the death of a tenant for life (*Re Roberts, Repington* v. *Roberts-Gawen* (1881), 19 Ch. D. 520, C. A.).

(*a*) *Storrs* v. *Benbow* (1853), 3 De G. M. & G. 390; *Cattlin* v. *Brown*

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the gift is single to each party, and is not a gift to a "class" in the proper legal sense of that term.

Gift of a fund in separate shares.

699. Where there is a time fixed at which a fund is to bedivided into separate shares, and that time is not obnoxious to the rule against perpetuities, then each share stands separate from the others, and the limitation of each share takes effect or not according as the dispositions of that share do or do not violate the rule, and the valid gift of one share is not made void by the invalidity of the gift of another share or portion of another share (*b*).

Clauses of substitution.

700. Where the limitation is first of all to a class of children or other issue absolutely, who are themselves ascertainable within a proper time, and a substitutionary clause is added giving the share of each one dying before distribution to a class of his or her issue not necessarily ascertainable within the perpetuity period, then, provided that the substitutionary clause is separated from the first absolute gift, the latter stands good, and the substitutionary clause only is invalid (*c*); but, if there is no absolute gift in the first instance, the whole is void (*d*).

Settlement of shares.

701. A direction for settlement of each share is severable among the shares, and takes effect as to those members of the class living at the time when the instrument comes into operation (*e*) though void as to other members. There must be an absolute gift of each share in the first place (*f*).

Forfeiture clause.

702. A clause of forfeiture is similarly severable (*g*).

(1853), 11 Hare, 372 (the fifth rule there enunciated by PAGE WOOD, V.-C.); *Wilkinson* v. *Duncan* (1861), 30 Beav. 111. *Blandford* v. *Thackerell* (1793), 2 Ves. 238, and *Liley* v. *Hay* (1842), 1 Hare, 580, appear to be examples of the application of this rule.

(*b*) The rule was enunciated as above in *Bentinck* v. *Portland* (*Duke*) (1877), 7 Ch. D. 693, *per* FRY, J., at p. 698; see *Griffith* v. *Pownall* (1843), 13 Sim. 393; *Cattlin* v. *Brown* (1853), 11 Hare, 372 (the fifth rule there enunciated by PAGE WOOD, V.-C.); *Wilson* v. *Wilson* (1858), 4 Jur. (N. S.) 1076; *Bell* v. *Bell* (1862), 13 I. Ch. R. 517, C. A.; *Knapping* v. *Tomlinson* (1864), 10 Jur. (N. S.) 626; *Re Coulman, Munty* v. *Ross* (1885), 30 Ch. D. 186; *Re Russell, Dorrell* v. *Dorrell*, [1895] 2 Ch. 698, C. A. *Greenwood* v. *Roberts* (1851), 15 Beav. 92, has been the subject of discussion and criticism; see the explanation of the case in *Cattlin* v. *Brown, supra*, at p. 379, and in *Webster* v. *Boddington* (1858), 26 Beav. 128, 136, 137, which places it upon a ground which is reconcilable with the other authorities; and see the criticism in *Knapping* v. *Tomlinson, supra*; Gray, Rule against Perpetuities, 2nd ed., s. 391; and Jarman on Wills, 6th ed., pp. 335—339. *Arnold* v. *Congreve* (1830), 1 Russ. & M. 209, is overruled on this point; see *Knapping* v. *Tomlinson, supra*; Gray, Rule against Perpetuities, 2nd ed., s. 391.

(*c*) *Goodier* v. *Johnson* (1881), 18 Ch. D. 441, C. A. The clause of substitution is, of course, valid if the issue are necessarily ascertainable within the proper period (*Pearks* v. *Moseley* (1880), 5 App. Cas. 714, 719).

(*d*) *Whitehead* v. *Rennett* (1853), 22 L. J. (CH.) 1020; *Webster* v. *Boddington, supra.*

(*e*) *Wilson* v. *Wilson, supra*; *Re Boyd, Nield* v. *Boyd* (1890), 63 L. T. 92; *Re Russell, Dorrell* v. *Dorrell*, [1895] 2 Ch. 698, C. A.

(*f*) *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; *Hancock* v. *Watson*, [1902] A. C. 14.

(*g*) *Hodgson* v. *Halford* (1879), 11 Ch. D. 959.

SUB-SECT. 5.—*Limitations to Series of Persons.*

SECT. 4. **Application of the Rule in General.**

Limitation to a series.

703. If the limitation is to a series of individuals answering a given description, and the first member of the series intended to take may by possibility be a person excluded by the rule against perpetuities, then no person whatever can take under the limitation (*h*). But if the first members of the series are not excluded by the rule they may take, provided that their interests are severable (*i*).

Chattels settled as realty.

704. In the case of a trust of chattels to be enjoyed as heirlooms with real estate, or to devolve in a course of descent applicable to real estate, the interests of successive takers are capable of being separated, and take effect, provided that the absolute interest is given to a person who must be ascertained within the perpetuity period (*k*).

(*h*) *Dungannon* (*Lord*) v. *Smith* (1846), 12 Cl. & Fin. 546, H. L.; *Cattlin* v. *Brown* (1853), 11 Hare, 372 (the third rule there enunciated by PAGE WOOD, V.-C., where it is stated as "any" member being an excluded person).

(*i*) *Dungannon* (*Lord*) v. *Smith*, *supra*. The first taker satisfying the description when the instrument takes effect has been held in some cases, upon the intention of the particular will, to take chattels absolutely (*Mackworth* v. *Hinxman* (1836), 2 Keen, 658 (criticised by SUGDEN, L.C., in *Ker* v. *Dungannon* (*Lord*) (1841), 1 Dr. & War. 509, 537, 538; Sugden, Law of Property, p. 341, n.; Gray, Rule against Perpetuities, 2nd ed., s. 399. n.); *Montagu* v. *Inchiquin* (*Lord*) (1875), 23 W. R. 592; explained in *Re Johnston*, *Cockerell* v. *Essex* (*Earl*) (1884), 26 Ch. D. 538, 547); or a fee simple in realty (*Charitable Donations Commissioners* v. *De Clifford* (*Baroness*) (1841), 1 Dr. & War. 245; Lewis, Law of Perpetuity, pp. 472, 476). In *Tollemache* (*Lady*) v. *Coventry* (*Earl and Countess*) (1834), 2 Cl. & Fin. 611, H. L., the reasons given were perhaps equally destructive of the estate of the first taker as of that of the second, who was immediately concerned; see *Dungannon* (*Lord*) v. *Smith*, *supra*; *Ker* v. *Dungannon* (*Lord*), *supra*; Sugden, Law of Property, p. 330). Whether the actual decision was that the first of the series took absolutely was doubted by some of the judges in *Dungannon* (*Lord*) v. *Smith*, *supra*; but in *Re Hill*, *Hill* v. *Hill*, [1902] 1 Ch. 807, 810, C. A., VAUGHAN WILLIAMS, L.J., expressed and gave reasons for the opinion that the decision of the House of Lords was to that effect. A life estate expressly limited to a first taker is valid, although the remainder on that estate or the absolute interest may be invalidly given (*Re Gage*, *Hill* v. *Gage*, [1898] 1 Ch. 498); and as to life estates to unborn persons, see pp. 335 *et seq.*, *ante*.

(*k*) *E.g.*, where the chattels are to follow a dignity (*Bacon* v. *Proctor* (1822), Turn. & R. 31; *Sackville-West* v. *Holmesdale* (*Viscount*) (1870), L. R. 4 H. L. 543; *Re Johnston*, *Cockerell* v. *Essex* (*Earl*) (1884), 26 Ch. D. 538; *Hill* v. *Hill*, [1897] 1 Q. B. 483, C. A.; *Re Hill*, *Hill* v. *Hill*, *supra*); and as to rules for settlement of chattels to go with a title, see Jarman on Wills, 6th ed., p. 700), or are to devolve with real estate (*Foley* v. *Burnell* (1785), 4 Bro. Parl. Cas. 319, the rule in this case being thus stated in Jarman on Wills, 6th ed., p. 697: "If chattels are bequeathed to or in trust for the persons for the time being entitled to the possession of settled real estate they do not vest absolutely in the tenant for life, but in the first tenant in tail on his birth, although he may be only tenant in tail in remainder, and a direction that they shall be treated as heirlooms and annexed to the real estate makes no difference"; *Re Johnson's Trusts* (1866), L. R. 2 Eq. 716; *Re Parker*, *Parker* v. *Parkin*, [1910] 1 Ch. 581, distinguishing *Re Chesham's* (*Lord*) *Settlement*, *Valentia* (*Viscount*) v. *Chesham* (*Lady*), [1909] 2 Ch. 329, C. A.); and whether or not the interest of a tenant in tail by purchase is defeasible on failure to attain twenty-one, or is not to vest absolutely unless he attains twenty-one

SECT. 4. **Application of the Rule in General.**

But, in case of a trust of chattels, where the absolute interest is expressly given only to a person whose description makes him excluded by the rule, for example, an unborn person who may not answer the required description within the proper period, and there is a trust in the meantime for persons successively entitled to real estate, or for persons successively satisfying a certain description, the interests of successive takers under the latter gift cannot take effect beyond life interests of persons who must necessarily be in actual existence at the time of the creation of the trust (*l*).

SUB-SECT. 6.—*Alternative Independent Limitations.*

Alternative limitations.

705. One of two limitations which are expressed to take effect independently and in the alternative may take effect notwithstanding that the other is void (*m*).

Limitations with a double aspect.

A single gift which is expressed to be limited contingently on two or more separate events, of which one is too remote under the rule, and the other not, may take effect on the latter contingency (*n*), although void so far as it depends upon the former.

(*Christie* v. *Gosling* (1866) L. R. 1 H. L. 279; *Harrington* (*Countess*) v. *Harrington* (*Earl*) (1871), L. R. 5 H. L. 87; *Martelli* v. *Holloway* (1872), L. R. 5 H. L. 532); or whether the chattels are given to persons entitled to actual possession of the real estate (*Scarsdale* (*Lord*) v. *Curzon* (1860), 1 John. & H. 40 (the rule enunciated in this case being stated in *Re Angerstein*, *Angerstein* v. *Angerstein*, [1895] 2 Ch. 883, 889, 890: "If the gift of the chattels is to the person actually seised at the death of tenants for life, or to the person seised of the actual freehold which is defined as freehold in possession, or there are other clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded"); *Hogg* v. *Jones* (1863), 32 Beav. 45; *Re Fothergill's Estate*, *Price-Fothergill* v. *Price*, [1903] 1 Ch. 149; *Re Chesham's* (*Lord*) *Settlement*, *Valentia* (*Viscount*) v. *Chesham* (*Lady*), [1902] 1 Ch. 329, C. A.; see the observations on the latter case in Jarman on Wills, 6th ed., pp. 698, 699, n.). In all cases the absolute interests must be in persons who are not excluded by the rule. Accordingly, any provision postponing the vesting of the heirlooms in the successive tenants in tail must be confined to tenants in tail by purchase. Where, however, the chattels are settled to follow realty in strict settlement, a proviso preventing the absolute vesting in any tenant in tail unless such person attains twenty-one is, on construction, confined to tenants in tail by purchase (*Christie* v. *Gosling*, *supra*; *Martelli* v. *Holloway*, *supra*; see, further, titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

(*l*) *Ibbetson* v. *Ibbetson* (1840), 5 My. & Cr. 26; followed in *Dungannon* (*Lord*) v. *Smith* (1846), 12 Cl. & Fin. 546, H. L.; *Wainman* v. *Field* (1854), 1 Kay, 507. In *Trafford* v. *Trafford* (1746), 3 Atk. 347, the objection of remoteness was not considered (see *Lincoln* (*Countess*) v. *Newcastle* (*Duke*) (1806), 12 Ves. 218, 231), and the case is no longer law (*Dungannon* (*Lord*) v. *Smith*, *supra*; Lewis, Law of Perpetuity, p. 653). In *Mackworth* v. *Hinxman* (1836), 2 Keen, 658, the gift of *corpus*, which was too remote, appears to have been ignored; see *Ker* v. *Dungannon* (*Lord*) (1841), 1 Dr. & War. 509, 537, 538. In *Bacon* v. *Proctor* (1822), Turn. & R. 31, no declaration was made as to the title beyond a life estate.

(*m*) *Vachel* v. *Vachel* (1669), 1 Cas. in Ch. 129, 130; *Crompe* v. *Barrow* (1799), 4 Ves. 681; and see the cases cited in note (*n*), *infra*.

(*n*) *Longhead* d. *Hopkins* v. *Phelps* (1770), 2 Wm. Bl. 703; *Porter* v. *Bradley* (1789), 3 Term Rep. 143; *Leake* v. *Robinson* (1817), 2 Mer. 363, 394; *Minter* v. *Wraith* (1842), 13 Sim. 52; *Goring* v. *Howard* (1848), 16 Sim. 395; *Monypenny* v. *Dering* (1852), 2 De G. M. & G. 145, 181;

Such a limitation is known as a limitation with a double aspect (*o*). It, in effect, comprises two or more alternative independent limitations (*p*).

Limitations contingent on the exercise of a power.

706. There may be an alternative independent gift to a class, valid if a power has not been exercised in a certain way, but capable of being invalidated by the exercise of the power. The explanation of such cases is referable to the distinctive legal qualities of a power and of the estate created by a power (*q*). For example, where there is a gift to children with power to appoint life estates to a husband or wife, and an ultimate gift to grandchildren living at the determination of the prior interests, the gift to the grandchildren is valid if the power has not been exercised, because the class of grandchildren would be ascertained within due course. On the other hand, the gift to the grandchildren is capable of being invalidated if the children's power is exercised in favour of a husband or wife not born in the lifetime of the original testator. In the latter alternative event, the class of grandchildren would not be ascertained until a period too remote. If, instead of a power to appoint life estates to a husband or wife, life estates had been given to husband or wife, the whole gift would be bad for perpetuity, and there would be no independent valid alternative gift (*r*).

Powers given to a series of persons may likewise be severable, so that an appointment exercised by one of the series may be valid, although it might be invalid if exercised by another (*s*).

Expression of double contingency

707. But the double contingency in the above cases (*t*) must be so expressed in the instrument (*u*).

A gift single in point of expression cannot be split, although it may include two or more events, one of which may or does happen within the limits of the perpetuity rule (*v*).

Cambridge v. *Rous* (1858), 25 Beav. 409 (in all which cases there was a gift on failure of issue at the death of an ancestor, as well as on failure of issue taking a vested interest); *Miles* v. *Harford* (1879), 12 Ch. D. 691; *Re Bowles, Page* v. *Page*, [1905] 1 Ch. 371; *Bandon (Earl)* v. *Moreland*, [1910] 1 I. R. 220; *Re Davies and Kent's Contract*, [1910] 2 Ch. 35, C. A. As regards *Evers* v. *Challis* (1859), 7 H. L. Cas. 531, see note (*b*), p. 350, *post*.

(*o*) *Luddington* v. *Kime* (1697), 1 Ld. Raym. 203, 208; and see *Porter* v. *Bradley* (1789), 3 Term Rep. 143, *per* Lord KENYON, C.J., at p. 147; Lewis, Law of Perpetuity, p. 501.

(*p*) *Monypenny* v. *Dering* (1852), 2 De G. M. & G. 145, 183; *Re Bowles, Page* v. *Page, supra*; *Re Davies and Kent's Contract, supra*, at p. 46.

(*q*) *Re Davies and Kent's Contract, supra*, at p. 47, approving *Re Bowles, Page* v. *Page, supra*.

(*r*) *Re Bowles, Page* v. *Page, supra, per* FARWELL, J., at p. 376.

(*s*) As to powers in this respect, see p. 354, *post*.

(*t*) See the text, *supra*.

(*u*) *Miles* v. *Harford, supra*, at p. 702; *Re Bence, Smith* v. *Bence*, [1891] 3 Ch. 242, 249, C. A.; *Hancock* v. *Watson*, [1902] A. C. 14.

(*v*) *Proctor* v. *Bath and Wells (Bishop)* (1794), 2 Hy. Bl. 358; *Ring* v. *Hardwick* (1840), 2 Beav. 352; *Dungannon (Lord)* v. *Smith* (1846), 12 Cl. & Fin. 546, H. L.; *Monypenny* v. *Dering, supra*, at p. 183; *Re Thatcher's Trusts* (1859), 26 Beav. 365; *Re Harvey, Peek* v. *Savory* (1888), 39 Ch. D. 289, C. A.; *Re Bence, Smith* v. *Bence, supra*; *Hancock*

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708. An exception to the last rule exists (*a*), founded on the principle of English real property law, that if a devise can take effect as a remainder it shall do so. Where a gift over, single in expression, can, in the event which has happened, take effect as a contingent remainder, it is allowed to take effect as such, although, if another event had happened, it would have been void for remoteness as an executory devise (*b*).

Exemption of a remainder.

SECT. 5.—*Failure of a Limitation under the Rule.*

SUB-SECT. 1.—*Effect in General.*

Effect in general.

709. The general effect of a limitation being void under the rule is that the instrument takes effect as if the void limitation and all limitations dependent upon it were omitted (*c*).

On prior limitations.

If a gift over is void, the limitation prior to it and made defeasible by it becomes free from such gift over, and may become indefeasible (*d*). On the other hand, a prior limitation of an estate is as a general rule not affected by the failure of a limitation arising on the expiration of the prior estate (*e*). In a series of limitations

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v. *Watson*, [1902] A. C. 14, 18. In *Watson* v. *Young* (1885), 28 Ch. D. 436, the contingency was split, but it is doubtful whether the case is correct; see *Re Bence, Smith* v. *Bence*, [1891] 3 Ch. 242, 249, C. A.

(*a*) A *quasi*-exception, as pointed out by Lewis, Law of Perpetuity, pp. 367, 509, and Gray, Rule against Perpetuities, 2nd ed., s. 356, also occurs in the case where personalty is bequeathed to a series of unborn persons by words which would create successive estates tail if the subject of the limitation were real estate. In such cases, if the gift to the first of the series fails, *e.g.*, by death without issue in the lifetime of the testator, the gift to the second of the series may take effect, although it would have been bad if the first taker had survived the testator. In *Marsh* v. *Marsh* (1783), 1 Bro. C. C. 293; *Wilkinson* v. *South* (1798), 7 Term Rep. 555; and *Williams* v. *Lewis* (1859), 6 H. L. Cas. 1013, 1024, a limitation of personalty on a failure of issue was treated as a limitation with a double aspect; and see *Brown* v. *Higgs* (1799), 4 Ves. 708; *Pelham* (*Lady*) v. *Gregory* (1760), 3 Bro. Parl. Cas. 204; *Re Lowman, Devenish* v. *Pester*, [1895] 2 Ch. 348, C. A.

(*b*) *Evers* v. *Challis* (1859), 7 H. L. Cas. 531, where a gift over in default of A. leaving a child who being a son should attain twenty-three, or being a daughter should attain twenty-one, took effect, on the death of A. without ever having had a child, as a contingent remainder. In *Proctor* v. *Bath and Wells* (*Bishop*) (1794), 2 Hy. Bl. 358, the limitation could not take effect as a remainder in any case. *Watson* v. *Young, supra* (where PEARSON, J., purported to follow *Evers* v. *Challis, supra*), was doubted in *Re Bence, Smith* v. *Bence, supra*. The exception has no relation to personal estate (*Re Thatcher's Trusts* (1859), 26 Beav. 365; *Hancock* v. *Watson, supra*).

(*c*) Lewis, Law of Perpetuity, p. 657.

(*d*) See the cases of gifts on general failure of issue cited in note (*k*), p. 307, *ante*; *Doe* d. *Blesard* v. *Simpson* (1842), 3 Man. & G. 929; *Taylor* v. *Frobisher* (1852), 5 De G. & Sm. 191; *James* v. *Wynford* (*Lord*) (1852), 1 Sm. & G. 40, 57; *Courtier* v. *Oram* (1855), 21 Beav. 91; *Webster* v. *Parr* (1858), 26 Beav. 236, 238; *Hodgson* v. *Halford* (1879), 11 Ch. D. 959; *Goodier* v. *Johnson* (1881), 18 Ch. D. 441, 446; *Re Baillie, Faithful* v. *Sydney Industrial Blind Institution* (1907), 7 New South Wales State Reports, 265; *Re Tyrrell's Estate*, [1907] 1 I. R. 292, C. A.; *Re Donoughmore's* (*Earl*) *Estate*, [1911] 1 I. R. 211; Lewis, Law of Perpetuity, pp. 532, 657; Gray, Rule against Perpetuities, 2nd ed., s. 247.

(*e*) *Re Blunt's Trusts, Wigan* v. *Clinch*, [1904] 2 Ch. 767; *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535, following *Garland* v. *Brown* (1864), 10 L. T. 292. As to the *cy-près* doctrine, see p. 367, *post*.

every part which is valid in itself, and can be separated from those parts which are void, is upheld (*f*).

710. The estate or interest which is the subject of the void limitation devolves as on failure of the limitation for other causes, for example, in case of a settlement to the settlor or grantor (*g*), and in case of a will, as on a lapse, to the residuary legatee or devisee (*h*), or, if the limitation is itself of residue, or there is no residuary gift, to the persons entitled as on intestacy (*i*), and, in case of the exercise of a special power, to the persons entitled in default of appointment (*k*). On the interest invalidly limited.

711. The property devolves subject to such directions as are validly imposed (*l*). Real estate held on a valid trust for sale, where the trusts of the proceeds of sale fail for remoteness, becomes under the doctrine of reconversion subject to a trust for the heir or person entitled in default of disposition (*m*); and where a trust for sale of real estate is void for remoteness, but the trusts of the proceeds are valid, the beneficiaries take the property as realty (*n*). Devolution subject to valid directions.

712. Every limitation on the failure of, or expectant on the determination of, or in defeasance of, a limitation void under the rule, is void (*o*). This applies although the subsequent limitation is to a person *in esse*, who would otherwise take a vested interest (*p*), On subsequent limitations.

(*f*) *Gooding* v. *Read* (1853), 4 De G. M. & G. 510, C. A.; and as to limitations to a series of persons, some of whom are not ascertainable within the perpetuity period, see p. 347, *ante*.

(*g*) *Re Morse's Settlement* (1855), 21 Beav. 174; *Re Slark's Trusts* (1872), 21 W. R. 165.

(*h*) *Leake* v. *Robinson* (1817), 2 Mer. 363, 392; *Bentinck* v. *Portland* (*Duke*) (1877), 7 Ch. D. 693, 700.

(*i*) *Proctor* v. *Bath and Wells* (*Bishop*) (1794), 2 Hy. Bl. 358; *Stuart* v. *Cockerell* (1870), 5 Ch. App. 713; *Bentinck* v. *Portland* (*Duke*), *supra*. Where a testator carves a chattel interest out of his real estate, and makes it the subject of remote limitations, it results to his heir with the character of personal estate which the testator impressed upon it (*Burley* v. *Evelyn* (1848), 16 Sim. 290, 295).

(*k*) See, further, p. 360, *post*.

(*l*) *Tregonwell* v. *Sydenham* (1815), 3 Dow, 194, H. L.; *Re O'Brien's Estate, Prytz* v. *Trustees, Executors and Agency Co., Ltd.* (1899), 24 Victorian Law Reports, 360 (trust for maintenance).

(*m*) *Newman* v. *Newman* (1839), 10 Sim. 51; *Whitehead* v. *Bennett* (1853), 1 Eq. Rep. 560; *Hale* v. *Pew* (1858), 25 Beav. 335; and see title EQUITY, Vol. XIII., p. 109.

(*n*) *Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Re Daveron, Bowen* v. *Churchill*, [1893] 3 Ch. 421; *Re Appleby, Walker* v. *Lever, Walker* v. *Nisbet*, [1903] 1 Ch. 565, C. A.

(*o*) *Robinson* v. *Hardcastle* (1788), 2 Term Rep. 241, 380, 781; *Proctor* v. *Bath and Wells* (*Bishop*) (1794), 2 Hy. Bl. 358 (where the point was said to have been expressly decided in *Chatham* (*Earl*) v. *Tothill* (1771), 7 Bro. Parl. Cas. 453); *Routledge* v. *Dorril* (1794), 2 Ves. 357, 363; *Brudenell* v. *Elwes* (1801), 1 East, 442; *Beard* v. *Westcott* (1822), 5 B. & Ald. 801 (in King's Bench, although one of the subsequent limitations had been held valid in Common Pleas; see S. C. (1813), 5 Taunt. 393; (1822), Turn. & R. 25); Lewis, Law of Perpetuity, p. 660.

(*p*) *Monypenny* v. *Dering* (1852), 2 De G. M. & G. 145, 181; *Re Thatcher's Trusts* (1859), 26 Beav. 365. The point was accordingly assumed without argument in *Re Mortimer, Gray* v. *Gray*, [1905] 2 Ch. 502, C. A., a case under the old rule (see p. 364, *post*), where the person would otherwise have taken a vested interest; see 27 Law Quarterly Review, pp. 110, 112. The ground

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and although such person only takes a life interest, which must otherwise take effect, if at all, during his life (*q*). In every case it is a question of construction whether the prior contingency is expressly or impliedly imported into the subsequent limitations (*r*); if it is, they are void; but if not, they take effect as independent or alternative limitations and may be valid (*s*). Limitations in default of appointment are thus unaffected by a void power of appointment (*t*).

SUB-SECT. 2.—*Void Restrictions on Valid Limitations.*

Restraint on anticipation.

713. A restraint on anticipation imposed on the interest of an unborn person, which may possibly extend beyond the perpetuity period, is invalid (*u*); but, in a limitation by will to a class, such a restraint is severable among the shares, and may be good as to those members of the class who are born in the testator's lifetime (*a*), though void as to the shares of those who are born afterwards.

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given is that the limitation over was never intended to take effect if the persons intended to take under the prior limitations would, if they had been alive, have been capable of enjoying the estate; see *Monypenny* v. *Dering* (1852), 2 De G. M. & G. 145, 181.

(*q*) *Beard* v. *Westcott* (1822), 5 B. & Ald. 801; *Monypenny* v. *Dering*, *supra*; *Re Thatcher's Trusts* (1859), 26 Beav. 365; see, however, Gray, Rule against Perpetuities, 2nd ed., ss. 251 *et seq.*; *Re Norton*, *Norton* v. *Norton*, [1911] 2 Ch. 27, *per* JOYCE, J., at p. 40.

(*r*) In *Brudenell* v. *Elwes* (1801), 1 East, 442, 454, the reason given was that the subsequent limitation was made to depend on the limitations to persons incapable of taking under the rule, and was not to take effect until they were extinct; see also *Palmer* v. *Holford* (1828), 4 Russ. 403; *Re Abbott*, *Peacock* v. *Frigout*, [1893] 1 Ch. 54, *per* STIRLING, J., at p. 57.

(*s*) Thus a trust to take effect "on failure of" a trust made void by the rule may be valid as an alternative trust (*Willson* v. *Cobley*, [1870] W. N. 46). In *Monypenny* v. *Dering*, *supra*, Lord ST. LEONARDS, L.C., at p. 182, said, "where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in, and accord with, previous limitations which are valid."

(*t*) See p. 360, *post*.

(*u*) *Fry* v. *Capper* (1853), Kay, 163; *Armitage* v. *Coates* (1865), 35 Beav. 1; *Re Teague's Settlement* (1870), L. R. 10 Eq. 564; *Re Cunynghame's Settlement* (1871), L. R. 11 Eq. 324; *Re Errington*, *Bawtree* v. *Errington*, [1887] W. N. 23; *Shute* v. *Hogge* (1888), 58 L. T. 546; *Whitby* v. *Mitchell* (1889), 42 Ch. D. 494, not appealed from on this point (1890), 44 Ch. D. 85, C. A. In *Re Ridley*, *Buckton* v. *Hay* (1879), 11 Ch. D. 645, JESSEL, M.R., reluctantly followed the first-named cases; he considered that the restraint ought to have been held an exception. In *Carver* v. *Bowles* (1831), 2 Russ. & M. 301; *Thornton* v. *Bright* (1836), 2 My. & Cr. 230; and *Dickinson* v. *Mort* (1850), 8 Hare, 178, the decisions were to the contrary effect, but the point was not argued. See, further, title HUSBAND AND WIFE, Vol. XVI., pp. 371, 372.

(*a*) *Wilson* v. *Wilson* (1858), 4 Jur. (N. S.) 1076; *Herbert* v. *Webster* (1880), 15 Ch. D. 610; *Re Russell*, *Dorrell* v. *Dorrell*, [1895] 2 Ch. 698, C. A.; *Re Ferneley's Trusts*, [1902] 1 Ch. 543; *Re Millward*, *Steedman* v. *Hobday* (1902), 87 L. T. 476; and *Re Game*, *Game* v. *Tennent*, [1907] 1 Ch. 276, are to this effect. *Re Michael's Trusts* (1877), 46 L. J. (CH.) 651 (afterwards not followed by the same judge in *Herbert* v. *Webster*, *supra*), and *Re Ridley*, *Buckton* v. *Hay* (1879), 11 Ch. D. 645 (where the restraints were held void without considering the question of severance), are no longer followed;

SECT. 5. Failure of a Limitation under the Rule.

714. If there is a direction, not by way of executory trust, that property limited to any person shall be settled on him and his issue, on trusts which fail for remoteness, the direction for settlement on the issue is inoperative, and may be rejected, so long as there is a good absolute gift to the person in the first instance (*b*), but not in case there is no such absolute gift (*c*).

Directions for settlement.

SECT. 6.—*Application of the Rule to Powers.*

SUB-SECT. 1.—*Powers in General.*

Objections to powers.

715. With regard to powers (*d*), objections on the ground of remoteness may be made either to the creation of the power or to the mode of exercise of the power.

Remoteness in creation.

Objections to the validity of a power in its creation may be made on the grounds that the persons to exercise the power, or the time fixed by the terms of the power for its exercise or for its coming into effect, or the objects of the power or the subject-matter of the power, may possibly not be ascertained within the perpetuity period; such an objection, if well founded, prevents the power from ever being effectively exercised.

Remoteness in exercise.

To a disposition exercising a power validly created there may also be the objection that it has an effect not allowed by the rule; and such an objection is fatal to the particular disposition concerned.

Exceptions.

716. The following are exceptions from the application of the rule:—A power of appointment (*e*) or collateral power (*f*) limited after a failure of issue in tail, and barrable by the tenants in tail; powers created by way of security (*g*); and powers to raise money for payment of the debts of the creator of the power (*h*).

see also *Cooper* v. *Laroche* (1881), 17 Ch. D. 368, 372 (where the grounds of the decision are no longer regarded as sufficient).

(*b*) *Arnold* v. *Congreve* (1830), 1 Russ. & M. 209; *Carver* v. *Bowles* (1831), 2 Russ. & M. 301; *Ring* v. *Hardwick* (1840), 2 Beav. 352: *Harvey* v. *Stracey* (1852), 1 Drew. 73, 140; *Stephens* v. *Gadsden* (1855), 20 Beav. 463; *Gerrard* v. *Butler* (1855), 20 Beav. 541; *Salmon* v. *Salmon* (1860), 29 Beav. 27; *Cooke* v. *Cooke* (1887), 38 Ch. D. 202: *Re Boyd, Nield* v. *Boyd* (1890), 63 L. T. 92; *Hancock* v. *Watson*, [1902] A. C. 14, 22. In *Kampf* v. *Jones* (1837), 2 Keen, 756, where the first absolute gift was to an infant, the fund was carried to her account with liberty to apply, with a view to confirmation in case, on attaining twenty-one, it was found to be for her benefit. See also Lewis, Law of Perpetuity, p. 534.

(*c*) *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; and as to gifts to a class, see p. 346, *ante*.

(*d*) As to powers generally, see title POWERS.

(*e*) *Eno* v. *Eno* (1847), 6 Hare, 171; *Bandon* (*Earl*) v. *Moreland*, [1910] 1 I. R. 220. As to limitations after estates tail, see p 323, *ante*.

(*f*) *Lee* v. *Vincent* (1584), Cro. Eliz. 26; and see p. 325, *ante*. As to collateral powers, see title POWERS.

(*g*) As to the powers of mortgagees, see p. 364, *post*.

(*h*) *Silk* v. *Prime* (1768), 1 Bro. C. C. 138, n.: *Holder* d. *Sulyard* v. *Preston* (1769), 2 Wils. 400; and, as to trusts for payment of debts and the explanation of this exception, see p. 327, *ante*. For another explanation of the validity of these powers, see Gray, Rule against Perpetuities, s. 486.

SECT. 6. **Application of the Rule to Powers.**

A power for an unborn person to appoint so that the appointment takes effect on his death is invalid (*e*); and so is a power to appoint so that the appointment takes effect on his marriage, for in such a case marriage is as uncertain as death with regard to the time when it is to take place (*f*).

Remoteness in the appointees.

Time from which period runs.

721. As regards the validity in its creation of a general power, no question can arise whether the objects of the power can be ascertained within the perpetuity period or not (*g*). The freedom of disposition and choice of alienee possessed by the donee is the same as if he were absolute owner (*h*). In the case, therefore, of a general power, if the power is well created, the perpetuity period for the purpose of exercise of the power must be calculated not from the time of creation of the power, but from the time of its exercise (*i*). This holds good although the power is made exercisable by will only (*j*), or with any other formalities of execution (*k*).

SUB-SECT. 2.—*Special Powers of Appointment.*

Special powers generally.

722. Special powers of appointment (*l*), as regards their creation, are subject to the propositions above stated as applicable to general powers of appointment with respect to the ascertainment during the perpetuity period of (1) the donees who are to exercise them, (2) the time at which they are to be exercised, and (3) the time at which they are to take effect (*m*). But in the case of special powers the perpetuity period is always calculated from the time of the creation of the power (*m*).

Victorian Law Reports, 584; *Re O'Brien's Estate, Prytz* v. *Trustees, Executors, and Agency Co., Ltd.* (1899), 24 Victorian Law Reports, 360.

(*e*) See note (*t*), p. 355, *ante*.

(*f*) *Morgan* v. *Gronow* (1873), L. R. 16 Eq. 1, 10; compare *Re Finch and Chew's Contract*, [1903] 2 Ch. 486.

(*g*) As to special powers, see p. 357, *post*.

(*h*) See title POWERS; Lewis, Law of Perpetuity, p. 483; Sugden, Powers, p. 394; Gray, Rule against Perpetuities, 2nd ed., s. 524. The view of Powell (note to Fearne, Executory Devises, p. 5) that a general power was only equivalent to absolute ownership where the donee had the absolute interest in default of appointment is not now accepted; see *Rous* v. *Jackson* (1885), 29 Ch. D. 521.

(*i*) See the cases cited in note (*i*), p. 332, *ante*; Butler, note to Co. Litt. 272 b; *Jee* v. *Audley* (1787), 1 Cox, Eq. Cas. 324 (a case of a limitation in exercise of a general power; see 2 Ves. 365); *Taylor* v. *Frobisher* (1852), 5 De G. & Sm. 191; and title POWERS.

(*j*) *Rous* v. *Jackson, supra*; *Re Flower, Edmonds* v. *Edmonds* (1885), 55 L. J. (CH.) 200; *Stuart* v. *Babington* (1891), 27 L. R. Ir. 551, not following *Re Powell's Trusts* (1869), 39 L. J. (CH.) 188 (which case is, however, considered by Gray (Rule against Perpetuities, 2nd ed., ss. 526 *et seq.*) as the soundest authority); and see p. 355, *ante*.

(*k*) *Rous* v. *Jackson, supra*. The formalities required must only relate to execution, otherwise they would amount to an independent restriction, as in *Webb* v. *Sadler* (1873), 8 Ch. App. 419 (consent of trustees required).

(*l*) As to special powers of appointment generally, see title POWERS.

(*m*) See p. 353, *ante*, and see p. 357, *post*. As to remoteness in the donee, see *Re Hargreaves, Midgley* v. *Tatley* (1890), 43 Ch. D. 401, C. A.; as to remoteness in the time of exercise, see *Wollaston* v. *King* (1869) L. R. 8 Eq. 165; as to remoteness in the contingency on which appointments

SECT. 6. **Application of the Rule to Powers.**

Remoteness in objects.

723. Special powers are subject to further restrictions, due to the fact that the class of objects in favour of whom the power may be executed is limited by the creator of the power. If this class is to be ascertainable on a contingency, the contingency must be one which must necessarily occur within the perpetuity period, reckoning from the date of the creation of the power (*n*). The power is void if the contingency, upon which the class of objects is to be ascertained, may be beyond the perpetuity period, even although the class forms part of a larger class, every member of which must be so ascertained. The rule requires the ascertainment not only of the extreme limits of the class of persons who may take, but of the very persons who are to take (*o*).

Class comprising valid and invalid objects.

724. Where the class of objects is defined by such a description that, if any of the class exist at all, some, at all events, of the class must necessarily be ascertained within the proper period, although the whole class may not be, as in the case of a power to appoint to issue generally of a living person, then the power is valid, although within its terms an appointment may be made which is too remote. In such a case the only question that can arise will be as to how in fact the power has been exercised (*p*). In creating such a power as last mentioned, therefore, it is not necessary to insert words limiting the objects to persons born within a particular time, or otherwise taking vested interests within the proper period (*q*); the insertion of such a restriction has no influence in rendering valid an appointment, even so far as the appointees are within the restriction (*r*).

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under the power are to take effect, see *Re Norton, Norton* v. *Norton*, [1911] 2 Ch. 27.

(*n*) *E.g.*, persons living at a certain time or surviving a certain person (*Blight* v. *Hartnoll* (1881), 19 Ch. D. 294 (at time of sale); *Re Norton, Norton* v. *Norton, supra*; and see *Re Bowles, Page* v. *Page*, [1905] 1 Ch. 371).

(*o*) *Blight* v. *Hartnoll, supra, per* FRY, J., at p. 300: "This is because the rule is aimed at the practical object of telling who can deal with the property; and, if you cannot tell who are entitled to the property but only who may become entitled to the property, the property is practically tied up."

(*p*) *Griffith* v. *Pownall* (1843), 13 Sim. 393, 396; *Slark* v. *Dakyns* (1874), 10 Ch. App. 35; *Re Warren's Trusts* (1884), 26 Ch. D. 208; and see *Routledge* v. *Dorril* (1794), 2 Ves. 357; Lewis, Law of Perpetuity, p 487. As to *Thomas* v. *Thomas* (1844), 14 Sim. 234, which is apparently to the contrary, see Lewis, Law of Perpetuity, Supplement, p. 166; Gray, Rule against Perpetuities, 2nd ed., s. 512.

(*q*) Lewis, Law of Perpetuity, p. 487; Sugden, Powers, 8th ed., p. 397; Gray, Rule against Perpetuities, 2nd ed., s. 399; and compare Encyclopædia of Forms and Precedents, Vol. XIII., p. 356. It is, however, a desirable practice to refer to the rule by way of reminder to the parties (see *ibid.*, Vol. XIII., pp. 361, 426, 427; Vol. XV., p. 405; and, as to a portions clause, see *ibid.*, Vol. XIII., pp. 372, 395). The form given appears preferable to a restriction to the life of the donee and twenty-one years after.

(*r*) *Kampf* v. *Jones* (1837), 2 Keen, 756; *Whitby* v. *Mitchell* (1889), 42 Ch. D. 494; *Hutchinson* v. *Tottenham*, [1898] 1 I. R. 403; affirmed [1899] 1 I. R. 344, C. A.; *Re Beales' Settlement. Barrett* v. *Beales*, [1905] 1 Ch. 256; *Re Wright, Whitworth* v. *Wright*, [1906] 2 Ch. 288. A suggestion was

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725. The exercise of a special power of appointment takes effect as a selection among the objects (*s*), and as a delegated disposition by the creator of the power (*t*). The donee, therefore, may not, by exercising the power, create estates or interests which the creator of the power could not himself in like circumstances have created by some other disposition instead of creating the power (*a*). In other words, while the circumstances in which the appointment is made are considered and taken into account, the perpetuity period is reckoned from the time of creation of the power, and not, as in the case of a general power, from the time of exercise (*b*).

Remoteness in appointees.

Test for appointments.

An appointment is conveniently tested in this respect by placing the estates and interests created by the appointment in the instrument creating the power in the place of the power itself as if the instrument creating the power and the instrument executing the power had been incorporated in one instrument (*c*). In adopting this test the language of the appointment should neither be written literally into the instrument creating the power, for in that case contradictions of time would be introduced (*d*), nor be translated into the language which the creator of the power would have used at the time of creation to describe the appointees or to fix the times of vesting of their interests (*e*). The appointment should be read into the prior instrument with reference to all its attendant circumstances at the time when it took effect (*f*).

Circumstances taken into account.

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made in Jarman on Wills, 1st ed., p. 250, and adopted in Lewis, Law of Perpetuity, p. 498, that an appointment among the whole class without the restriction would be good *pro tanto*, but Lewis (Law of Perpetuity, p. 499) and Gray (Rule against Perpetuities, 2nd ed., s. 538) point out insuperable difficulties in adopting this suggestion, which has not been supported by subsequent editors of Jarman on Wills, nor by any decision of a court. As to *Stroud* v. *Norman* (1854), Kay, 313, see Gray, Rule against Perpetuities, 2nd ed., s. 540.

(*s*) Co. Litt. 272 b, Butler's note.

(*t*) See, generally, title POWERS.

(*a*) Lewis, Law of Perpetuity, p. 488; *Marlborough* (*Duke*) v. *Godolphin* (*Earl*) (1759), 1 Eden, 404, *per* HENLEY, Lord Keeper, at p. 417; affirmed, *Spencer* (*Lord*) v. *Marlborough* (*Duke*) (1763), 3 Bro. Parl. Cas. 232; *Whitting* v. *Whitting* (1908), 53 Sol. Jo. 100.

(*b*) *Robinson* v. *Hardcastle* (1786), 2 Bro. C. C. 22; (1788), 2 Term Rep. 241, 380, 781; *Routledge* v. *Dorril* (1794), 2 Ves. 357; *Massey* v. *Barton* (1844), 7 I. Eq. R. 95, observed upon, however, as to the application of the rule to the facts of the case, in *Re Hallinan's Trusts*, [1904] 1 I. R. 452, C. A., *per* PORTER, M.R., at pp. 456, 458; *Chance* v. *Chance* (1853), 16 Beav. 572; *Slark* v. *Dakyns* (1874), 10 Ch. App. 35; *Re Coulman, Munby* v. *Ross* (1885), 30 Ch. D. 186; *Cooke* v. *Cooke* (1887), 38 Ch. D. 202; *Re Boyd, Nield* v. *Boyd* (1890), 63 L. T. 92; *Tredennick* v. *Tredennick*, [1900] 1 I. R. 354; *Whitby* v. *Von Luedecke*, [1906] 1 Ch. 783; Sugden, Powers, p. 396; Gray, Rule against Perpetuities, 2nd ed., s. 515.

(*c*) *Marlborough* (*Duke*) v. *Godolphin* (*Lord*) (1750), 2 Ves. Sen. 61, 78; *Harvey* v. *Stracey* (1852), 1 Drew. 73, 134; *D'Abbadie* v. *Bicoin* (1871), 5 I. R. Eq. 205; *Re Brown and Sibly's Contract* (1876), 3 Ch. D. 156; *Re Thompson, Thompson* v. *Thompson*, [1906] 2 Ch. 199.

(*d*) *Re Thompson, Thompson* v. *Thompson, supra, per* JOYCE, J., at p. 205.

(*e*) *Re Hallinan's Trusts*, [1904] 1 I. R. 452, C. A.; Gray, Rule against Perpetuities, 2nd ed., s. 517, criticising the contrary view in Lewis, Law of Perpetuity, p. 491.

(*f*) See note (*o*), p. 333, *ante*.

It is as if the creator had left a blank in the limitations or succession of interests in the instrument creating the power and had himself, at the date and in the circumstances existing when the appointment took effect, filled up that blank.

An appointment by will is ambulatory until the death of the testator, and the appointment may be valid at his death although it would have been invalid at the date of the will (*g*).

Appointment for life with special power by will.

726. A special power may therefore be exercised in favour of an object of the power by giving him a life interest and a general power of appointment by will only, if he is alive at the creation of the power (*h*), but not if he is unborn at the creation of the power (*i*).

Appointment to next of kin.

An appointment after the deaths of any objects of the power to their next of kin is valid in the case of an object alive at the creation of the power, subject to the question whether the next of kin are objects of the power, but is invalid under the rule against perpetuities in the case of an object unborn at the creation of the power (*j*).

Invalid appointment with the concurrence of an object.

727. Where an appointment is made which is invalid wholly or partially under the rule, and in the same instrument of appointment a person concurs, as a party to the deed or otherwise, who is an object of the power, and one to whom a perfectly valid appointment might have been made of the property appointed, then, if the facts warrant it, and if there is no question of a fraud on the power (*k*), the appointment may be treated as an appointment to that person absolutely, with a subsequent settlement or disposition by him in favour of the actual appointees (*l*). The acts of concurrence must be such as to make the disposition binding on the object concurring (*m*).

Rejection of restrictions.

728. The principles as to rejecting separable invalid restrictions on validly created interests, and other rules as to direct limitations (*n*), apply to appointments under powers (*o*).

(*g*) *Re Thompson, Thompson* v. *Thompson*, [1906] 2 Ch. 199, 205.

(*h*) *Phipson* v. *Turner* (1838), 9 Sim. 227; *Morse* v. *Martin* (1865), 34 Beav. 500; *Slark* v. *Dakyns* (1874), 10 Ch. App. 35.

(*i*) *Wollaston* v. *King* (1869), L. R. 8 Eq. 165; *Whitby* v. *Mitchell* (1889), 42 Ch. D. 494; *Tredennick* v. *Tredennick*, [1900] 1 I. R. 354; and see *Cooke* v. *Cooke* (1887), 38 Ch. D. 202.

(*j*) *Re Coulman, Munby* v. *Ross* (1885), 30 Ch. D. 186. As to appointments to executors and administrators of an unborn person, see *Webb* v. *Sadler* (1873), 8 Ch. App. 419, 427, 428.

(*k*) See *Birley* v. *Birley* (1858), 25 Beav. 299; and title POWERS.

(*l*) *Routledge* v. *Dorril* (1794), 2 Ves. 357, 362; *Whitting* v. *Whitting* (1908), 53 Sol. Jo. 100; and see *Morgan* v. *Gronow* (1873) L. R. 16 Eq. 1, 10 (where the ground of invalidity of one daughter's appointment was said to be that she did not concur in the appointment, and therefore there was no settlement on her issue other than by the exercise of the power); see Gray, Rule against Perpetuities, 2nd ed., ss. 528, 529. As to the effect of such concurrence generally, see title POWERS.

(*m*) See *Brudenell* v. *Elwes* (1802), 7 Ves. 382, 390.

(*n*) See p. 352, *ante*.

(*o*) Thus, invalid directions for settlement were rejected in appointments in *Carver* v. *Bowles* (1831), 2 Russ. & M. 301, 304; *Harvey* v. *Stracey* (1852), 1 Drew. 73, 140; *Stephens* v. *Gadsden* (1855), 20 Beav. 463; *Gerrard* v. *Butler* (1855), 20 Beav. 541; *Cooke* v. *Cooke* (1887), 38 Ch. D. 202; *Re Boyd, Nield* v. *Boyd* (1890), 63 L. T. 92; and see *Griffith* v. *Pownall*

SECT. 6. **Application of the Rule to Powers.**

Deduction of interest invalidly appointed.

729. Subject to the rules permitting the separation of any part of an appointment capable of being separated, the rejection of invalid restrictions, a valid further appointment (*p*) or valid confirmation (*q*), the whole of any interest which is invalidly appointed under the rule against perpetuities goes to the persons entitled in default of appointment (*r*).

Effect on gift in default of appointment.

730. The fact that a power may be exercised in a manner contrary to the rule does not affect a gift in default of appointment, which takes effect unless it is itself obnoxious to the rule against perpetuities (*s*). This is so because, until the power is exercised, the property remains vested in those who take in default of appointment (*t*).

Effect on gift subject to exercise of power.

731. A gift to take effect on the determination of prior interests, including interests to be appointed under a power, may take effect as an independent alternative gift. If the power is not exercised, or is exercised so as to render the subsequent gift unobjectionable under the rule, the gift takes effect; and, if it is exercised so as to make the subsequent gift objectionable under the rule, the gift will be void, so that until the exercise of the power it cannot be said whether the gift is good or bad (*a*).

(1843). 13 Sim. 393; and restraints on anticipation in appointments to females were rejected in *Re Teague's Settlement* (1870), L. R. 10 Eq. 564; *Re Cunynghame's Settlement* (1871), L. R. 11 Eq. 324; *Shute* v. *Hogge* (1888), 58 L. T. 546; *Whitby* v. *Mitchell* (1889), 42 Ch. D. 494. The marriage of the appointee is not an adoption of the trusts of the appointed fund, so as to establish the validity of the restraint clause (*Re Teague's Settlement*, *supra*, at p. 569).

(*p*) *Morgan* v. *Gronow* (1873), L. R. 16 Eq. 1; *Wollaston* v. *King* (1868), L. R. 8 Eq. 165 (where there was a residuary appointment).

(*q*) A void appointment may, if circumstances afterwards make it possible, be confirmed by reappointment, but not by any mere expression of desire to confirm the invalid appointment (*Morgan* v. *Gronow*, *supra*, at p. 11).

(*r*) *Routledge* v. *Dorril* (1794), 2 Ves. 357; *Chance* v. *Chance* (1853), 16 Beav. 572; *Ratcliffe* v. *Hampson* (1855), 1 Jur. (N. S.) 1104; *Wollaston* v. *King* (1869), L. R. 8 Eq. 165; *D'Abbadie* v. *Bizoin* (1871), 5 I. R. Eq. 205; *Whitby* v. *Mitchell* (1889), 42 Ch. D. 494; affirmed (1890), 44 Ch. D. 85, C. A.; *Re Boyd, Nield* v. *Boyd* (1890), 63 L. T. 92. In *Re Heathcote, Trench* v. *Heathcote*, [1891] W. N. 10, and *Re Crichton's Settlement, Sweetman* v. *Batty* (1912), 106 L. T. 588, the persons so entitled in default of appointment were ordered to bring certain validly appointed interests into hotchpot. With regard to appointments by will under general powers, an interest invalidly appointed may pass under a residuary devise or bequest; see the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 25, 27; and the text, *supra*. As to appointments under special powers, an interest invalidly appointed will not as a general rule pass under a residuary devise or bequest (*Freme* v. *Clement* (1881), 18 Ch. D. 499, where the contrary was held, was disapproved in *Holyland* v. *Lewin* (1884), 26 Ch. D. 266, C. A.).

(*s*) *Wollaston* v. *King* (1869), L. R. 8 Eq. 165; *Webb* v. *Sadler* (1873), 8 Ch. App. 419; *Re Coulman, Munby* v. *Ross* (1885), 30 Ch. D. 186; *Re Abbott, Peacock* v. *Frigout*, [1893] 1 Ch. 54; *Re Hobson's Will, etc., Hobson* v. *Sharp*, [1907] Victorian Law Reports, 724.

(*t*) See *Lambert* v. *Thwaites* (1866), L. R. 2 Eq. 151, 155; and title POWERS.

(*a*) *Re Bowles, Page* v. *Page*, [1905] 1 Ch. 371, approved in *Re Davies and Kent's Contract*, [1910] 2 Ch. 35, C. A., in both of which cases powers to

SECT. 6. Application of the Rule to Powers.

Election.

732. In the case where a testator has a special power of appointment and exercises it in favour of objects not capable of taking under the rule, but at the same time disposes of his own property in favour of objects entitled in default of appointment, the latter persons are not bound to elect whether they will confirm the invalid disposition or take the interest in the testator's property (*b*).

SUB-SECT. 4.—*Collateral Powers.*

Powers arising on contingency.

733. If a power of sale or other collateral power is created to arise on a future event, that event must be such as must necessarily happen within the perpetuity period (*c*).

Duration of powers.

734. The duration of a power, whether created to arise immediately or on a future event, is a matter of construction of the instrument creating it (*d*). Where the power is made exercisable, expressly or impliedly, during the continuance of the beneficial trusts declared by the instrument, then, so long as these beneficial trusts are valid within the rule, the power is validly exercisable, until the effect of the settlement is spent, and the estates under it become vested in possession (*e*).

Presumption as to valid continuance of trusts for sale.

735. Express or implied trusts for sale of land are by statute deemed, in favour of a purchaser, to be subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale, but without prejudice to the order of any court restraining a sale (*f*).

Powers framed in general terms.

736. Powers, although framed in general terms, are limited by the nature of the limitations contained in the instrument, so that

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appoint to husbands or wives, which might have been exercised invalidly, did not displace gifts to take effect on the determination of the trusts, including the trusts arising under the appointments; and see p. 349, *ante*.

(*b*) *Robinson* v. *Hardcastle* (1788), 2 Bro. C. C. 344; *Re Nash, Cook* v. *Frederick*, [1910] 1 Ch. 1, C. A., a case under the older rule (see p. 364, *post*), approving the decisions in *Wollaston* v. *King* (1868), L. R. 8 Eq. 165; *Re Warren's Trusts* (1884), 26 Ch. D. 208; *Re Oliver's Settlement, Evered* v. *Leigh*, [1905] 1 Ch. 191; *Re Beales' Settlement, Barrett* v. *Beales*, [1905] 1 Ch. 256; *Re Wright, Whitworth* v. *Wright*, [1906] 2 Ch. 288; *Re Handcock's Trusts* (1889), 23 L. R. Ir. 34, C. A., and disapproving *Re Bradshaw, Bradshaw* v. *Bradshaw*, [1902] 1 Ch. 436; and see title EQUITY, Vol. XIII., p. 116; and compare p. 366, *post*. The question is therefore settled in England; but see Gray, Rule against Perpetuities, 2nd ed., pp. 421—436.

(*c*) *Hale* v. *Pew* (1858), 25 Beav. 335; see *Re Davies and Kent's Contract*, [1910] 1 Ch. 35, C. A. (a trust for sale); *Blight* v. *Hartnoll* (1881), 19 Ch. D. 294; and see p. 318, *ante*.

(*d*) *Re Cotton's Trustees and London School Board* (1882), 19 Ch. D. 624, *per* FRY, J., at p. 626; *Re Jump, Galloway* v. *Hope*, [1903] 1 Ch. 129.

(*e*) *Trower* v. *Knightley* (1821), Madd. & G. 134; *Boyce* v. *Hanning* (1832), 2 Cr. & J. 334; *Wood* v. *White* (1838), 4 My. & Cr. 460; *Lanlsbery* v. *Collier* (1856), 2 K. & J. 709; *Doncaster* v. *Doncaster* (1856), 3 K. & J. 26; *Taite* v. *Swinstead* (1859), 26 Beav. 525; *Re Hornaill, Womersley* v. *Hornaill*, [1909] 1 Ch. 631. Similarly, as to powers exercisable only with the consent of persons entitled under the beneficial limitations (Real Property Commissioners' 3rd Report, p. 34; *Biddle* v. *Perkins* (1829), 4 Sim. 135; *Powis* v. *Capron* (1830), 4 Sim. 138, n.).

(*f*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 10 (3), (4).

SECT. 6. **Application of the Rule to Powers.**

when, by reason of the expiration or cesser of those limitations, the absolute interests come into existence, the power, in general, is considered to be at an end (*g*). This affords a guarantee against remoteness in such cases. This principle, however, has no application where the power is to take effect on the coming into existence of the absolute interests (*h*), whether for the purposes of division (*i*) or other purposes connected with the instrument (*j*). In these cases the power may be exercised validly in a reasonable time afterwards (*k*).

Powers which may be barred.

737. Powers which may be barred by a tenant in tail are not obnoxious to the rule during the continuance of the estate tail (*l*); but a power of management annexed to an unbarrable estate during minorities, not confined to the minorities of tenants in tail by purchase, is invalid (*m*), as is a similar power to cut timber (*n*).

Powers to change nature of interests.

738. No power can be given to change the nature of the interests limited by the instrument at a time exceeding the limit prescribed by the rule (*o*).

SECT. 7.—*Application of the Rule to Securities.*

Mortgages.

739. Where an estate or interest is invalidated by the rule against perpetuities, a mortgage, charge, or other security (*p*) upon that estate or interest is nugatory as a security. But where an estate or interest is validly created, the rule does not appear to have any application to the estates, interests, or rights of an ordinary mortgagor and mortgagee, chargor and chargee, or persons deriving

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(*g*) *Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429, C. A.; *Nelson* v. *Callow* (1848), 15 Sim. 353; compare *Meller* v. *Stanley* (1864), 2 De G. J. & Sm. 183, C. A. (trust to renew lease indefinitely). In *Re Brown's Settlement* (1870), L. R. 10 Eq. 349, 353, JAMES, V.-C., said that so long as there is a settled estate in any part of the property, so long must the power remain in existence; and see title POWERS.

(*h*) *Peters* v. *Lewes and East Grinstead Rail. Co.*, *supra*.

(*i*) *Re Cotton's Trustees and London School Board* (1882), 19 Ch. D. 624; *Re Henzell, Holgate* v. *Humphris*, [1887] W. N. 240; *Re Sudeley (Lord) and Baines & Co.*, [1894] 1 Ch. 334.

(*j*) *Re Dyson and Fowke*, [1896] 2 Ch. 720.

(*k*) See *Forbes* v. *Peacock* (1846), 1 Ph. 717; *Re Tweedie and Miles* (1884), 27 Ch. D. 315 (a case of a trust at discretion to sell, where the delay was held not unreasonable); *Re Sudeley (Lord) and Baines & Co.*, *supra*. In *Peters* v. *Lewes and East Grinstead Rail. Co.*, *supra*, JESSEL, M.R., at p. 434, said that, in a case where there is nothing but absolute limitations of interests given in the first instance, no one would say that twenty-one years was a reasonable time.

(*l*) *Biddle* v. *Perkins* (1829), 4 Sim. 135; *Waring* v. *Coventry* (1833), 1 My. & K. 249; *Wallis* v. *Freestone* (1839), 10 Sim. 225; *Cole* v. *Sewell* (1843), 4 Dr. & War. 1, 32. In *Lantsbery* v. *Collier* (1856), 2 K. & J. 709, the power was held exercisable during the continuance of the settlement and after possibility of issue was extinct.

(*m*) See p. 325, *ante*.

(*n*) *Ferrand* v. *Wilson* (1845), 4 Hare, 344, criticised in Gray, Rule against Perpetuities, 2nd ed., s. 502; see p. 380, *post*.

(*o*) *Ware* v. *Polhill* (1805), 11 Ves. 257; *Peters* v. *Lewes and East Grinstead Rail. Co.*, *supra*, *per* JESSEL, M.R., at p. 433; *Tyrrell* v. *Naylor* (1892), 11 New Zealand Law Reports, 118.

(*p*) See, generally, title MORTGAGE, Vol. XXI., pp. 65 *et seq.*

title under them, or to the exercise of the powers conferred by the security (*q*).

Rights of mortgagor to redeem.

740. At all events, as regards the right of redemption, it is useless to provide that it must be exercised, if at all, within any limited period. Any such restriction is inoperative against the mortgagor, who may redeem at any time, however remote, subject to the provisions of the Statutes of Limitation (*r*). If, again, it is provided that the right shall not be exercised for a period which the court considers unreasonable, the restriction is invalid, not on the ground of perpetuity, but as a clog on the equity of redemption (*s*). A proviso for redemption at any time is not invalid under the rule (*t*); and where a rentcharge is granted by way of Welsh mortgage, a proviso for redemption at any time is valid (*a*).

(*q*) *E.g.*, a vendor's lien for money only payable on a remote contingent event (*Quart* v. *Eager* (1908), 18 Ontario Law Reports, 18); and compare a devise of land to secure a contingent debt (*Wood* v. *Drew* (1864), 33 Beav. 610, 615). Gray, Rule against Perpetuities, 2nd ed., ss. 562 *et seq.*, discusses the question whether, if, under a mortgage, the mortgagor and mortgagee's rights may not arise until a period beyond the limits of the rule (*e.g.*, if the condition of the mortgage was to pay the debt in thirty years), they would be void for remoteness, and gives the opinion that they would be void. The fact that the date for payment is fixed at an indefinitely distant time, however, does not appear to be treated as material (see the cases cited *supra*), except that where repayment is not to be made at all, or at Doomsday, or only at the option of the covenantor, the provision is void as repugnant (Shep. Touch., ed. Preston, p. 369; *Re Tewkesbury Gas Co., Tysoe* v. *The Co.*, [1911] 2 Ch. 279; affirmed, [1912] 1 Ch. 1, C. A.). It is possible to suppose several kinds of transactions which, though resembling mortgages, are really not so in substance, *e.g.*, sales with provisoes for repurchase, which create future interests to which the rule would apply. It has been suggested that the exemption of mortgages from the rule may be explained by the view that they are contracts, that the securities and the rights and interests, legal and equitable, which they create, *e.g.*, the mortgagor's equity of redemption and the mortgagee's legal estate, are, in substance and reality, not future but present rights and interests, and that it is only the remedies, *e.g.*, sale, foreclosure, suits for redemption, which are future or indefinite in point of time. Gray, however (Rule against Perpetuities, 2nd ed., s. 569), deprecates such suggestions as "verbal jugglery." As the law stands, whatever be the true foundation of their exemption, they are undoubtedly exempt from the rule. Rentcharges securing personal covenants to pay annuities, upon a possibly remote event, have been held not to be within the rule: see *Morgan* v. *Davey* (1883), Cab. & El. 114; which case, it has been suggested, may be supported on the ground that such rentcharges give merely a remedy, not a right of property (Gray, Rule against Perpetuities, 2nd ed., s. 273 a); and see title RENTCHARGES AND ANNUITIES.

(*r*) See title MORTGAGE, Vol. XXI., pp. 142 *et seq.* Different considerations may apply where the right of redemption is given to a third party; see *Marks* v. *Marks* (1718), 10 Mod. Rep. 419.

(*s*) See title MORTGAGE, Vol. XXI., p. 143. The period allowed as reasonable appears at present to be less than the perpetuity period.

(*t*) See *Hasker* v. *Summers* (1884), 10 Victorian Law Reports, Equity Cases, 204.

(*a*) See *Howel* v. *Price* (1715), 1 P. Wms. 291; *Bulwer* v. *Astley* (1844), 1 Ph. 422, both cases being between persons claiming under the mortgagor only; *Orde* v. *Heming* (1686), 1 Vern. 418. As to Welsh mortgages, see title MORTGAGE, Vol. XXI., pp. 87, 88. As to rentcharges granted beneficially, compare note (*h*), p. 321, *ante*.

SECT. 7. **Application of the Rule to Securities.**

741. The rule against perpetuities does not apply to any restrictions on the estate or interest of the mortgagee (*b*) or on his powers of sale or other powers (*c*), granted or conferred by the mortgage, incidental to the estate of the mortgagee, and relating to the maintenance or enforcing of his security.

Rights of mortgagee.

Collateral advantages given to the mortgagee are protected from objection on account of remoteness by the rule against clogging the equity of redemption (*d*).

Company securities.

742. A floating charge on a company's assets is treated as valid although the events upon which it may crystallise may take place at any remote period (*e*).

By statute, debentures of a company under the Companies (Consolidation) Act, 1908, may be made irredeemable, or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long (*f*).

Part III.—The Rule Prohibiting Limitations to Successive Generations of Unborn Issue.

SECT. 1.—*Nature of the Rule.*

The second rule.

743. The second rule against remoteness of limitation is as follows:—

In the case of realty, after a limitation for life to any person not in existence at the time that the instrument creating the limitation becomes operative, a limitation by remainder to any issue of such person as purchasers is void (*g*). It has been

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(*b*) *Gilbertson* v. *Richards* (1860), 5 H. & N. 453, Ex. Ch.; Sugden, Powers, 8th ed., p. 16; as to which, see Gray, Rule against Perpetuities, 2nd ed., ss. 273a, 570.

(*c*) Lewis, Law of Perpetuity, p. 560; 1 Powell on Devises by Jarman, pp. 250, 251. As to mortgages by deed where the powers are implied under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), no doubt can arise, the powers being statutory.

(*d*) See title MORTGAGE, Vol. XXI., pp. 143, 144.

(*e*) As to floating charges, see title COMPANIES, Vol. V., p. 348.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 103, re-enacting the Companies Act, 1907 (7 Edw. 7, c. 50), s. 14; see title COMPANIES, Vol. V., p. 346. The latter enactment was apparently intended to negative the decision in *Re Southern Brazilian Rio Grande do Sul Rail. Co., Ltd.*, [1905] 2 Ch. 78, in which case, however, no question as to the rule against perpetuities was raised.

(*g*) *Whitby* v. *Mitchell* (1890), 44 Ch. D. 85, C. A.; *Re Nash, Cook* v. *Frederick*, [1910] 1 Ch. 1, C. A.; Fearne, Contingent Remainders, p. 502; Sugden, Powers (ed. 1861), p. 393; Challis, Real Property, 3rd ed., p. 115. The rule is sometimes called the rule in *Whitby* v. *Mitchell*, but the rule is older than that case, for it was a rule of the common law (see *Re Nash, Cook* v. *Frederick, supra*; *Marlborough (Duke)* v. *Godolphin (Earl)* (1759), 1 Eden, 404; *Hay* v. *Coventry (Earl)* (1789), 3 Term Rep. 83, 86). It was formerly known as the rule against a "possibility on a possibility,"

SECT. 1. Nature of the Rule.

suggested that the rule is of wider application (*h*), and that the purpose of the rule relates to the ascertainment of the person who is to take under the limitations (*i*).

Under this rule, the limitation to the issue of the unborn person is void, although it may have been restricted so as to satisfy the rule against perpetuities (*k*), since the two rules are independent of each other (*l*).

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under a principle, forbidding remote possibilities, which was applied to particular instances of remote contingencies (*Chedington's (Rector) Case* (1598), 1 Co. Rep. 153 a, 156 b; *Stafford's (Lord) Case* (1609), 8 Co. Rep. 73 b, 75 a; *Lampet's Case* (1612), 10 Co. Rep. 46 b, 50 b; *Blamford* v. *Blamford* (1615), 3 Bulst. 98, 108; *Sanders* v. *Cornish* (1631), Cro. Car. 230; *London Corporation* v. *Alford* (1640), Cro. Car. 576; *Pearse* v. *Reeve* (1661), Poll. 29; *Child* v. *Baylie* (1618), Cro. Jac. 459, 461; *Burgis* v. *Burgis* (1674), 1 Mod. Rep. 114; *Chapman* d. *Oliver* v. *Brown* (1765), 3 Burr. 1626; *Cole* v. *Sewell* (1843), 4 Dr. & War. 1, *per* SUGDEN, L.C., at p. 28; *Re Frost, Frost* v. *Frost* (1889), 43 Ch. D. 246; 2 Cases with Opinions of Counsel, 435); but, since there is no rule that in the general sense of the words there cannot be a possibility on a possibility (*Cotton* v. *Heath* (1639), 1 Roll. Abr. 612; *Snowe* v. *Cuttler* (1664), 1 Lev. 135; *Love* v. *Windham* (1670), 1 Sid. 450, 451; *Norfolk's (Duke) Case* (1685), 3 Cas. in Ch. 1, H. L., *per* Lord NOTTINGHAM, L.C., at pp. 29, 30; *Thellusson* v. *Woodford* (1799), 4 Ves. 227, *per* BULLER, J., at p. 327; *Egerton* v. *Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 53, 54, 76, 95, 122, 205), this phrase should not be used (*Re Nash, Cook* v. *Frederick*, [1910] 1 Ch. 1, 10, C. A.). The principle against remote possibilities also forbids a limitation of a remainder to a corporation not *in esse*, or to the right heirs, as purchasers, of a person not *in esse* (Challis, Real Property, 3rd ed., p. 116; see title REAL PROPERTY AND CHATTELS REAL). Objection has been made that there is no trace of the rule in old cases (Lewis, Law of Perpetuity, Supplement, p. 124; Gray, Rule against Perpetuities, 2nd ed., ss. 125 *et seq.*). Such limitations were not attempted before the introduction of the rule against perpetuities; see *Marlborough (Duke)* v. *Godolphin (Earl)* (1759), 1 Eden, 404, 415; and compare Williams, Juridical Society Papers, Vol. I., p. 45, on the origin of the present mode of settlement. The first limitation, to the unborn person himself, is valid; see p. 338, *ante*.

(*h*) It has been suggested that the rule may not be confined to cases where the second unborn person is the issue of the first unborn person (see *Honywood* v. *Honywood* (1905), 92 L. T. 814, H. L., *per* Lord DAVEY, at pp. 815, 816 (the question arose on the limitations in this case, but was not argued, and the point was expressly reserved by the judgment); see also *Seaward* v. *Willock* (1804), 5 East, 198, *per* Lord ELLENBOROUGH, C.J., at p. 205; *Doe* d. *Garrod* v. *Garrod* (1831), 2 B. & Ad. 87, *per* Lord TENTERDEN, C.J., at p. 96; and compare note (*g*), p. 336, *ante*. In *Re Frost, Frost* v. *Frost, supra*, at p. 253, the rule was said to apply to a remainder, after limitations to an unmarried woman and to any surviving husband she might marry, to her children (not necessarily the children of such surviving husband) living at the death of the survivor, but the case has been criticised; see Challis, Real Property, 3rd ed., p. 117. As to whether the rule applies where the first unborn person takes an estate tail, see 2 Preston, Abstracts of Title, p. 115, where it is so stated, and Williams, Real Property, 20th ed., p. 402 (a), where it is submitted that such limitations should be valid. For other suggestions, see notes (*o*), (*r*), p. 366, *post*.

(*i*) *A.-G.* v. *Cummins* (1895), [1906] 1 I. R. 406, *per* PALLES, C.B., at p. 408; 1 Preston, Abstracts of Title, pp. 128, 129.

(*k*) *Whitby* v. *Mitchell* (1889), 42 Ch. D. 494, *per* KAY, J., at p. 500; *Re Nash, Cook* v. *Frederick, supra*, at p. 7. The observations in *Cattlin* v. *Brown* (1853), 11 Hare, 372, *per* PAGE WOOD, V.-C., at p. 375,

(*l*) For note (*l*) see next page.

SECT. 1. **Nature of the Rule.**

Application of the rule.

744. This second rule applies to legal (*m*) and equitable (*n*) contingent remainders (*o*) created by limitations in instruments whether operating at common law under the Statute of Uses (*p*), or otherwise (*q*), but it does not apply to any limitations of personal estate (*r*), and, as to limitations in wills, is subject to the *cy-près* doctrine (*s*).

Application of the rule to powers.

745. In the case of appointments under special powers, the rule is applied as from the date when the instrument creating the power became operative (*t*). It has, it appears, been so applied without regard to the fact that, though the persons to take under the limitations were unborn at the date of the creation of the power, they were alive and ascertained at the date of the appointment (*a*).

The persons taking in default of appointment, on whom the void estate devolves, are not impliedly put to their election to confirm the appointment (*b*).

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which appear to be to the contrary, were explained in *Re Nash, Cook* v. *Frederick*, [1909] 2 Ch. 450, *per* EVE, J., at pp. 458, 461, 462, as having no direct reference to this rule as distinct from the rule against perpetuities.

(*l*) See *Honywood* v. *Honywood* (1905), 92 L. T. 814, H. L., *per* Lord DAVEY, at p. 815.

(*m*) *Whitby* v. *Mitchell* (1890), 44 Ch. D. 85, C. A.

(*n*) *Re Nash, Cook* v. *Frederick*, [1910] 1 Ch. 1, C. A., following *Monypenny* v. *Dering* (1852), 2 De G. M. & G. 145; see *Hopkins* v. *Hopkins* (1734), Cas. *temp.* Talb. 44, 53, n.; *Humberston* v. *Humberston* (1717), 1 P. Wms. 332.

(*o*) For a suggestion that the rule applies possibly also to executory devises, see 27 Law Quarterly Review, pp. 112, 171; see also *Nicholl* v. *Nicholl* (1777), 2 Wm. Bl. 1159 (where the *cy-près* doctrine was applied to an executory devise, but the case is of doubtful authority; see note (*n*), p. 368, *post*, note (*g*), p. 369, *post*).

(*p*) 27 Hen. 8, c. 10.

(*q*) In *Whitby* v. *Mitchell* (1889), 42 Ch. D. 494; (1890), 44 Ch. D. 85, C. A., it was argued unsuccessfully that the rule did not apply to limitations by way of use.

(*r*) *Re Bowles, Amedroz* v. *Bowles*, [1902] 2 Ch. 650. Accordingly personalty may be limited to an unborn child for life, and after his death to his issue, provided that the limitations are valid under the rule against perpetuities (*Routledge* v. *Dorril* (1794), 2 Ves. 357, 362). It has been suggested that executory bequests of terms of years are subject to the rule; see 27 Law Quarterly Review, pp. 112, 171, where *Somerville* v. *Lethbridge* (1795), 6 Term Rep. 213, and *Beard* v. *Westcott* (1822), 5 B. & Ald. 801, in King's Bench, and *Beard* v. *Westcott* (1822), Turn. & R. 25, in Chancery, are cited as instances. On the other hand, it may be said that these cases were instances of the application of the rule against perpetuities and that *Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372, H. L., affirming *Bengough* v. *Edridge* (1827), 1 Sim. 173, where, at p. 209, the point was raised by Sugden, *arguendo*, may be pointed to as supporting the contrary view that the only restriction on such bequests is the rule against perpetuities.

(*s*) See p. 367, *post*.

(*t*) *Whilting* v. *Whitting* (1908), 53 Sol. Jo. 100; *Re Nash, Cook* v. *Frederick*, [1910] 1 Ch. 1, C. A. In *Whitby* v. *Mitchell* (1890), 44 Ch. D. 85, C. A., the rule was applied as from the date of marriage articles in pursuance of which the settlement creating the power was made.

(*a*) *Whitby* v. *Mitchell*, *supra* (where the issue were confined by the appointment to issue living at the date of the appointment); *Re Nash, Cook* v. *Frederick*, [1910] 1 Ch. 1, C. A. (where both the unborn person and the remoter issue were alive and specifically named in the appointment); compare the cases under the rule against perpetuities, cited in note (*o*), p. 353, *ante*.

(*b*) *Re Nash, Cook* v. *Frederick*, [1910] 1 Ch. 1, C. A., following the cases

SECT. 2.—*The Cy-près Doctrine.*

SECT. 2. The Cy-près Doctrine.

746. The *cy-près* doctrine is a rule of construction of wills (*c*), and, as applied to limitations void under the above rule, is as follows:—

Cy-près doctrine.

Where, in a will, there is a limitation of real estate to a person unborn for life, with remainders in tail to his children, or with successive remainders for life to his issue indefinitely, and the testator's intention that they shall take as purchasers cannot be legally effected, but there is a clear general intention that the estate is to go in a course of descent, then the limitation is construed as such an estate tail in the person to whom the estate is given for life as will, if unbarred, carry the property to all the persons to whom the testator has invalidly limited it and to no others (*d*).

Application of doctrine.

The doctrine, first applied to executory trusts (*e*), applies also to direct devises (*f*), and to appointments by will under a power to an object of the power for life with remainder in tail to his first and other sons who are not objects of the power (*g*); but it does not apply to deeds (*h*), or to gifts of personal estate (*i*).

as to the rule against perpetuities, cited in note (*b*), p. 361, *ante*; and see *Re Nash, Cook* v. *Frederick*, [1909] 2 Ch. 450, *per* EVE, J., at pp. 470, 471.

(*c*) *Parfitt* v. *Hember* (1867), L. R. 4 Eq. 443, 446; *Hampton* v. *Holman* (1877), 5 Ch. D. 183, 190. The rule is generally spoken of as an example of effectuating the general intention of the testator by sacrificing the particular intention so far as may be necessary to carry out the former according to law: see also *Monypenny* v. *Dering* (1852), 2 De G. M. & G. 145, 172, where Lord ST. LEONARDS, L C., points out that the general intent is not carried into effect at the expense of the particular intent, for nothing is sacrificed.

(*d*) *Routledge* v. *Dorril* (1794), 2 Ves. 357, *per* ARDEN, M.R., at p. 364; approved in *Monypenny* v. *Dering*, *supra*, at p. 174; *Re Richardson, Parry* v. *Holmes*, [1904] 1 Ch. 332, 340; Gray, Rule against Perpetuities, 2nd ed., s. 643, adopted in *Re Mortimer, Gray* v. *Gray*, [1905] 2 Ch. 502, *per* FARWELL, J., at p. 506; and see *ibid.*, *per* COZENS-HARDY, L.J., at p. 514.

(*e*) *Humberston* v. *Humberston* (1717), 1 P. Wms. 332; *Lyddon* v. *Ellison* (1854), 19 Beav. 565.

(*f*) *Pitt* v. *Jackson* (1786), 2 Bro. C. C. 51 (as to which case see note (*a*), p. 368, *post*); *Griffith* v. *Harrison* (1791), 3 Bro. C. C. 410; *Vanderplank* v. *King* (1843), 3 Hare, 1, 12; *Stackpoole* v. *Stackpoole* (1843), 6 I. Eq. R. 18; *Parfitt* v. *Hember*, *supra*; *Hampton* v. *Holman*, *supra*. *Mortimer* v. *West* (1828), 2 Sim. 274, 282, to the contrary, is not followed.

(*g*) *Pitt* v. *Jackson*, *supra*; *Spencer* (*Lord*) v. *Marlborough* (*Duke*) (1763), 3 Bro. Parl. Cas. 232; *Stackpoole* v. *Stackpoole*, *supra*; *Re Dennehy's Estate* (1865), 17 I. Ch. R. 97, C. A. (where the court refused to apply the doctrine to a will under which the appointees were put to their election; as to this case, see Jarman on Wills, 6th ed., p. 289, note (o)); *Line* v. *Hall* (1873), 43 L. J. (CH.) 107.

(*h*) *Brudenell* v. *Elwes* (1802), 7 Ves. 382, and see S. C. (1801), 1 East, 442; *Bell* v. *Bell* (1862), 13 I. Ch. R. 517, 526; *Re Dennehy's Estate*, *supra*, *per* BRADY, L.C., at p. 103; Lewis, Law of Perpetuity, p. 440; *Adams* v. *Adams* (1777), 2 Cowp. 651; Sugden, Powers, 8th ed., p. 502. In *Hucks* v. *Hucks* (1754), 2 Ves. Sen. 568, if that case is an example of the application of the rule, it was applied to articles for a marriage settlement; and see 2 Preston, Abstracts of Title, pp. 166, 167; Lewis, Law of Perpetuity, p. 440, n.

(*i*) *Routledge* v. *Dorril*, *supra*, at p. 364; *Harvey* v. *Towell* (1847),

SECT. 2. The Cy-près Doctrine.

Implication.

747. Where the court comes to the conclusion that, although the testator has used words indicating an intention that persons taking under the limitation shall take for life only, the limitation, upon its true construction, gives an estate of inheritance in fee (*k*) or in tail either expressly (*l*) or by implication (*m*), then the court rejects the words indicating an intention of giving a life interest only as being repugnant to, or as being merely descriptive of, the estate of inheritance.

Restriction to objects of testator's bounty.

748. Neither by implication nor by the doctrine of *cy-près* can an estate be carried to a class or portion of a class for whom the testator never intended to provide (*n*). The doctrine is inapplicable, therefore, where an estate tail conferred on the first unborn person would either include any class of his issue who are not intended to take (*o*), or omit any of his issue who are intended to take (*p*), or where, in passing from generation to generation, the children of the parent dying are to take their parent's share equally between them (*q*). So, too, where an estate tail would not describe the estate of the issue or the course of descent, as where the issue of the unborn person are to take under a power of appointment by him (*r*), or are to take an estate in fee simple (*s*), or successive estates for years determinable on lives (*t*), no estate tail can be created under this doctrine.

The doctrine applies, however, where the children of the unborn person are to take as tenants in common in tail (*a*).

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7 Hare, 231, 234; *Raphael* v. *Boehm*, *Cockburn* v. *Raphael* (1852), 22 L. J. (CH.) 299; Lewis, Law of Perpetuity, p. 435; Sugden, Powers, 8th ed., p. 502. As to a mixed fund, see *Boughton* v. *James* (1844), 1 Coll. 26 44; Lewis, Law of Perpetuity, p. 437; Gray, Rule against Perpetuities, 2nd ed., s. 647, n.

(*k*) *Doe* d. *Cotton* v. *Stenlake* (1810), 12 East, 515.

(*l*) *Reece* v. *Steel* (1828), 2 Sim. 233; *Hugo* v. *Williams* (1872), L. R. 14 Eq. 224.

(*m*) *Wollen* v. *Andrewes* (1824), 2 Bing. 126; *Brooke* v. *Turner* (1835), 2 Bing. (N. C.) 422; *Trash* v. *Wood* (1839), 4 My. & Cr. 324; *Forsbrook* v. *Forsbrook* (1867), 3 Ch. App. 93; compare *Goodtitle* d. *Cross* v. *Wodhull* (1745), Willes, 592, observed upon in Prior on Issue, p. 62, Lewis, Law of Perpetuity, p. 448, and Gray, Rule against Perpetuities, 2nd ed., s. 656, note 7, who express the opinion that this case was simply an instance of the rule in *Shelley's Case*.

(*n*) *Monypenny* v. *Dering* (1852), 2 De G. M. & G. 145, 174; *Re Rising*, *Rising* v. *Rising*, [1904] 1 Ch. 533; *Re Mortimer*, *Gray* v. *Gray*, [1905] 2 Ch. 502. *Nicholl* v. *Nicholl* (1777), 2 Wm. Bl. 1159, if and so far as it decided the contrary, is not now followed (see *Re Mortimer*, *Gray* v. *Gray*, *supra*, at p. 512), though the case is supported in *Monypenny* v. *Dering*, *supra*, at p. 175.

(*o*) *Monypenny* v. *Dering*, *supra*; *Re Mortimer*, *Gray* v. *Gray*, *supra*.

(*p*) *Re Rising*, *Rising* v. *Rising*, *supra*.

(*q*) *Re Richardson*, *Parry* v. *Holmes*, [1904] 1 Ch. 332, 341; compare *Bristow* v. *Warde* (1794), 2 Ves. 336, 349. As to *Mogg* v. *Mogg* (1815), 1 Mer. 654, see Lewis, Law of Perpetuity, p. 431; Gray, Rule against Perpetuities, 2nd ed., ss. 635, 636.

(*r* *Bristow* v. *Warde*, *supra*.

(*s*) *Hale* v. *Pew* (1858), 25 Beav. 335.

(*t*) See *Somerville* v. *Lethbridge* (1795), 6 Term Rep. 213; *Beard* v. *Westcott* (1822), 5 B. & Ald. 801; Lewis, Law of Perpetuity, p. 441.

(*a*) *Pitt* v. *Jackson* (1786), 2 Bro. C. C. 51 (not reversed on this point on a

Application to shares distributively.

749. In a case where estates for life are given to a class of children of a living person, and estates tail in the share of each member of the class are given to the children of that member, the doctrine has been applied to the shares of such members of the class as are unborn in the testator's lifetime, the limitations being valid as they stand in the case of those members born in his lifetime (*b*).

Similarly, where the limitations are to a number of persons and their eldest sons in succession, if the construction necessitates giving estates for life only to those persons who are in being, the *cy-près* doctrine may be applied to the limitations to those persons who are unborn (*c*).

Succession not in course of descent.

750. The doctrine has been held to have no application where a number of successive estates for life were given to a definite number of generations of issue (*d*), or where an indefinite number of successive estates for life were given in favour of a larger class than would take under an estate tail (*e*).

Doctrine not extended.

751. The doctrine is not to be extended (*f*); and no contingent limitation can be introduced in order to enable an ultimate limitation, which would otherwise be remote, to take effect (*g*).

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bill of review in *Smith* v. *Camelford* (*Lord*) (1795), 2 Ves. 698 (see *ibid.*, at p. 711), no decision on the question of *cy-près* being given by the Lord Chancellor (see *Routledge* v. *Dorril* (1794), 2 Ves. 357, *per* ARDEN, M.R., at p. 364)); see also *Mogg* v. *Mogg* (1815), 1 Mer. 654 (where estates tail were implied); *Vanderplank* v. *King* (1843), 3 Hare, 1. *Pitt* v. *Jackson* (1786), 2 Bro. C. C. 51, though described as going to the verge of the law, is regarded as correct (*Brudenell* v. *Elwes* (1801), 1 East, 442, 451; *Stackpoole* v. *Stackpoole* (1843), 6 I. Eq. R. 18, 30; *Monypenny* v. *Dering* (1847), 16 M. & W. 418, 431—436; (1852), 2 De G. M. & G. 145, 175; *Re Mortimer, Gray* v. *Gray*, [1905] 2 Ch. 502, 515; Lewis, Law of Perpetuity, p. 429). *Re Wilson's Will, Delves* v. *Wilson* (1899), 25 Victorian Law Reports, 193 (where the issue took at twenty-one), appears to be a step further than *Pitt* v. *Jackson*, *supra*.

(*b*) *Vanderplank* v. *King*, *supra*, applied in *Peyton* v. *Lambert* (1858), 8 I. C. L. R. 485; see *East* v. *Twyford* (1853), 4 H L. Cas. 517, *per* Lord ST. LEONARDS, at p. 556; Lewis, Law of Perpetuity, Supplement, p. 146; Gray, Rule against Perpetuities, 2nd ed., s. 650, and note thereto; Jarman on Wills, 6th ed., p. 293.

(*c*) *East* v. *Twyford* (1851), 9 Hare, 713, *per* TURNER, V.-C., at p. 729; affirmed (1853), 4 H. L. Cas. 517.

(*d*) *Seaward* v. *Willock* (1804), 5 East, 198.

(*e*) *Re Richardson, Parry* v. *Holmes*, [1904] 1 Ch. 332, 341—343, explaining *Seaward* v. *Willock*, *supra*, distinguishing *Mortimer* v. *West* (1828), 2 Sim. 274, and approving Jarman on Wills, 5th ed., p. 270; Lewis, Law of Perpetuity, p. 433.

(*f*) *Brudenell* v. *Elwes* (1802), 7 Ves. 382, 390; *Boughton* v. *James* (1844), 1 Coll. 26, 44; *Re Mortimer, Gray* v. *Gray*, [1905] 2 Ch. 502, 512; Lewis, Law of Perpetuity, p. 453.

(*g*) *Re Mortimer, Gray* v. *Gray*, *supra*; *Nicholl* v. *Nicholl* (1777), 2 Wm. Bl. 1159 (where the estate tail was made determinable), is not followed.

Part IV.—Restriction of Accumulation.

SECT. 1.

SECT. 1.—*Limits of Period of Accumulation.*

Limits of Period of Accumulation.

752. Trusts for accumulation and dispositions directly or indirectly causing accumulation, wholly or partially, of the rents, profits, or income of any real or personal property are subject to the following restrictions:—

Duration of accumulation generally.

(1) Rule against perpetuities.

753. First, whatever the date of the instrument, or the purpose of the accumulation, not being for the payment of debts or incumbrances (*a*), such trusts and provisions are subject to the rule against perpetuities, and must therefore be so limited that the accumulation must necessarily come to an end, or be determinable on the beneficiaries attaining vested interests, within the perpetuity period (*b*). This is the only restriction in cases not coming within the second or third rules following (*c*).

(2) Accumulations Act, 1800.

754. Secondly (*d*), in all instruments dated after the 28th July, 1800 (*e*), and in wills dated before that date of testators who were living and of sound mind after the 28th July, 1801 (*f*). whatever the purpose of accumulation (with certain specified exceptions (*g*)), property cannot be settled or disposed of so that the rents, profits, or income are to be wholly or partially (*h*) accumulated for any longer term than such one of the following periods (*i*) as either is

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(*a*) As to the exception of accumulations to pay off debts or incumbrances, see p. 327, *ante*; and see p. 376, *post*.

(*b*) As to this period, see p. 300, *ante*.

(*c*) *Harrison* v. *Harrison* (1787), cited *Thellusson* v. *Woodford* (1799), 4 Ves. 227, 286, 338; *Thellusson* v. *Woodford* (1805), 11 Ves. 112, H. L.: *Shaw* v. *Rhodes* (1836), 1 My. & Cr. 135, 154; affirmed *sub nom. Evans* v. *Hellier* (1837), 5 Cl. & Fin. 114, H. L.; *Curtis* v. *Lukin* (1842), 5 Beav. 147; *Wilson* v. *Wilson* (1851), 1 Sim. (N. S.) 288, 298; and for cases of accumulations void under this rule, see note (*n*), p. 371, *post*.

(*d*) Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), s. 1. The Act originated in the discussion produced by the will of Mr. Thellusson, which came before the court in *Thellusson* v. *Woodford* (1799), 4 Ves. 227 (affirmed after the Act was passed (1805), 11 Ves. 112, H. L.), and is commonly called the Thellusson Act (see Hargrave, Thellusson Act, pp. 1 *et seq.*; 2 Jurisconsult Exercitations, p. 307). As to the proper mode of construction of the statute, see *Yarlo* v. *Faden* (1859), 1 De G. F. & J. 211, *per* Lord CAMPBELL, L. C., at pp. 222, 223.

(*e*) The date of commencement of the Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98) (*ibid.*, s. 1). The Act applies to deeds as well as wills (*Re Rosslyn's (Lady) Trust* (1848), 16 Sim. 391).

(*f*) Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), s. 4.

(*g*) See note (*m*), p. 371, *post*, and p. 376, *post*.

(*h*) *E.g.*, a specific aliquot part of the rents (*Shaw* v. *Rhodes* (1836), 1 My. & Cr. 135, 155 (two-thirds)), or the excess of income over a certain sum (*Trickey* v. *Trickey* (1832), 3 My. & K. 560), or over what is applied to other purposes (*Mathews* v. *Keble* (1868), 3 Ch. App. 691).

(*i*) Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), s. 1; and see *Re Collins, Collins* v. *Collins* (1886), 32 Ch. D. 229; *Re Smeed, Archer* v. *Prall* (1886), 54 L. T. 929. As to these periods, see, further, p. 375, *post*; and as to the considerations of public policy embodied in them, see 2 Preston, Abstracts of Title, p. 180.

expressly chosen by the instrument or is appropriate to the disposition thereby made, namely:— SECT. 1. Limits of Period of Accumulation.

(i.) the life or lives of the grantor or grantors, settlor or settlors;

(ii.) the term of twenty-one years from the death of any such grantor or settlor, or of the testator;

(iii.) the minority or respective minorities of any person or persons living or *en ventre sa mère* at the time of the death of such grantor, settlor, or testator;

(iv.) the minority (*k*) or respective minorities of any person or persons who, under the uses or trusts of the instrument, would for the time being, if of full age, be entitled to the rents, profits, or income directed to be accumulated.

These periods are alternative, and only one may be chosen; two or more of them cannot be made consecutive periods for accumulation (*l*). Any shorter period may be chosen.

755. Thirdly, in instruments dated after the 28th June, 1892, and in wills dated before that date of testators who died after that date, where the purpose of accumulation is the purchase of land only, the only period for accumulation allowed is the minority or respective minorities of any person or persons who, under the uses or trusts of the instrument, would for the time being, if of full age, be entitled to receive the rents, profits, or income directed to be accumulated (*m*). The two latter rules are hereafter called "the statutory rules," and the periods so prescribed "the statutory periods." (3) Accumulations Act, Act, 1892.

756. In every case where an accumulation is directed for any period longer than these statutory periods, then, if the period fixed by the instrument may exceed the perpetuity period, the direction is entirely void (*n*); but, if it does not exceed the perpetuity period, or is necessarily determinable by beneficiaries within that period, Effect of excessive accumulation.

(*k*) An accumulation directed during a conventional minority (*e.g.*, until some person attains the age of twenty-five) takes effect subject to the Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98); see *Fulford* v. *Hardy*, [1909] A. C. 570, 575, P. C.

(*l*) *Re Rosslyn's (Lady) Trust* (1848), 16 Sim. 391, *Wilson* v. *Wilson* (1851), 1 Sim. (N. S.) 288; *Jagger* v. *Jagger* (1883), 25 Ch. D. 729; *Re Errington, Errington-Turbutt* v. *Errington* (1897), 76 L. T. 616.

(*m*) Accumulations Act, 1892 (55 & 56 Vict. c. 58), s. 1; *Re Llanover (Baroness), Herbert* v. *Freshfield* (2), [1903] 2 Ch. 330. The Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), applies to wills and instruments within that Act not falling within the scope of the Accumulations Act, 1892 (55 & 56 Vict. c. 58); see, for example, *Re Allan, Havelock* v. *Havelock* (1881), 17 Ch. D. 807, 811; *Re Strangways, Hickley* v. *Strangways* (1886), 34 Ch. D. 423, C. A., and *Re Alford, Hunt* v. *Parry* (1885), 32 Ch. D. 383, 386 (twenty years); *Re De Hoghton, De Hoghton* v. *De Hoghton*, [1896] 1 Ch. 855, 866, C. A. (twenty-one years).

(*n*) *Southampton (Lord)* v. *Hertford (Marquis)* (1813), 2 Ves. & B. 54; *Marshall* v. *Holloway* (1820), 2 Swan. 432; *Palmer* v. *Holford* (1828), 4 Russ. 403; *Vawdry* v. *Geddes* (1830), 1 Russ. & M. 203; *Porter* v. *Fox* (1834), 6 Sim. 485; *Griffith* v. *Blunt* (1841), 4 Beav. 248; *Curtis* v. *Lukin* (1842), 5 Beav. 147; *Browne* v. *Stoughton* (1846), 14 Sim. 369; *Scarisbrick* v. *Skelmersdale* (1850), 17 Sim. 187; *Turvin* v. *Newcome* (1856), 3 K. & J. 16; *Smith* v. *Cuninghame* (1884), 13 L. R. Ir. 480; and s. c. *Baker* v. *Stuart* (1897), 28 Ontario Reports, 439; *Girard Trust Co.* v. *Russell* (1910), 179 Federal Reporter, 446; Lewis, Law of Perpetuity, p. 594.

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the direction is not entirely void, but is valid to the extent of such one of the four statutory periods as is appropriate, and is invalid for the excess over such statutory period (*o*). Where the purposes of accumulation include a purpose affected by either of the statutory rules, the effect is to strike out the purpose in question from the direction to accumulate so far as the statutory rule is infringed (*p*).

Property subject to the rules.

757. The property subject to the statutory rules includes English land devised by the will of a testator domiciled abroad (*q*); but not property the rights in which are governed by the law of any other country where these rules are not adopted (*r*); and the second rule does not apply to property the rights in which are governed by Irish law (*s*).

A direction in the will of a testator domiciled in England that the income of his residuary personal estate is to be invested in landed property abroad, as to which these rules have not been adopted, does not render the rules inapplicable (*t*).

What directions are within the rules.

758. Accumulation within the meaning of the statutory rules is directed by any expression denoting that the whole or part of the income of property is to be separated from the ownership of that property, so as either to form, or to be an accretion to, the capital of any fund (*a*); or so as to be a postponement of, and restriction on, the beneficial enjoyment of the property (*b*).

(*o*) *Griffiths* v. *Vere* (1803), 9 Ves 127; *Longdon* v. *Simson* (1806), 12 Ves. 295; *Shaw* v. *Rhodes* (1836), 1 My. & Cr. 135, 154; affirmed in *Evans* v. *Hellier* (1837), 5 Cl. & Fin. 114, H. L.; *Blease* v. *Burgh* (1840), 2 Beav. 221; *Re Rosslyn's (Lady) Trust* (1848), 16 Sim. 391; *Re Errington, Errington-Turbutt* v. *Errington* (1897), 76 L. T. 616.

(*p*) *Re Llanover (Baroness), Herbert* v. *Freshfield* (2), [1903] 2 Ch. 330, 335; compare *Vine* v. *Raleigh*, [1891] 2 Ch. 13, 16, C. A.; *Re Mason, Mason* v. *Mason*, [1891] 3 Ch. 467. A direction for accumulation, including accumulation for payment of debts, is good if unlimited in time, so far as that purpose is concerned (*Southampton (Lord)* v. *Hertford (Marquis)* (1813), 2 Ves & B. 54; *Re Stamford and Warrington (Earl), Payne* v. *Grey*, [1912] 1 Ch. 343, C. A.).

(*q*) *Freke* v. *Carbery (Lord)* (1873), L. R. 16 Eq. 461; see title CONFLICT OF LAWS, Vol. VI., p. 209; and compare note (*q*), p. 311, *ante*.

(*r*) *Haldane* v. *Eckford* (1871), 24 L. T. 934 (testator domiciled in Jersey). As to Scotland, the exception of heritable property in that country in the Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), s. 3, was repealed by the Entail Amendment Act, 1848 (11 & 12 Vict. c. 36), s. 41, as to instruments coming into effect after the passing of the latter Act; see *Keith's Trustees* v. *Keith* (1857), 19 Dunl. (Ct. of Sess.) 1040. The Act is in force in Ontario and New Zealand, and similar enactments have been passed by the Australian States.

(*s*) Including Irish land (*Ellis* v. *Maxwell* (1849), 12 Beav. 104, where, however, it was held to affect the accumulation of income of the accumulated rents), or funds settled by an Irish settlement, though they are to be invested in England (*Heywood* v. *Heywood* (1860), 29 Beav. 9). The Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), does not apply to Ireland, having been passed before the Act of Union; but the Accumulations Act, 1892 (55 & 56 Vict. c. 58), applies to Ireland; see *Shillington* v. *Portadown Urban District Council*, [1911] 1 I. R. 247, 261.

(*t*) *Macpherson* v. *Stewart* (1858), 28 L. J. (CH.) 177.

(*a*) *E.g.*, directions to add dividends to capital (*Webb* v. *Webb* (1840), 2 Beav. 493; *Martin* v. *Margham* (1844), 14 Sim. 230); to invest income to form a subsequent gift (*Mathews* v. *Keble* (1868), 3 Ch. App. 691: *Smith* v. *Cuninghame* (1884), 13 L. R. Ir. 480; *Re Walker*,

(*b*) For note (*b*) see next page.

SECT. 1. Limits of Period of Accumulation

759. The accumulation may be either at simple or compound interest—that is, the income derived from capitalised income may be itself capital or not (*c*).

Capitalisation.

760. Such accumulation may be implied from the form or nature of a gift, where the substantial meaning of the limitation requires that accumulation shall take place, or where accumulation would be the inevitable result of the limitation either generally or upon certain contingencies (*d*); this is a question of construction, determined as if no such rules existed (*e*).

Accumulations implied in the gift.

A trust for accumulation implied in the gift arises where residuary personal estate is bequeathed on a future contingency, and the gift carries intermediate income; pending the contingency there is an implied accumulation, which is valid for one only of the statutory periods (*f*).

The fact that rents, which do not fall due until after the expiration of the statutory period, and are to be apportioned to that period, will not be received until after the end of that period does not make an invalid accumulation (*g*).

Accumulation required by law.

761. In general, accumulation required by law does not cause any suspension of the enjoyment of the property and is not affected

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Walker v. *Walker* (1886), 54 L. T. 792; *Re Mason*, *Mason* v. *Mason*, [1891] 3 Ch. 467); to place the income in certain investments (*Macpherson* v. *Stewart* (1858), 28 L. J. (CH.) 177); to "retain and set apart" income (*Re Cox* *Cox* v. *Edwards*, [1900] W. N. 89; see *Bateman* v. *Hotchkin* (1847), 10 Beav. 426); to form a reserve fund (*Re Swain*, *Monckton* v. *Hands*, [1905] 1 Ch. 669, C. A., *Re Hurlbatt*, *Hurlbatt* v. *Hurlbatt*, [1910] 2 Ch. 553); or a sinking fund (*Bateman* v. *Hotchkin*, *supra*; *Varlo* v. *Faden* (1859), 1 De G. F. & J. 211). The mere fact of the word "accumulations" being used does not constitute such a direction if the accumulation is not the result of any direction by the testator; see *Bridgnorth Corporation* v. *Collins* (1847), 15 Sim. 538, 540; note (*d*), *infra*.

(*b*) Preamble to the Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98); *Vine* v. *Raleigh*, [1891] 2 Ch. 13, C. A.

(*c*) *Colquhoun* v. *Colquhoun's Trustees* (1892), 19 R. (Ct. of Sess.) 946; *Mackay's Trustees* v. *Mackay*, [1909] S. C. 139, 143; *Wentworth* v. *Wentworth*, [1900] A. C. 163, 170, P. C.

(*d*) *Evans* v. *Hellier* (1837), 5 Cl. & Fin. 114, H. L.; and see S. C., *sub nom.* *Shaw* v. *Rhodes* (1836), 1 My. & Cr. 135; *Morgan* v. *Morgan* (1851), 4 De G. & Sm. 164; *Tench* v. *Cheese* (1855) 6 De G. M. & G. 453, C. A., *per* Lord CRANWORTH, L.C., at p. 462, followed in *Mathews* v. *Keble* (1868), 3 Ch. App. 691, 696; *Lord* v. *Colvin* (1860), 23 Dunl. (Ct. of Sess.) 111; *Smyth's Trustees* v. *Kinloch etc.* (1880), 7 R. (Ct. of Sess.) 1176. If *Elborne* v. *Good* (1844), 14 Sim. 165, 175, 176, and *Bridgnorth Corporation* v. *Collins*, *supra*, amount to *dicta* or decisions of SHADWELL, V.-C., that where there is no express direction to accumulate the statute does not apply, these cases are not followed.

(*e*) *Shaw* v. *Rhodes*, *supra*, at pp. 153, 155; *Tench* v. *Cheese*, *supra*, at p. 466, C. A.; *Campbell's Trustees* v. *Campbell* (1891), 18 R. (Ct. of Sess.) 992.

(*f*) *Green* v. *Ekins* (1742), 2 Atk. 473; *M'Donald* v. *Bryce* (1838), 2 Keen, 276; *Bective* (*Countess*) v. *Hodgson* (1864), 10 H. L. Cas. 656; *Pursell* v. *Elder* (1865), 4 Macq. 992, H. L.; *Wade-Gery* v. *Handley* (1876), 1 Ch. D. 653; *Ralph* v. *Carrick* (1877), 5 Ch. D. 984, 997; affirmed (1879), 11 Ch. D. 873, C. A.; *Re Hiscoe*, *Hiscoe* v. *Waite* (1883), 48 L. T. 510; *Logan's Trustees* v. *Logan* (1896), 23 R. (Ct. of Sess.) 848; *Re Taylor*, *Smart* v. *Taylor*, [1901] 2 Ch. 134.

(*g*) *St. Aubyn* v. *St. Aubyn* (1861), 1 Drew. & Sm. 611.

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by the statutory rules (*h*). Where property is immediately given on trusts for any purpose, to which no immediate application of the property is possible, there is a duty in the trustees, implied by law, to accumulate the income in the interval; and accordingly an express direction for such accumulation is valid, but is mere surplusage (*i*). Similarly, where at the end of a valid period of accumulation the person entitled is an infant, there may be a further period of accumulation during his infancy imposed by law (*j*).

Purposes of accumulation.

762. A direction to invest in stocks, to produce a fund to be invested in the purchase of real estate on a contingency, is a direction for the purchase of land under the third rule (*k*); and "land" has the meaning given to it by the Interpretation Act, 1889 (*l*).

Since under the Settled Land Acts (*m*) capital moneys may be applied to other purposes than the purchase of land, a direction in an instrument that accumulations are to be deemed capital money under the Settled Land Acts (*m*) is not within the third rule (*n*).

The accumulation involved in a direction by will to invest a fund and its accumulations in the purchase of land, or to invest the proceeds of sale of land and the accumulated rents in personal estate, may be confined to a valid period by the doctrines as to the time allowed for conversion and payment of legacies (*o*).

Determination of the appropriate statutory period.

763. The question which is the appropriate period for which accumulation is validly directed is a question of construction of each instrument (*p*); that period is not necessarily the longest, nor the one which may best effectuate the intention to accumulate, but it is the one that actually fits the intention as declared by the instrument (*q*). In selecting the period, not merely events which

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(*h*) *Bryan* v. *Collins* (1852), 16 Beav. 14, *per* ROMILLY, M.R., at p. 17.

(*i*) *Lombe* v. *Stoughton* (1841), 12 Sim. 304.

(*j*) *Griffiths* v. *Vere* (1803), 9 Ves. 127, *per* Lord ELDON, L.C., at p. 136, explained in *Tench* v. *Cheese* (1855), 6 De G. M. & G. 453, 463, C. A., and *Mathews* v. *Keble* (1868), 3 Ch. App. 691, 696, as a matter merely of the management of the infant's property by the court; and see *Bryan* v. *Collins* (1852), 16 Beav. 14, 17, 18, where it is pointed out that in this case the accumulations may, if necessary, be applied for the maintenance and advancement of the infant.

(*k*) *Re Clutterbuck, Fellowes* v. *Fellowes*, [1901] 2 Ch. 285, not following an observation of CHITTY, J., in *Re Danson, Bell* v. *Danson* (1895), 13 R. 633. As to the third rule, see p. 371, *ante*.

(*l*) 52 & 53 Vict. c. 63; *Re Clutterbuck, Fellowes* v. *Fellowes*, *supra*, at p. 288; *Re Danson, Bell* v. *Danson*, *supra*; see titles SETTLEMENTS; STATUTES.

(*m*) See title SETTLEMENTS.

(*n*) *Re Danson, Bell* v. *Danson*, *supra*.

(*o*) *Sitwell* v. *Bernard* (1801), 6 Ves. 520; see Jarman on Wills, 6th ed., p. 1232; Hargrave, Thellusson Act, p. 159. See, generally, title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 242, 262.

(*p*) The construction and effect of the instrument is unaffected by the Act in other respects (*Green* v. *Gascoyne* (1865), 11 Jur. (N. S.) 145, 146; and see *Eyre* v. *Marsden* (1838), 2 Keen, 564, *per* Lord LANGDALE, M.R., at p. 574).

(*q*) *Re Errington, Errington-Turbutt* v. *Errington* (1897), 76 L. T. 616, *per* KEKEWICH, J., at p. 617; and see *Jagger* v. *Jagger* (1883), 25 Ch. D.

have actually happened, but those which might have happened, to affect the limitations of the instrument are to be considered (*r*). The appropriate period is none the less adhered to because accumulation is only directed to begin at some time after the commencement of the period, and therefore the trust either cannot continue for the full length of that period or is entirely ineffectual (*s*).

Calculation of the periods.

764. In non-testamentary instruments, to which alone the first period of the second rule (*t*) is applicable, where accumulation is directed during the lives of strangers without a reference to any minority, it is valid for the period common to their lives and the settlor's life (*u*).

The period of twenty-one years from the death of the settlor or testator is reckoned so as to go up to and include the twenty-first anniversary of his death and to follow immediately on his death (*a*).

The term of a minority of any person living or *en ventre sa mère* at the time of the grantor's or testator's death is also reckoned to begin immediately on that death (*b*).

The fourth period of the second rule (*c*), where the minority is that of a person who would be entitled if of full age to the rents and profits to be accumulated, need not begin from the death of the testator, and is not confined to persons born in the testator's or settlor's lifetime (*d*).

729, 733. In a will, unless the accumulation is directed by reference to a minority, or some personal event connected with a person who for the time being would be entitled, as under the fourth period, the twenty-one years period is adopted (*Griffiths* v. *Vere* (1803), 9 Ves. 127; *Crawley* v. *Crawley* (1835), 7 Sim. 427; *Miles* v. *Dyer* (1837), 8 Sim. 330; *Tench* v. *Cheese* (1855), 6 De G. M. & G. 453, C. A.).

(*r*) *Jagger* v. *Jagger* (1883), 25 Ch. D. 729, *per* KAY, J., at p. 734. As to the extent to which the court will take into account the fact that a woman is past the age of child-bearing, see *Edwards* v. *Tuck* (1853), 3 De G. M. & G. 40, 64, 72, C. A.; *Re Travis, Frost* v. *Greatorex*, [1900] 2 Ch. 541, C. A.

(*s*) *Webb* v. *Webb* (1840), 2 Beav. 493; *A.-G.* v. *Poulden* (1844), 3 Hare, 555; *Lord* v. *Colvin* (1860), 23 Dunl. (Ct. of Sess.) 111; *Smith* v. *Lomas* (1864), 33 L. J. (CH.) 578; *Campbell's Trustees* v. *Campbell* (1891), 18 R. (Ct. of Sess.) 992; *Re Errington, Errington-Turbutt* v. *Errington* (1897), 76 L. T. 616; *Re Travis, Frost* v. *Greatorex*, [1900] 2 Ch. 541, C. A.

(*t*) See p. 370, *ante*.

(*u*) *Re Rosslyn's (Lady) Trust* (1848), 16 Sim. 391; *Jagger* v. *Jagger, supra*; see *Re Errington, Errington-Turbutt* v. *Errington, supra*.

(*a*) *Webb* v. *Webb, supra*; *Gorst* v. *Lowndes* (1841), 11 Sim. 434 (where dividends due on the twenty-first anniversary of the testator's death were held to be subject to the direction for accumulation); *A.-G.* v. *Poulden* (1844), 3 Hare, 555; *Campbell's Trustees* v. *Campbell, supra*.

(*b*) *Jagger* v. *Jagger, supra, per* KAY, J., at p. 733. In *Blasson* v. *Blasson* (1864), 2 De G. J. & Sm. 665, where accumulation was directed until the children of A., B., and C., born and living at the death of the testatrix, attained twenty-one, it was held that a child *en ventre sa mère* was not included.

(*c*) See p. 370, *ante*.

(*d*) *Re Cattell, Cattell* v. *Cattell*, [1907] 1 Ch. 567, not following the suggestion in *Haley* v. *Bannister* (1819), 4 Madd. 275 (which, however, was accepted as accurate in *Ellis* v. *Maxwell* (1841), 3 Beav. 587, 597, and *Bryan*

SECT. 2. **Exceptions from the Statutory Rules.**

SECT. 2.—*Exceptions from the Statutory Rules.*

SUB-SECT. 1.—*Provisions for Payment of Debts or Incumbrances.*

Debts.

765. The first exception is any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons (*e*). The provision must be *bonâ fide* for the payment of debts (*f*); but the provision is none the less *bonâ fide* because it provides for other matters in addition to the payment of debts (*g*).

The debts may be either existing debts, or contingent liabilities to arise in the future (*h*), and may be debts of a stranger (*i*). The debts must not be, however, mere charges on the interest of a person under a trust for accumulation (*j*). The exception has been applied to mortgages, either existing at the testator's death or made pursuant to his will, of an amount ascertained or to be ascertained in the execution of valid trusts (*k*).

Recoupment of beneficiaries.

766. Where creditors are paid otherwise than from the proceeds of the fund directed to be accumulated to pay debts, the trust for

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v. *Collins* (1852), 16 Beav. 14, 17), and the *dictum* in *Jagger* v. *Jagger* (1883), 25 Ch. D. 729, *per* KAY, J., at p. 733, that the statute prevented accumulation of income during the minority of a child unborn at the death of the testator, or date of the settlement: see also 2 Preston, Abstracts of Title, p. 181; Hargrave, Thellusson Act, pp. 119—136. In *Longdon* v. *Simson* (1806), 12 Ves. 295, the period of twenty-one years was taken by the court as the limit. If the duration is during all such times as any person beneficially interested in real estate settled in strict settlement should be under twenty-one, it is entirely void under the rule against perpetuities (*Marshall* v. *Holloway* (1820), 2 Swan. 432; and see *Martelli* v. *Holloway* (1872), L. R. 5 H. L. 532, and p. 370, *ante*), except where the trust is statutory (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42).

(*e*) Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), s. 2; *Bacon* v. *Proctor* (1822), Turn. & R. 31; *Bateman* v. *Hotchkin* (1847), 10 Beav. 426.

(*f*) *Mathews* v. *Keble* (1868), 3 Ch. App. 691, 697, following *Varlo* v. *Faden* (1859), 27 Beav. 255; affirmed 1 De G. F. & J. 211.

(*g*) *Re Hurlbatt, Hurlbatt* v. *Hurlbatt*, [1910] 2 Ch. 553, 559; but see *St. Aubyn* v. *St. Aubyn* (1861), 30 L. J. (CH) 917, *per* KINDERSLEY, V.-C., at p. 922. After the debts are paid, the accumulation is confined to the statutory period (*Colquhoun* v. *Colquhoun's Trustees* (1892), 19 R. (Ct. of Sess.) 946).

(*h*) *Varlo* v. *Faden* (1859), 1 De G. F. & J. 211, 224, explaining the *dicta* of Lord ST. LEONARDS, L.C., in *Barrington* (*Viscount*) v. *Liddell* (1852), 2 De G. M. & G. 480, 498; *Re Mason, Mason* v. *Mason*, [1891] 3 Ch. 467; *Re Hurlbatt, Hurlbatt* v. *Hurlbatt*, *supra*. In *Re Cox, Cox* v. *Edwards*, [1900] W. N. 89, BYRNE, J., held a provision for a reserve fund against future losses in the testator's business void beyond the twenty-one years, "there being no direction in the will for payment of debts."

(*i*) *Barrington* (*Viscount*) v. *Liddell*, *supra*, at pp. 497, 498, *dictum* of Lord ST. LEONARDS, L.C., in opposition to that of TURNER, V.-C., in S. C. (1852), 10 Hare, 429, 434; as to the exception under the rule against perpetuities, see p. 327, *ante*.

(*j*) *Mathews* v. *Keble* (1868), 3 Ch. App. 691.

(*k*) *Bateman* v. *Hotchkin* (1847), 10 Beav. 426, 433; *Bacon* v. *Proctor* (1822), Turn. & R. 31; but see *Smyth's Trustees* v. *Kinloch etc.* (1880), 7 R. (Ct. of Sess.) 1176, *per* Lord ORMIDALE, at p. 1185. In *Re Llanover* (*Baroness*), *Herbert* v. *Ram*, [1907] 1 Ch. 635, a mortgage by the trustees of a will for the purpose of raising estate duty was held to be an incumbrance within an accumulation clause, but no question arose under the Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98).

accumulation comes to an end, and any right expressly or impliedly given to the persons who, claiming under the instrument, are thus disappointed by the mode of payment, to have the accumulation continued to recoup them is not within the exception, and is valid only for one of the statutory periods (*l*).

SECT. 2. Exceptions from the Statutory Rules.

SUB-SECT. 2.—*Provisions for Raising Portions.*

767. The second exception is any provision for raising portions for any child or children of any grantor, settlor or devisor, or any child or children of any person taking any interest under the instrument (*m*). Portions.

768. A portion, as allowed to be thus provided for, includes a sum of money secured to a child or class of children out of property springing from or settled on their parent (*n*); and, in general, must take effect as a part or share of the whole property of the family (*o*). Meaning of the term.

The portion need not, however, be created by the instrument directing accumulation (*p*); thus, the portions may be portions charged for younger children in a strict settlement, contained either in the instrument directing the accumulation (*q*) or in any other instrument (*r*). Instruments which may create portions.

769. A pecuniary legacy or annuity directed to accumulate may be such a portion, according to the circumstances of the case (*s*). Funds which may or may not be portions.

(*l*) *Re Heathcote, Heathcote* v. *Trench*, [1904] 1 Ch. 826; and see note (*o*), p. 329, *ante*.

(*m*) Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), s. 2. The statutory expression in the last few words is "taking any interest under such conveyance, settlement or devise"; but the last word is now interpreted to mean "will" (*Barrington (Viscount)* v. *Liddell* (1852), 2 De G. M. & G. 480, 500, *per* Lord ST. LEONARDS, L.C., reversing S. C. (1852), 10 Hare, 429, where TURNER, V.-C., held that the interest must be taken in the devised property the income of which was to be accumulated); see also *Bourne* v. *Buckton* (1851), 2 Sim. (N. S.) 91, 101; *Morgan* v. *Morgan* (1851), 4 De G. & Sm. 164, 171, 172, 174; *Re Stephens, Kilby* v. *Betts*, [1904] 1 Ch. 322, 327. Where the purposes include other objects, then after the portions are raised the accumulation is confined to the statutory period (*Re Phillips, Phillips* v. *Levy* (1880), 49 L. J. (CH.) 198).

(*n*) *Beech* v. *St. Vincent (Lord)* (1850), 3 De G. & Sm. 678; *Jones* v. *Maggs* (1852), 9 Hare, 605, 607, *per* TURNER, V.-C.; *Re Stephens, Kilby* v. *Betts, supra, per* BUCKLEY, J., at p. 327; *Colquhoun's Trustees* v. *Colquhoun*, [1907] S. C. 346, *per* Lord STORMONTH-DARLING, at p. 352.

(*o*) *Edwards* v. *Tuck* (1853), 3 De G. M. & G. 40, C. A., *per* Lord CRANWORTH, L.C., at p. 58.

(*p*) *Halford* v. *Stains* (1849), 16 Sim. 488; *Bourne* v. *Buckton* (1851), 2 Sim. (N. S.) 91, 96; *Barrington (Viscount)* v. *Liddell, supra*, at p. 498.

(*q*) *Beech* v. *St. Vincent (Lord), supra.*

(*r*) *Barrington (Viscount)* v. *Liddell, supra; Middleton* v. *Losh* (1852), 1 Sm. & G. 61 (additions to portions created by another instrument).

(*s*) In *Beech* v. *St. Vincent (Lord), supra; Barrington (Viscount)* v. *Liddell, supra* (explained in *Watt* v. *Wood* (1862), 2 Drew. & Sm. 56, 61); *St. Paul* v. *Heath* (1865), 11 Jur. (N. S.) 903; *Middleton* v. *Losh* (1852), 1 Sm. & G. 61; *Re Stephens, Kilby* v. *Betts, supra;* and *Colquhoun's Trustees* v. *Colquhoun, supra*, such an accumulated legacy was held to be a "portion"; and see *Burt* v. *Sturt* (1853), 10 Hare, 415, as reported at 22 L. J. (CH.) 1071, *per* PAGE WOOD, V.-C., at p. 1074; see note (*c*), p. 378, *post*. In *Jones* v. *Maggs, supra* (purporting to follow *Eyre* v. *Marsden* (1838), 2 Keen, 564, and *Bourne* v. *Buckton* (1851), 2 Sim. (N. S.) 91, which were cases of residuary

SECT. 2. **Exceptions from the Statutory Rules.**

But a provision for a portion is not constituted by a provision directing additions of income to capital merely for the purpose of making one gift of an aggregate fund (*a*). In such a case, in which the accumulation is simply to increase the amount of the fund, no provision for a portion is made where the fund is the whole estate of the settlor or testator (*b*), or is a residuary estate or share of a residuary estate of a testator (*c*), or is a specific or general legacy to named persons (*d*). No provision for a portion is made where the accumulated fund is held on trust for the parent for life and after his death for his children, even though an eldest son is excluded, as is usual in provisions for portions under family settlements (*e*); nor where the fund is set apart to provide annuities for the parents, and after their deaths is given to their children (*f*); nor where the child has only a power of appointment over the fund (*g*), or only takes the interest of the fund (*h*).

estates); *Morgan* v. *Morgan* (1851), 4 De G. & Sm. 164, 174; *Drewett* v. *Pollard* (1859), 27 Beav. 196; *Watt* v. *Wood* (1862), 2 Drew. & Sm. 56, 61 (where the legacy was held on trust for the parent during her life, and after her death for her younger children), legacies were held not to be portions. In *Shaw* v. *Rhodes* (1836), 1 My. & Cr. 135 (affirmed in *Evans* v. *Hellier* (1837), 5 Cl. & Fin. 114, H. L.), BOSANQUET, J., at p. 159, said that where (as in that case) the whole rents and profits are given in the first place to persons during the lives of their parents, with the exception of small annuities only to be paid thereout to the parents themselves for their own lives, and a gift (of a specific sum) to the same persons after the death of their parents is superadded which is to be paid out of the subsequent rents and profits, the superadded gift could not be a "portion"; and see *Barrington* (*Viscount*) v. *Liddell* (1852), 2 De G. M. & G. 480, *per* Lord ST. LEONARDS, L.C., at p. 504, on *Shaw* v. *Rhodes*, *supra*.

(*a*) *Eyre* v. *Marsden* (1838), 2 Keen, 564, *per* Lord LANGDALE, M.R., at p. 573, applied in *Bourne* v. *Buckton* (1851), 2 Sim. (N. S.) 91, 98, 99; *Re Clulow's Trust* (1859), 1 John. & H. 639, 647.

(*b*) *Wildes* v. *Davies* (1853), 1 Sm. & G. 475; *Edwards* v. *Tuck* (1853), 3 De G. M. & G. 40, C. A., *per* Lord CRANWORTH, L.C., at pp. 57, 58.

(*c*) *Eyre* v. *Marsden*, *supra* (observed upon in *Barrington* (*Viscount*) v. *Liddell*, *supra*, *per* Lord ST. LEONARDS, L.C., at p. 503; but see *Burt* v. *Sturt* (1853), 22 L. J. (CH.) 1071, 1073; *Pride* v. *Fooks* (1840), 2 Beav. 430; *Bourne* v. *Buckton*, *supra*; *Edwards* v. *Tuck*, *supra*; *Mathews* v. *Keble* (1868), 3 Ch. App. 691; *Moon's Trustees* v. *Moon* (1899), 2 F. (Ct. of Sess.) 201; *Mackay's Trustees* v. *Mackay*, [1909] S. C. 139; and see *Cain* v. *Watson*, [1910] Victorian Law Reports, 256. But, if specific sums by way of portion are given out of such accumulated residue, it may be a valid accumulation for that purpose (*Burt* v. *Sturt*, *supra*, *per* PAGE WOOD, V.-C., at p. 1074; in that case the judge did not rely on the fact that the fund was a residuary estate, and therefore indefinite, which he thought was a shadowy distinction). Where, accordingly, real and personal estate are given as a mixed fund, and the realty after accumulation is given to a class of nephews and nieces, and the personalty to their parents and other persons, the rents of the realty cannot be separated so as to make them an independent fund for portions (*Re Walker*, *Walker* v. *Walker* (1886), 54 L. T. 792).

(*d*) *Morgan* v. *Morgan* (1851), 4 De G. & Sm. 164.

(*e*) *Watt* v. *Wood*, *supra*.

(*f*) *Webb* v. *Webb* (1840), 2 Beav. 493; *Drewett* v. *Pollard*, *supra*; and see *Mathews* v. *Keble*, *supra*; *Re Walker*, *Walker* v. *Walker*, *supra*; note (*c*), *supra*.

(*g*) *Re Clulow's Trust*, *supra*, at pp. 646, 647.

(*h*) *Mackay's Trustees* v. *Mackay*, *supra*, at p. 143.

The use of the word "portion" in describing the children's interests is immaterial (*i*).

Children's interests.

770. The children for whom this provision by means of accumulation may be made include children born after the date of the instrument or death of the testator, and are not restricted merely to those then living (*k*); they do not include any illegitimate children (*l*), and the exception is not complied with if the provision is for those children only who survive their parents (*m*) or other class of persons (*n*).

The benefit is, however, none the less a portion because it is given to all the children including the eldest child, and not to younger children only (*o*). On the other hand, the fact that younger children only are provided for does not make the benefit a portion unless it is a portion in other respects (*p*).

Grandchildren and others.

A provision for grandchildren of a testator, where some only of their parents take interests under his will, does not come within the exception (*q*), nor is it sufficient that the testator stands *in loco parentis* to the class of children (*r*).

Parent's interest.

771. The interest which must be taken by a parent, in order to make a provision for his children a portion under this exception, may be any interest, however small, taken under the instrument (*s*) in any property, not necessarily in that the income of which is to be accumulated (*t*).

(*i*) *Halford* v. *Stains* (1849), 16 Sim. 488; *Bourne* v. *Buckton* (1851), 2 Sim. (N. S.) 91; see, however, *Middleton* v. *Losh* (1852), 1 Sm. & G. 61.

(*k*) *Beech* v. *St. Vincent* (*Lord*) (1850), 3 De G. & Sm. 678. If in the events which happen there is a failure of the children for whom provision is made, the accumulation is void after the appropriate statutory period (*Edwards* v. *Tuck* (1853), 3 De G. M. & G. 40, 72, C. A.; *Re Clulow's Trust* (1859), 1 John. & H. 639).

(*l*) *Shaw* v. *Rhodes* (1836), 1 My. & Cr. 135, *per* BOSANQUET, J., at p. 159, who, assuming that two of the class were illegitimate, held that the provision, if for portions, would be void as to all; the observation, however, was *obiter dictum*, as the alleged illegitimacy in that case appears not to have existed; see *Evans* v. *Hellier* (1837), 5 Cl. & Fin. 114, 125, H. L.

(*m*) *Drewett* v. *Pollard* (1859), 27 Beav. 196.

(*n*) *Burt* v. *Sturt* (1853), 10 Hare, 415; and see *Moon's Trustees* v. *Moon* (1899), 2 F. (Ct. of Sess.) 201, *per* Lord MONCRIEFF, at p. 214, as to a gift over on death without issue before division.

(*o*) *Re Stephens, Kilby* v. *Betts*, [1904] 1 Ch. 322, *per* BUCKLEY J., at p. 327.

(*p*) *Watt* v. *Wood* (1862), 2 Drew. & Sm. 56 (where the accumulated fund was settled on the parent and younger children in succession). In *Beech* v. *St. Vincent* (*Lord*), *supra*, an annuity charged upon the income given to the parent for his younger children was held to be a portion.

(*q*) *Eyre* v. *Marsden* (1838), 2 Keen, 564, 573.

(*r*) See *Webb* v. *Webb* (1840), 2 Beav. 493; and see *Shaw* v. *Rhodes*, *supra*; affirmed, *sub nom. Evans* v. *Hellier*, *supra*, where the point was raised; but compare *Colquhoun's Trustees* v. *Colquhoun*, [1907] S. C. 346, *per* Lord Low, at p. 353.

(*s*) See note (*m*), p. 377, *ante*.

(*t*) *Barrington* (*Viscount*) v. *Liddell* (1852), 2 De G. M. & G. 480; *Re Stephens, Kilby* v. *Betts*, *supra* (where the parent was tenant for life of the residuary estate); compare *Evans* v. *Hellier*, *supra*, at pp. 126, 127. In *Morgan* v. *Morgan* (1851), 4 De G. & Sm. 164, 174, the parent

SECT. 2. Exceptions from the Statutory Rules.

SUB-SECT. 3.—*Directions as to Timber.*

Timber.

772. The third exception is any direction touching the produce or wood upon any lands or tenements (*u*).

SUB-SECT. 4.—*Repairs and Replacement of Wasting Capital.*

Repairs and other purposes.

773. Any trust or direction which simply keeps the property up to its present value is valid, and not subject to the second or third rule (*a*). Trusts (*b*), therefore, out of income to effect improvements coming generally under the heading of maintaining in good habitable repair houses and tenements (*c*), or to keep up a policy for the replacement, at the end of the term for which leaseholds are held, of the capital lost by not selling them (*d*), or, it appears, to accumulate part of the rents as a sinking fund for the same purpose and as an indemnity fund (*e*), are not restricted within the statutory periods (*f*), though a trust for the purpose of building houses on building land would be within the second rule (*g*).

Other purposes included.

774. A trust which includes the keeping up of the property to its present value besides other purposes not within the exceptions mentioned is valid, though unrestricted in time, in so far as it is a *bonâ fide* provision for that object, and when that is fulfilled it will be subject to the statutory restrictions (*h*).

In such a case where, in a due course of execution of the trusts, accumulation will not be sanctioned by the court, the rights which arise under the statutory rules will have effect given to them (*i*). It appears that the court, while upholding such a trust, will not

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was a specific legatee, and the provision was held not to be a provision for portions. In *Jones* v. *Maggs* (1852), 9 Hare, 605, 607, TURNER, V.-C., said that although there might be cases in which provisions for children out of property in which the parents took no interest might be called portions, such provisions would only receive that designation where the nature or context of the instrument gave them that character.

(*u*) Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), s. 2. Such a direction may, however, be void under the rule against perpetuities (*Ferrand* v. *Wilson* (1845), 4 Hare, 344; see p. 362, *ante*.). As to the grounds of this exception, see Hargrave, Thellusson Act, p. 206.

(*a*) *Re Gardiner, Gardiner* v. *Smith*, [1901] 1 Ch. 697, 699, 701.

(*b*) In *Bassil* v. *Lister* (1851) 9 Hare, 177, TURNER, V.-C., at p. 184, suggested the following additional examples:—a partnership agreement for a long term where part of the profits is to accumulate; policies of insurance on the lives of debtors; a settlement of policies, with stock transferred in trust to pay premiums out of the dividends.

(*c*) *Vine* v. *Raleigh*, [1891] 2 Ch. 13, C. A., *per* LINDLEY, L.J., at p. 26. In *Curtis* v. *Lukin* (1842), 5 Beav. 147, such a trust was invalid under the rule against perpetuities.

(*d*) *Re Gardiner, Gardiner* v. *Smith, supra*.

(*e*) *Re Hurlbatt, Hurlbatt* v. *Hurlbatt*, [1910] 2 Ch. 553, where, however, the trust, being primarily a trust for indemnity against liabilities, was supported on the principle of *Varlo* v. *Faden* (1859), 1 De G. F. & J. 211; see note (*h*), p. 376, *ante*.

(*f*) See p. 370, *ante*.

(*g*) Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98); see p. 370, *ante*; *Vine* v. *Raleigh*, [1891] 3 Ch. 13, C. A., *per* LINDLEY, L.J., at p. 26.

(*h*) *Re Mason, Mason* v. *Mason*, [1891] 3 Ch. 467, where inquiries were ordered to ascertain the necessary expenditure.

(*i*) *Re Mason, Mason* v. *Mason, supra, per* STIRLING, J., at pp. 472, 473.

authorise the application of income to purposes, the expenses of which ought to be defrayed out of capital (*k*).

SECT. 2. **Exceptions from the Statutory Rules.**

SUB-SECT. 5.—*Savings out of Income and Insurance.*

Savings.

775. The statutory rules do not prevent trustees or anyone else from making savings out of income; in the case of trustees, the check is provided by the duty of conforming to the trust (*l*).

Contracts.

776. An insurance takes effect as a contract only, and a direction to effect or keep up a policy effected by the testator or the trustees is not affected by these rules (*m*).

SECT. 3.—*Application of Surplus Accumulations.*

Effect in general of invalidity.

777. If there is a primary gift of an absolute interest, cut down or charged only by the trust for accumulation, the latter is rejected for the excess, and the primary gift takes effect free from it (*n*). Otherwise the effect of the invalidity of a direction to accumulate is not to accelerate the interests of persons who take subject thereto (*o*), but during the excess of the directed period of accumulation over the appropriate statutory period the rents, profits, and income go to such person or persons as would have been entitled thereto if such excessive accumulation had not been directed (*p*); that is to say, as if a gap had been left between the end of the valid period of accumulation and the commencement of the next interest (*q*).

(*k*) *Vine* v. *Raleigh*, [1891] 2 Ch. 13, 26, C. A.

(*l*) *Lindsay's Trustees*, [1911] S. C. 584; and see *Tench* v. *Cheese* (1855), 6 De G. M. & G. 453, C. A., *per* Lord CRANWORTH, L.C., at p. 463.

(*m*) *Bassil* v. *Lister* (1851), 9 Hare, 177, 184; *Re Vaughan, Halford* v. *Close*, [1883] W. N. 89; *Cathcart's Trustees* v. *Heneage's Trustees* (1883), 10 R. (Ct. of Sess.) 1205.

(*n*) *Trickey* v. *Trickey* (1832), 3 My. & K. 560, 565; *Evans* v. *Hellier* (1837), 5 Cl. & Fin. 114, 127, H. L., explained in *Re Clulow's Trust* (1859), 1 John. & H. 639, 648; *Combe* v. *Hughes* (1865), 11 Jur. (N. S.) 194, 380; and see *Ogilvie's Trustees* v. *Dundee Kirk Session* (1846), 8 Dunl. (Ct. of Sess.) 1229; *Mackenzie* v. *Mackenzie's Trustees* (1877), 4 R. (Ct. of Sess.) 962; *Maxwell's Trustees* v. *Maxwell* (1877), 5 R. (Ct. of Sess.) 248, 250. Similarly, if the income be disposed of subject to a trust for accumulation for an excessive period "so long as the same can lawfully operate" (*Westcar* v. *Westcar* (1856), 21 Beav. 328).

(*o*) *Eyre* v. *Marsden* (1838), 2 Keen, 564; *Boughton* v. *James* (1844), 1 Coll. 26, affirmed *sub nom. Boughton* v. *Boughton, Boughton* v. *James* (1848), 1 H. L. Cas. 406; *Nettleton* v. *Stephenson* (1849), 13 Jur. 618; *Green* v. *Gascoyne* (1865), 11 Jur. (N. S.) 145; *Re Parry, Powell* v. *Parry* (1889), 60 L. T. 489; and see *Muirhead* v. *Muirhead and Crellin* (1890), 15 App. Cas. 289, 299. As to acceleration of the interests in the accumulated fund, where distribution is dependent upon accumulation, see *Colquhoun* v. *Colquhoun's Trustees* (1892), 19 R. (Ct. of Sess.) 946.

(*p*) Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), s. 3.

(*q*) *Green* v. *Gascoyne* (1865), 4 De G. J. & Sm. 565, 572; *Weatherall* v. *Thornburgh* (1878), 8 Ch. D. 261, 269, 271, 272, C. A.; compare *Re Travis, Frost* v. *Greatorex*, [1900] 2 Ch. 541, 546, C. A.

SECT. 3. **Application of Surplus Accumulations.**

Settlements.

778. If the invalid direction is contained in a settlement, the rents and income result to the settlor for the excess, but, if he is dead, the rents of realty during the excess period belong to the heir of the settlor, and the income of personalty to his executors (*r*).

Wills.

779. If the direction is contained in a will, the income for the excess period devolves as on a lapse of an interest held for the void excess (*s*); and therefore, if not itself the income of a residuary estate, falls into residue, if any (*t*), and forms part (as it has recently been held) of the capital of that residue (*u*). If the direction is for accumulation of the residuary estate itself, or there is no residuary gift, the income for the excess period, subject to the rights of the personal representative of the testator, devolves, in the case of income derived from real estate, to the heir (*x*), or, in default of heirs, to the Crown (*a*), and in the case of income derived from personal estate to the next of kin of the testator at his decease (*b*), or if none to the Crown (*c*); and a mixed fund is apportionable accordingly (*d*).

(*r*) *Re Rosslyn's (Lady) Trust* (1848), 16 Sim. 391.

(*s*) As to lapse, see title WILLS.

(*t*) *Haley* v. *Bannister* (1819), 4 Madd. 275; *Crawley* v. *Crawley* (1835), 7 Sim. 427; *O'Neill* v. *Lucas* (1838), 2 Keen, 313; *Webb* v. *Webb* (1840), 2 Beav. 493; *Ellis* v. *Maxwell* (1841), 3 Beav. 587; *A.-G.* v. *Poulden* (1844), 3 Hare, 555; *Morgan* v. *Morgan* (1851), 4 De G. & Sm. 164; *Bryan* v. *Collins* (1852), 16 Beav. 14, 17; *Re Phillips, Phillips* v. *Levy* (1880), 49 L. J. (CH.) 198; *Re Parry, Powell* v. *Parry* (1889), 60 L. T. 489; *Re Pope, Sharp* v. *Marshall*, [1901] 1 Ch. 64.

(*u*) The authorities, however, conflict on this point. The accumulations were held to be capital in *Re Pope, Sharp* v. *Marshall, supra*, following *Crawley* v. *Crawley, supra*, and *O'Neill* v. *Lucas, supra*, where, however, the question does not appear to have been argued as between tenant for life and remainderman; but they were held to be income in *Re Phillips, Phillips* v. *Levy, supra; Morgan* v. *Morgan, supra* (and see S. C., 20 L. J. (CH.) 109, 441, explained in this sense and followed in *Otterson* v. *Gould* (1892), 11 New Zealand Law Reports, 577, C. A.; another explanation being given in *Bryan* v. *Collins* (1852), 16 Beav. 14, 21, 22); and compare *Trickey* v. *Trickey* (1832), 3 My. & K. 560; *Re Clulow's Trust* (1859), 1 John. & H. 639.

(*x*) *Sewell* v. *Denny* (1847), 10 Beav. 315; *Nettleton* v. *Stephenson* (1849), 3 De G. & Sm. 366; *Burt* v. *Sturt* (1853), 10 Hare, 415, 428; see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 1 *et seq.*; and, as to wills made before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), see *Smith* v. *Lomas* (1864), 10 Jur. (N. S.) 742; *Green* v. *Gascoyne* (1865), 11 Jur. (N. S.) 145.

(*a*) *Weatherall* v. *Thornburgh* (1878), 8 Ch. D. 261, C. A.; see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 26 *et seq.*

(*b*) *M'Donald* v. *Bryce* (1838), 2 Keen, 276; *Eyre* v. *Marsden* (1838), 2 Keen, 564; *Pride* v. *Fooks* (1840), 2 Beav. 430; *Elborne* v. *Goode* (1844), 14 Sim. 165; *Wilson* v. *Wilson* (1851), 1 Sim. (N. S.) 288; *Mathews* v. *Keble* (1868), 3 Ch. App. 691; *Elder's Trustees* v. *Free Church of Scotland (Treasurer)* (1892), 20 R. (Ct. of Sess.) 2 (where the residuary legatee was not ascertainable); see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 26 *et seq.*

(*c*) *Weatherall* v. *Thornburgh, supra*; see title DESCENT AND DISTRIBUTION, Vol. XI., p. 28.

(*d*) *Eyre* v. *Marsden, supra*; *Burt* v. *Sturt, supra*; *Ralph* v. *Carrick*

SECT. 3. Application of Surplus Accumulations.

780. The heir is entitled to the income of real estate under the doctrine of reconversion, although conversion has taken place (*e*); but he does not become protector of the settlement for purposes of disentail as claiming under a resulting use or trust for the settlor (*f*). The heir or other person claiming by virtue of the period of accumulation exceeding the statutory period may, however, be a tenant for life under the Settled Land Acts (*g*).

Position of the heir.

The interest of the heir, where accumulation is directed for the life of any person, is a chattel interest which devolves on his personal representative (*h*).

A trust to invest accumulations of personal estate in land does not give the invalid accumulations to the heir; they go to the next of kin (*i*).

781. Where accumulations are directed of a fund arising under the exercise of a power to charge, the invalid accumulations do not sink for the benefit of the estate charged in a case where the fund has been made part of the estate of the person exercising the power (*k*).

Charge under a power.

782. The claims of persons apparently entitled under these rules may be ousted where the trust for accumulation is entirely ineffective owing to the rights of some other person who has a vested interest to determine the trust (*l*).

Ineffective accumulations.

783. The costs of proceedings to determine the invalidity of a provision for accumulation in a will are subject to the discretion of the court, and generally are ordered to come out of the general

Costs.

(1877), 5 Ch. D. 984, 998; *Re Walker, Walker* v. *Walker* (1886), 54 L. T. 792; *Harrison* v. *Harrison* (1904), 7 Ontario Law Reports, 297: compare *Talbot* v. *Jevers* (1875), L. R. 20 Eq. 255.

(*e*) *Eyre* v. *Marsden* (1838), 2 Keen, 564; *Re Perkins, Brown* v. *Perkins* (1909), 101 L. T. 345; compare *Moon's Trustees* v. *Moon* (1899), 2 F. (Ct. of Sess.) 201; and see title EQUITY, Vol. XIII., pp. 108, 109.

(*f*) *Re Hughes*, [1906] 2 Ch. 642; Fines and Recoveries Act, 1833 (3 & 4 Will. c. 74), s. 22); and see, generally, title REAL PROPERTY AND CHATTELS REAL.

(*g*) See title SETTLEMENTS; *Vine* v. *Raleigh*, [1896] 1 Ch. 37; *Re Atherton*, [1891] W. N. 85.

(*h*) *Sewell* v. *Denny* (1847), 10 Beav. 315; *Barrett* v. *Buck* (1848), 12 Jur. 771; in the latter case the proposition was admitted. In *Halford* v. *Staunton* (1849), 16 Sim. 488, the interest undisposed of was held to go to the heir of the heir as "part of the inheritance"; see Gray, Rule against Perpetuities, 2nd ed., s. 702.

(*i*) *Bourne* v. *Buckton* (1851), 2 Sim. (N. S.) 91, 101; see *Vine* v. *Raleigh*, *supra*, at pp. 38, 39.

(*k*) *Simmons* v. *Pitt* (1873), 8 Ch. App. 978.

(*l*) *Wharton* v. *Masterman*, [1895] A. C. 186; *Re Swain, Monckton* v. *Hands*, [1905] 1 Ch. 669, C. A.; and see *Oddie* v. *Brown* (1859), 4 De G. & J. 179, C. A.; *MacVean* v. *MacVean* (1899), 24 Victorian Law Reports, 835. As to the determination of such trusts by the beneficiaries having all attained a vested interest, see title TRUSTS AND TRUSTEES. There is no interference with the statutory rights unless the trust for accumulation is thus determinable (*Talbot* v. *Jevers*, *supra*, at p. 260; *Weatherall* v. *Thornburgh* (1878), 8 Ch. D. 261, C. A.; *Re Parry, Powell* v. *Parry* (1889), 60 L. T. 489; *Re Travis, Frost* v. *Greatorex*, [1900] 2 Ch. 541, C. A.).

SECT. 3. **Application of Surplus Accumulations.**

estate, including the accumulations validly made, but not out of the accumulations invalidly made (*m*).

(*m*) *Eyre* v. *Marsden* (1839), 4 My. & Cr. 231; *Barrett* v. *Buck* (1848), 12 Jur. 771; *Burt* v. *Sturt* (1853), 10 Hare, 415; *Re Clulow's Trust* (1859), 1 John. & H. 639; *Talbot* v. *Jevers* (1875), L. R. 20 Eq. 255; *Ralph* v. *Carrick* (1877), 5 Ch. D. 984, 998. In *Elborne* v. *Goode* (1844), 14 Sim. 165, and *Green* v. *Gascoyne* (1865), 4 De G. J. & Sm. 565, 572, the costs were divided *pro ratâ* between a fund, part of the general residue, including the lawful accumulations, and a fund, the remainder of the general residue, representing the accumulations made void by statute; and in *Nettleton* v. *Stephenson* (1849), 18 L. J. (CH.) 191, the costs were made payable out of the valid accumulations, and any deficiency was directed to be borne by the excess accumulations; compare *Smith* v. *Lomas* (1864), 33 L. J. (CH.) 578. In *Bourne* v. *Buckton* (1851), 2 Sim. (N. S.) 91, and *Bryan* v. *Collins* (1852), 16 Beav. 14, the costs were paid out of the excess accumulations. As to costs generally, see titles PRACTICE AND PROCEDURE; SOLICITORS.

PERSONAL PROPERTY.

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Part I.—Definitions.

SECT. 1.—*Personal Property in General.*

784. Personal property or personalty may be roughly described as comprising all forms of property, movable or immovable, corporeal or incorporeal, other than freehold or copyhold estates of inheritance in land and its appurtenances (*a*), or estates in such land or appurtenances, for the life or lives, or (with some exceptions) chattels affixed to such lands. Originally the only remedy for the recovery of personal property was an action for damages (*b*), but specific delivery can now be ordered, and other remedies have in some cases been provided by statute (*c*). Real property was always specifically

Definition of personal property.

(*a*) There are certain interests which partake of the nature of real estate, *e.g.*, peerages and dignities (see title PEERAGES AND DIGNITIES, p 269, *ante*), shares in certain public undertakings (*Drybutter* v. *Bartholomew* (1723), 2 P. Wms. 127; *Buckeridge* v. *Ingram* (1795), 2 Ves. 652), and title deeds of real estate, which are the "sinews of the land" (Co. Litt. 6 a), and pass by a conveyance of land without express mention (*Harrington* v. *Price* (1832), 3 B. & Ad. 170), which may not be completely covered by the above definition; but for all practical purposes such definition is believed to be sufficient. The usual definition of personal estate is property which on the owner's death passes at common law to his legal personal representative; but as by statute a deceased owner's real estate now passes to his legal personal representative (see title DESCENT AND DISTRIBUTION, Vol. XI., p. 4), the latter definition is confusing. As to the descent of an annuity given with words of inheritance, see title RENTCHARGES AND ANNUITIES.

(*b*) As to the right to recover particular chattels, see pp. 397, 400, *post*.

(*c*) As to ejectment in respect of leaseholds, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 558 *et seq.*; REAL PROPERTY AND CHATTELS REAL. As to the description of personal estate, see, further, title DESCENT AND DISTRIBUTION, Vol. XI., p. 3. No attempt can be made here to describe in detail the origin of the distinction now drawn between real and personal property. The following brief summary will, however, suffice to render intelligible the definition of personal property attempted in the text. The feudal system established in England after the Norman Conquest was concerned only with property in land, then the chief, but by no means the only, form of wealth (2 Pollock and Maitland, History of English Law, p. 149), and with a few other objects related to land, and not with goods and chattels, which from their movable and destructible nature were not fit objects of feudal tenure (*ibid.*, p. 180; Williams on Real Property, 19th ed., p. 12). The law of personal property is said to be derived mainly from the Roman civil law and the custom of merchants (Butler's note to Co. Litt. 191 a, II., 2). The terms "real" and "personal" were originally used to describe particular forms of actions at law and the nature of relief thereby afforded. Thus an *actio in rem*, or real action, was a suit brought for the specific restitution of the *res*, or thing, claimed, and at first lay only for the wrongful taking of freehold land (Glanv. i. 7—31; ii. 3—20; iii. 3—9; xiii. 32—39; Bract. fol. 101 b, 159 b); whereas personal actions were brought to recover damages for the wrongful taking of chattels. In course of time the expression "real property," or "realty," was applied to the subject-matter of a "real" action (Co. Litt. 118 b; 2 Bl. Com. pp. 16, 384), and "personal property," or "personalty," to denote all property not recoverable by a "real" action (*ibid.*). As to the forms of real actions and personal actions, see title ACTION, Vol. I., pp. 31 *et seq.* The distinction between real and personal property may also be traced in the different modes of succession to the two classes of property after death:

SECT. 1. Personal Property in General.

recoverable by process of law (*d*). It also differs from real property in the methods by which it is alienable (*e*). Chattels real and personal are included in the expression "personal estate."

SECT. 2.—*Chattels Real.*

Chattels real.

785. Interests concerning or savouring of realty, such as a term for years in land (*f*), an option by the lessee to purchase the fee (*g*), or the next presentation to a church (*h*), having the quality of immobility which makes them akin to realty (*i*), but lacking indeterminate duration, are called chattels real (*k*). In some respects they are subject, like other chattels, to the law of personal property, in others, to the law of real property (*l*).

SECT. 3.—*Chattels Personal.*

Chattels personal.

786. Chattels personal are, strictly speaking, things movable, but in modern times the expression is used to denote any kind of property other than real property and chattels real (*m*).

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see titles DESCENT AND DISTRIBUTION, Vol. XI., pp. 4 *et seq.*; LANDLORD AND TENANT, Vol. XVIII., pp. 347, 413.

(*d*) See title REAL PROPERTY AND CHATTELS REAL. The remedy differed owing to the physical distinction between lands and chattels. Land, being indestructible and irremovable, is by nature specifically recoverable. Goods, on the other hand, may be destroyed by the wrongful taker, or may be removed out of the jurisdiction of the court. An action by a dispossessed owner for the specific restitution of goods cannot, therefore, be invariably successful, and so it came about that such actions were regarded as personal, because it was uncertain whether the goods would be forthcoming, or whether the defendant would absolve himself by payment of pecuniary compensation (Glanv. x., 2, 13; Bract. fol. 102 b; *Anon.* (1340), Y. B. 14 Edw. 3, 30 (Rolls Series); 3 Bl. Com., pp. 146, 413). In more recent times the dispossessed owner of personalty acquired certain rights of specific restitution; see p. 400, *post.*

(*e*) See p. 404, *post.*

(*f*) *Freke* v. *Carbery* (*Lord*) (1873), L. R. 16 Eq. 461, 466; *Re Watson, Carlton* v. *Carlton* (1887), 35 W. R. 711; *Tomkins* v. *Jones* (1889), 22 Q. B. D. 599, 602, C. A.; *Re Grassi, Stubberfield* v. *Grassi*, [1905] 1 Ch. 584; see title LANDLORD AND TENANT, Vol. XVIII., pp. 392 *et seq.*

(*g*) *Re Adams and Kensington Vestry* (1884), 27 Ch. D. 394, C. A.; see title LANDLORD AND TENANT, Vol. XVIII., pp. 392 *et seq.*

(*h*) Fitz. Nat. Brev. 33, P. (G.), 34, B.; *R.* v. *Canterbury* (*Archbishop*) (1588), 4 Leon. 109; Co. Litt. 388 a: and see title ECCLESIASTICAL LAW, Vol. XI., p. 585.

(*i*) See title CONFLICT OF LAWS, Vol. VI., p. 196.

(*k*) Co. Litt. 42 a, 43 b, 118 b; 2 Bl. Com. p. 386; and see *Re Fraser, Lowther* v. *Fraser*, [1904] 1 Ch. 111, 116; affirmed, [1904] 1 Ch. 726, C. A.; see, further, title REAL PROPERTY AND CHATTELS REAL.

(*l*) Co. Litt. 42 a, 118 b; *Whitaker* v. *Ambler* (1758), 1 Eden, 151, 152; *Prescott* v. *Barker* (1874), 9 Ch. App. 174, 190.

(*m*) The word "chattel" is derived from the Latin "*catalla*," which primarily signified beasts of husbandry or cattle. In its secondary sense it was applied to all kinds of movables (2 Bl. Com., p. 385; 2 Pollock and Maitland, History of English Law, p. 149). As to whether a prehistoric boat embedded in the soil below the surface is a chattel, see *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch. D. 562. As to what things are regarded as "movable," see *Chamberlayne* v. *Collins* (1894), 70 L. T. 217, C. A. (machinery erected on land and removable without injury to the soil —a chattel); and titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 173, 174; CONFLICT OF LAWS, Vol. VI., p. 196; DESCENT AND DISTRIBUTION,

SECT. 3. Chattels Personal.

The term "personalty" or "personal property" now includes many kinds of property unknown to the common law, such as bills of exchange, bank-notes and cheques (*n*), land improvement charges (*o*), copyrights (*p*), patents (*q*), shares in joint-stock companies (*r*), debentures (*s*), Government annuities and stock in the public funds (*t*), goodwill (*u*), and the exclusive right of burial in any particular place (*v*); but the term does not include title deeds relating to real estate (*a*), heirlooms in the strict sense (*b*), fixtures (*c*), growing crops and trees (*d*), or wild animals (*e*).

Some kinds of property are declared to be personalty by statute (*f*).

Corporeal and incorporeal chattels.

787. Property in chattels personal may be in possession or in action. It is in possession where the possessor has not only the right to enjoy, but the actual enjoyment of, the chattels, the chattels being in such case sometimes called corporeal chattels. Where only a bare right to enjoy exists, the property is said to be in action, and the chattels are called incorporeal. Personal property

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Vol. XI., p. 3. note (*f*); DISTRESS, Vol. XI., p. 136; LANDLORD AND TENANT, Vol. XVIII., pp. 416 *et seq.*; MORTGAGE, Vol. XXI., p. 70.

(*n*) See title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 457 *et seq.*

(*o*) See title LAND IMPROVEMENT, Vol. XVIII., p. 297.

(*p*) Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 5 (2); see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 140.

(*q*) See title PATENTS AND INVENTIONS, p. 127, *ante*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 22; and see titles CHOSES IN ACTION, Vol. IV., p. 362; COMPANIES, Vol. V., p. 680.

(*s*) *Attree* v. *Hawe* (1878), 9 Ch. D. 337, 351, C. A.

(*t*) National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 9 (Government annuities); Bank of England Act, 1696 (8 & 9 Will. 3, c. 20), s. 33 (repealed) (Bank of England stock); stat. (1697) 9 Will. 3, c. 44, s. 71 (shares in East India Company); see *Dundas* v. *Dutens* (1790), 1 Ves. 196, 198; *Wildman* v. *Wildman* (1803), 9 Ves. 174, 177; *R.* v. *Capper* (1817), 5 Price, 217, 263, 264. As to annuities, see title RENTCHARGES AND ANNUITIES.

(*u*) See titles PARTNERSHIP, p. 104, *ante*; TRADE AND TRADE UNIONS.

(*v*) See title BURIAL AND CREMATION, Vol. III., pp. 520, 521.

(*a*) As to title deeds, see title REAL PROPERTY AND CHATTELS REAL.

(*b*) These are heirlooms which by virtue of a special custom descend with the inheritance of the land; see *ibid.*; and see title SETTLEMENTS.

(*c*) See title LANDLORD AND TENANT, Vol. XVIII., pp. 416 *et seq.*

(*d*) See titles AGRICULTURE, Vol. I., p. 282; LANDLORD AND TENANT, Vol. XVIII., pp. 565, 566; REAL PROPERTY AND CHATTELS REAL.

(*e*) See title ANIMALS, Vol. I., pp. 365 *et seq.*

(*f*) In the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 1, "personal estate" includes "monies, shares of Government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits and goods"; see title DESCENT AND DISTRIBUTION, Vol. XI., p. 3. Personal chattels or personal property are also defined for the purposes of succession duty (see Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1; title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 263) and bills of sale (see title BILLS OF SALE, Vol. III., pp. 20 *et seq.*). In the case of charitable gifts various kinds of property indirectly connected with land have been held to be personalty; see title CHARITIES, Vol. IV., p. 125, note (*q*). "Property" is also defined in the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 24 (see title HUSBAND AND WIFE, Vol. XVI., p. 348), and in the Conveyancing Acts, 1881 (44 & 45 Vict. c. 41), s. 2 (1), and 1882 (45 & 46 Vict. c. 39), s. 1 (4) (i.); see title REAL PROPERTY AND CHATTELS REAL. For revenue purposes "personal property" includes land of which there

SECT. 3. Chattels Personal.

may also be partly in possession and partly in action, as, for example, bills of exchange and promissory notes. The debt thereby secured is a chose in action (*g*), but the actual document is a chose in possession (*h*).

Choses in possession.

788. Choses or things in possession include all things which are at once tangible, movable, and visible, and of which possession can be taken, as, for example, animals, household stuff, money, jewels, corn, garments, and everything else that can properly be put in motion and transferred from place to place (*i*).

Choses in action.

789. Things or choses in action are things recoverable by suit or action at law as contrasted with things or choses in actual physical possession (*k*).

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has been an equitable conversion (*A.-G.* v. *Dodd*, [1894] 2 Q. B. 150; Customs and Inland Revenue Acts, 1881 (44 & 45 Vict. c. 12), s. 38 (2), and 1889 (52 & 53 Vict. c. 7), s. 11), and a mortgagee's interest in realty (*A.-G.* v. *Worrall*, [1895] 1 Q. B. 99, C. A.); and see titles ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 239, 306, 307; INCOME TAX, Vol. XVI., pp. 618, 619; REVENUE.

(*g*) *Hertford* (*Marquis*) v. *Lowther* (*Lord*) (1843), 7 Beav. 1; see title CHOSES IN ACTION, Vol. IV., p. 360.

(*h*) *Re Prater, Desinge* v. *Beare* (1888), 37 Ch. D. 481, C. A.; *Re Robson, Robson* v. *Hamilton*, [1891] 2 Ch. 559. Such documents may be the object of larceny; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 641, 642.

(*i*) 2 Bl. Com., p. 387.

(*k*) *Ibid.*, p. 396; see title CHOSES IN ACTION, Vol. IV., pp. 359 *et seq.*, where choses in action are dealt with in detail.

Rights of indemnity, which are choses in action, have been recently considered in *Re Richardson, Ex parte St. Thomas's Hospital (Governors)*, [1911] 2 K. B. 705, C. A. Indemnity requires that the party to be indemnified shall never be called upon to pay (*ibid.*, *per* BUCKLEY, L.J., at p. 716). Thus a person entitled to be indemnified is entitled either to a declaration that the person who is liable to indemnify him is bound to procure his release from the liability to the creditor (*ibid.*, at pp. 709, 716; *Cruse* v. *Paine* (1869), 4 Ch. App. 441), or to have a fund set aside to protect him from the liability when it arises (*Re Richardson, Ex parte St. Thomas's Hospital (Governors)*, *supra*, at pp. 709, 713; *Lacey* v. *Hill, Crowley's Claim* (1874), L. R. 18 Eq. 182, 191). Under the old common law rules no action could be maintained on a contract of indemnity unless actual loss had been incurred (*Re Richardson, Ex parte St. Thomas's Hospital (Governors)*, *supra*, at pp. 709, 712; *Collinge* v. *Heywood* (1839), 9 Ad. & El. 633), although a covenant to protect against liability (*Carr* v. *Roberts* (1833), 5 B. & Ad. 78), or to pay the debt (*Ashdown* v. *Ingamells* (1880), 5 Ex. D. 280, C. A.), could be enforced, notwithstanding that the person claiming the indemnity had not paid the whole debt. The fact that the person to be indemnified is insolvent does not affect the liability of the person who has covenanted to indemnify him (*Hill* v. *Smith* (1844), 12 M. & W. 618, 632; *Ashdown* v. *Ingamells*, *supra*, disapproving *Porter* v. *Vorley* (1832), 9 Bing. 93; *Re Richardson, Ex parte St. Thomas's Hospital (Governors)*, *supra*); but any sums recovered under the indemnity must be applied in satisfaction of the particular debt, and are not divisible among the general creditors in the bankruptcy of the person indemnified (*Re Richardson, Ex parte St. Thomas's Hospital (Governors)*, *supra*); and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 137, 138. No order, however, for actual payment to the person claiming indemnity can apparently be made in the absence of the principal creditor unless the claimant has already paid the debt (*Re Richardson, Ex parte St. Thomas's Hospital (Governors)*, *supra*, at p. 713; but see *Carr* v. *Roberts*, *supra*). As to the nature of a contract of indemnity, see, further, title GUARANTEE, Vol. XV., pp. 444 *et seq.*

Part II.—Possession.

SECT. 1.—*Meaning of the Term.*

SECT. 1. Meaning of the Term.

Physical and legal possession distinguished.

790. "Possession" is a word of ambiguous meaning (*l*), and its legal senses do not coincide with the popular sense (*m*). In English law it is treated not merely as a physical condition protected by ownership, but as a right in itself (*n*).

De facto possession.

791. The word "possession" (*o*) may mean effective, physical, or manual control, or occupation, evidenced by some outward act, sometimes called *de facto* possession or detention (*p*). This is a question of fact rather than of law (*q*).

Legal possession.

792. The word "possession" may mean legal possession, which may exist with or without *de facto* possession, and with or without a rightful origin (*r*).

(*l*) *Bourne* v. *Fosbrooke* (1865), 18 C. B. (N. S.) 526; *Lyell* v. *Kennedy* (1887), 18 Q. B. D. 796, C. A., *per* FRY, L.J., at p. 813. As to the meaning of "possession" or "vacant possession" in a contract for the sale of land, see *Lake* v. *Dean* (1860), 28 Beav. 607; and see title SALE OF LAND.

(*m*) Pollock and Wright, Possession in the Common Law, p. 1.

(*n*) *Ibid.*, p. 19; Markby, Elements of Law, s. 349. "Possession" originally expresses the simple notion of a physical capacity to deal with a thing as the possessor likes, to the exclusion of everyone else (*ibid.*, s. 348). It sometimes means physical control simply, the proper word for which is "detention" (*ibid.*, s. 398).

(*o*) As to the meaning of "apparent possession" for the purposes of the Bills of Sale Acts, see title BILLS OF SALE, Vol. III., p. 56. The expression "man in possession" used in the Distress (Costs) Act, 1817 (57 Geo. 3, c. 93), means a man in possession of the goods seized but not necessarily in possession of them on the premises when they were seized (*Scott* v. *Denton*, [1907] 1 K. B. 456).

(*p*) A shopkeeper is in *de facto* possession of bank-notes which are dropped by a stranger in a part of the shop frequented by customers and picked up by a customer (*Bridges* v. *Hawkesworth* (1851), 15 Jur. 1079). Again, a man may be said to be in *de facto* possession of bulky or immovable objects in his own house or garden, though absolute physical control is impracticable (Pollock and Wright, Possession in the Common Law, pp. 11 *et seq.*, 38).

(*q*) Such use and enjoyment as the nature of the subject-matter admits of is good evidence of possession (*Harper* v. *Charlesworth* (1825), 4 B. & C. 574). *De facto* possession of goods may be obvious where physical control is demonstrable. It is a question of fact. But in the capture of wild animals it may not always be clear when complete possession is taken. Thus, so long as a seine net is open, complete possession has not been taken of the fish (*Young* v. *Hichens* (1844), 6 Q. B. 606; 2 Kent, Commentaries on American Law, p. 349; and see title FISHERIES, Vol. XIV., p. 589). As to the custom relating to the capture of whales, see title CUSTOM AND USAGES, Vol. X., p. 283. As to the property in wild animals, see titles ANIMALS, Vol. I., pp. 365 *et seq.*; GAME, Vol. XV., pp. 211 *et seq.*

(*r*) Pollock and Wright, Possession in the Common Law, p. 26. Legal possession must be conceived as a definite right or interest, to which legal incidents are attached, and which exist independently of the true owner's title (*ibid.*, pp. 17, 19). "Possession in a legal sense is the determination to exercise physical control over a thing on one's own behalf coupled with the capacity for doing so; and is therefore of necessity exclusive" (Markby, Elements of Law, s. 397; see *ibid.*, s. 354, and Pollock and Wright, Possession in the Common Law, p. 16).

SECT. 1. **Meaning of the Term.**

The normal case of legal possession is where the true owner has *de facto* possession and intends to exclude unauthorised interference. In this instance *de facto* and legal possession are associated in the same person (*s*). A bailee also has *de facto* and legal possession during the bailment (*t*).

Nature of legal possession.

Lost property.

Legal possession of an article remains in the owner though he has lost or abandoned physical possession of it or otherwise ceased to exercise effective control over it, for example, where he has lost a jewel in his house, left his implements of husbandry in a field with the intention of returning, or even abandoned the article altogether, provided that no one else has taken *de facto* possession (*a*).

Possession of servants or guests.

The owner has legal possession of an article temporarily in the custody of his servant (*b*), except where the servant receives an article from a third party to hold for his master, in which case the servant holds as bailee and has legal possession (*c*). In the same way the owner retains the legal possession where the article is in the custody of a guest or licensee (*d*).

Stolen property.

A thief, however, may have legal possession of stolen goods, the true owner having merely the right to possession, on the principle that possession in fact with the manifest intention to exercise sole dominion imports possession in law (*e*).

Right to possession.

793. The third meaning of the word "possession" is the right to possession which may be equivalent to ownership, or merely of a temporary or special character (*f*).

SECT. 2.—*Different Kinds of Possession.*

SUB-SECT. 1.—*Absolute or Qualified.*

Absolute possession.

794. Possession is absolute where a man has solely and exclusively the right to and also the occupation of any movable chattel, so that it cannot be transferred from him or cease to be his without his own act or default. Thus a man may have absolute possession of all inanimate things and vegetable productions when severed from the plant or ground (*g*), and of tame animals (*h*).

Qualified possession.

795. Animals *feræ naturæ* may be the subject of qualified or limited property, either on account of their inability to escape from the land of the possessor or because the possessor has been granted an exclusive privilege of capture (*i*). Fire, light, air and water are

(*s*) Pollock and Wright, Possession in the Common Law, pp. 17, 41.
(*t*) See title BAILMENT, Vol. I., pp. 525, 541.
(*a*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 641; Pollock and Wright, Possession in the Common Law, p. 19.
(*b*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 632.
(*c*) Pollock and Wright, Possession in the Common Law, p. 60; see title MASTER AND SERVANT, Vol. XX., p. 67.
(*d*) Pollock and Wright, Possession in the Common Law, pp. 18, 58, 138, 140; Markby, Elements of Law, ss. 371—381; see title SALE OF GOODS.
(*e*) Pollock and Wright, Possession in the Common Law, p. 20; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 678.
(*f*) Pollock and Wright, Possession in the Common Law, pp. 25, 27, 146.
(*g*) 2 Bl. Com., p. 389; and see title AGRICULTURE, Vol. I., p. 293.
(*h*) 2 Bl. Com., p. 390; see title ANIMALS, Vol. I., p. 365.
(*i*) 2 Bl. Com., pp. 391—394; Savigny, Possession (ed. 1865), s. 31, p. 342;

also the subjects of qualified property, the property in them ceasing the instant they are out of possession (*k*).

SUB-SECT. 2.—*Possession of Owner.*

Possession annexed to ownership.

796. An owner of goods enjoys the full rights of ownership when he also has *de facto* possession, or use and enjoyment (*l*).

The right to have legal and *de facto* possession is a normal but not necessary incident of ownership (*m*). Such right may exist with, or apart from, *de facto* or legal possession, and in different persons at the same time in virtue of different proprietary rights (*n*). When separated from possession, right to possession is sometimes called "constructive possession" (*o*). Thus, when an owner has been wrongfully dispossessed of his goods by theft, or has lost them, he retains the right to possess them (*p*), but where he has bailed them his right is temporarily suspended (*q*). So, also, an executor immediately on the death of the testator, and before probate, has "constructive possession" of the testator's goods (*r*).

Where *de facto* possession is undetermined, for example, where it is equally consistent with the facts that possession may be in one person or another, legal possession attaches to the right to possess (*s*).

Possession of co-owners.

797. Where there are two co-owners, each is in possession of the whole and of the half (*t*), which means that while each co-owner has control or *de facto* possession of the whole, he exercises such control partly on behalf of himself and partly on behalf of his co-owner (*u*). In the case of a joint tenancy, the joint tenants have

Markby, Elements of Law, s. 361; see also title ANIMALS, Vol. I., pp. 365, 366.

(*k*) 2 Bl. Com., p. 395; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 297, 310, 326.

(*l*) See Williams on Real Property, 19th ed., p. 2; *Fouldes* v. *Willoughby* (1841), 8 M. & W. 540, 548; *Burroughs* v. *Bayne* (1860), 3 H. & N. 296. As to rights of ownership without possession, see p. 398, *post*.

(*m*) 2 Saund. 476, n.; Blackburn, Contract of Sale, 3rd ed., pp. 339, 340; *Bloxam* v. *Sanders* (1825), 4 B. & C. 941.

(*n*) Pollock and Wright, Possession in the Common Law, pp. 27, 146.

(*o*) *Ibid.*, pp. 25, 27. *E.g.*, where a seller or carrier agrees to hold as agent for the buyer, the buyer has constructive possession; see *Stoveld* v. *Hughes* (1811), 14 East, 308; *Jackson* v. *Nichol* (1839), 5 Bing. (N. C.) 508; and titles CARRIERS, Vol. IV., p. 97; SALE OF GOODS; SHIPPING AND NAVIGATION.

(*p*) Pollock and Wright, Possession in the Common Law, p. 27. As to whether a person with a mere right to possession can maintain trespass, see title TRESPASS.

(*q*) Pollock and Wright, Possession in the Common Law, p. 145.

(*r*) *Tharpe* v. *Stallwood* (1843), 5 Man. & G. 760. The same rule applies in the case of an administrator (*Morgan* v. *Thomas* (1853), 8 Exch. 302); and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 146.

(*s*) *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, C. A.; *Antoniadi* v. *Smith*, [1901] 2 K. B. 589, C. A.

(*t*) Littleton's Tenures, s. 288. As to larceny by husband or wife, or partner, or joint owner, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 634, 635. As to trespass by one of several co-owners, see title TRESPASS.

(*u*) Markby, Elements of Law, s. 399.

SECT. 2. Different Kinds of Possession.

both single possession and a single joint right to possess. Tenants in common have single possession, but several rights to possess (*a*).

SUB-SECT. 3.—*Possession of Bailee.*

Bailee.

798. A bailee has either actual or constructive possession of the goods bailed as well as the right to possess them; but his possession is conditional on redelivery to the owner or his nominee upon fulfilment of the purposes of the bailment (*b*).

SUB-SECT. 4.—*Possession of Trespasser.*

Trespasser.

799. The foundation of the action of trespass is the wrongful interference with the possession of another (*c*). The trespasser does not acquire possession of chattels unless there is an asportation or carrying away (*d*). Where a person takes the goods of another without his previous consent, possession in fact is acquired by trespass, which, according to circumstances, may or may not be justifiable (*e*).

SUB-SECT. 5.—*Possession of Finder.*

Finder of lost chattels.

800. The innocent (*f*) finder of a lost chattel who takes it into his custody obtains possession both in fact and in law, and has a limited right to possession good against all but the rightful owner (*g*).

The rule that a finder who takes possession of property absolutely abandoned or irretrievably lost by its former owner thereby acquires ownership (*h*) is not applicable as against the Crown or against

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(*a*) Littleton's Tenures, ss. 311, 314, 315.

(*b*) See title BAILMENT, Vol. I., pp. 524 *et seq.* The temporary custody of his master's property by a servant in charge must be distinguished from ordinary bailment; see title MASTER AND SERVANT, Vol. XX., p. 67. The custody of the servant apparently amounts merely to a licence to deal with the property in a certain way (Pollock and Wright, Possession in the Common Law, pp. 58—60, 130, 138; *Kerr* v. *Phyn* (1893), 30 Sc. L. R. 607). As to the right of an owner who has delivered goods to a bailee to maintain trover for conversion by a stranger, see *Quinn* v. *Pratt*, [1908] 2 I. R. 69, 82; titles BAILMENT, Vol. I., p. 563; TROVER AND DETINUE. As to possession of an auctioneer, see *Davis* v. *Artingstall* (1880), 49 L. J. (CH.) 609; title AUCTION AND AUCTIONEERS, Vol. I., p. 520.

(*c*) *Johnson* v. *Diprose*, [1893] 1 Q. B. 512, C. A.; see, further, title TRESPASS. The term "trespass" is also used with reference to injury to chattels where the trespasser does not take possession.

(*d*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 630.

(*e*) Pollock and Wright, Possession in the Common Law, pp. 118 *et seq.*; see also p. 397, *post*; titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 629; TRESPASS.

(*f*) *Buckley* v. *Gross* (1863), 3 B. & S. 566, 573.

(*g*) *Armory* v. *Delamirie* (1722), 1 Stra. 505; 1 Smith, L. C., 11th ed., p. 356; *Curtwright* v. *Green* (1803), 8 Ves. 504, 509; *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch. D. 562, 570. As to when a finder of a chattel is regarded as a bailee, owner, or thief; as to finding by a bailee or by a purchaser; as to rights of a finder against third parties; and as to chattels found on private property, see titles BAILMENT, Vol. I., pp. 528 *et seq.*; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 630; TROVER AND DETINUE; Pollock and Wright, Possession in the Common Law, pp. 171—187.

(*h*) Pollock and Wright, Possession in the Common Law, p. 124.

persons who have acquired franchises by grant or prescription in respect of chattels of which possession has been lost or abandoned in special circumstances, such as treasure trove (*i*).

SECT. 2. **Different Kinds of Possession.**

SECT. 3.—*Rights Annexed to Possession.*

Possession *primâ facie* title.

801. The *primâ facie* presumption of law is that the person who has *de facto* possession has the property (*k*), and accordingly such possession is protected, whatever its origin, against all who cannot prove a superior title (*l*). This rule applies equally in criminal (*m*) and civil (*n*) matters. Thus a person in actual or apparent possession, but without the right to possession, has, as against a stranger or a wrongdoer, all the rights and remedies of a person entitled to and able to prove a present right to possession (*o*).

No title against owner.

Title to property, created merely by the act of reducing a thing into possession, necessarily implies a reduction into possession effected by a lawful act. Such an act, if it constitutes a trespass, cannot create a title to property as against the rightful owner (*p*).

Stranger cannot set up owner's title.

Until a superior title is shown, *de facto* possession is conclusive evidence of the right to possess (*q*). The result is that a stranger or wrongdoer cannot defend himself by proving the right of a third party (*r*), unless he can show that he is acting on behalf of such third party (*s*).

SECT. 4.—*Acquisition of Possession.*

Acquisition of possession

802. Possession of chattels can be taken by physical contact (*t*) but contact is not essential where the intention of the parties is that possession shall be acquired (*u*). In each case possession depends

(*i*) As to treasure trove, see titles BAILMENT, Vol. I., p. 531, note (*j*); CONSTITUTIONAL LAW, Vol. VI., pp. 372, 489; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 521. As to estrays, wreck, jetsam, flotsam and ligan, see Co. Litt. 114 b; 1 Bl. Com., pp. 291—299; *Constable's* (*Sir Henry*) *Case* (1601), 5 Co. Rep. 106; *A.-G.* v. *Moore*, [1893] 1 Ch. 676; titles ADMIRALTY, Vol. I., p. 76; BAILMENT, Vol. I., pp. 530, note (*e*), 531; CONSTITUTIONAL LAW, Vol. VI., p. 479; Vol. VII., pp. 209 *et seq.*

(*k*) *Wilbraham* v. *Snow* (1670), 2 Wms. Saund. 47; *Jones* v. *Williams* (1837), 2 M. & W. 326, 331; *Jeffries* v. *Great Western Rail. Co* (1856), 5 E. & B. 802, 806; *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch. D. 562, 569; *The Winkfield*, [1902] P. 42, C. A.; *Glenwood Lumber Co.* v. *Phillips*, [1904] A. C. 405, 410, P. C.

(*l*) *Rogers* v. *Spence* (1844), 13 M. & W. 581.

(*m*) See 2 Pollock and Maitland, History of English Law, pp. 40 *et seq.*

(*n*) See *ibid.*, and titles TORT; TRESPASS.

(*o*) *Armory* v. *Delamirie* (1722), 1 Stra. 505; 1 Smith, L. C., 11th ed., p. 356; *Bridges* v. *Hawkesworth* (1851), 15 Jur. 1079; *Bourne* v. *Fosbrooke* (1865), 18 C. B. (N. S.) 515; see *Jeffries* v. *Great Western Rail. Co.* (1856), 5 E. & B. 802, *per* Lord CAMPBELL, C.J., at p. 805.

(*p*) *Blades* v. *Higgs* (1865), 11 H. L. Cas. 621; *Elwes* v. *Brigg Gas Co.*, *supra*, at p. 568; *Glenwood Lumber Co.* v. *Phillips*, *supra*; Holmes, The Common Law, title "Possession," p. 223.

(*q*) *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1; *Doe* d. *Smith and Payne* v. *Webber* (1834)), 1 Ad. & El. 119.

(*r*) *Bristow* v. *Cormican* (1878), 3 App. Cas. 641, 651.

(*s*) *Leake* v. *Loveday* (1842), 4 Man. & G. 972; *Newnham* v. *Stevenson* (1851), 10 C. B. 713, 724; see, further, title TORT.

(*t*) *E.g.*, a man can take possession of a coin by putting it in his pocket (Markby, Elements of Law, s. 358).

(*u*) *E.g.*, possession is acquired by the purchaser of goods stored in a warehouse when the keys are handed over to him by the vendor with the intention of transferring possession (Markby, Elements of Law, s. 358; see

SECT. 4. Acquisition of Possession.

on the physical possibility of the possessor dealing with the thing exclusively (*a*).

Where *de facto* possession is undetermined, the lawful owner may acquire it by entry or occupation (*b*). Where two persons claim *de facto* possession, the title of the one who can prove the right to possess prevails (*c*).

SECT. 5.—*Loss of Possession.*

Loss of possession.

803. Physical or *de facto* possession may be lost by discontinuance of physical control in various ways (*d*); but the loss of physical control does not necessarily involve loss of legal possession (*e*); and a person entitled to immediate possession, who has temporarily parted with *de facto* possession, has the rights and remedies of a *de facto* possessor (*f*).

What is abandonment.

804. Abandonment of goods takes place when possession of them is quitted voluntarily without any intention of transferring them to another (*g*). A buried coffin is not regarded as abandoned, but remains in the possession of the deceased person's representatives or in that of the person who buried the deceased (*h*). Similarly, the interment of animals does not imply abandonment (*i*).

The possession of a person who has wilfully abandoned a thing

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Guest v. *Homfray* (1801), 5 Ves. 818, 823; and title BILLS OF SALE, Vol. III., p. 7, note (*f*); and a mortgagee of personal chattels entitled to possession may acquire possession without physical interference with their use and enjoyment (Pollock and Wright, Possession in the Common Law, p. 79). In point of law possession of goods may be changed by agreement without any physical change in their position or in the position of the person who actually guards them (*Mills* v. *Charlesworth* (1890), 25 Q. B. D. 421, C. A., *per* LINDLEY, L.J., at p. 425; reversed on other grounds, [1892] A. C. 231).

(*a*) Markby, Elements of Law, s. 359.

(*b*) *Jones* v. *Chapman* (1849), 2 Exch. 802, 821, Ex. Ch.; *Bristow* v. *Cormican* (1878), 3 App. Cas. 641.

(*c*) Littleton's Tenures, s. 701; see *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, C. A.

(*d*) See Markby, Elements of Law, s. 362; Pollock and Wright, Possession in the Common Law, p. 15; and see p. 404, *post*.

(*e*) Pollock and Wright, Possession in the Common Law, p. 16.

(*f*) *E.g.*, a bailor where the bailment is revocable at will, or a trustee of chattels left under the control of the beneficiary (*Barker* v. *Furlong*, [1891] 2 Ch. 172). As to the right of stoppage of goods *in transitu*, which must be exercised after they have left the actual or constructive possession of the seller and before they are in the possession of the buyer, see titles CARRIERS, Vol. IV., p. 97; SALE OF GOODS. As to common law lien upon goods depending upon possession and ceasing when possession or right to possession is parted with, see *Great Eastern Railway* v. *Lord's Trustee*, [1909] A. C. 109; *Forth* v. *Simpson* (1849), 13 Q. B. 680; titles LIEN, Vol. XIX., p. 2; SALE OF GOODS.

(*g*) Pollock and Wright, Possession in the Common Law, p. 44. As to the possibility of a person divesting himself of a right to possession by wilful abandonment, see *ibid.*, pp. 124, 145; 22 Vin. Abr. 409, tit. Waif; and see *Haynes's Case* (1613), 12 Co. Rep. 113, where it was said "a man cannot relinquish the property he hath to his goods unless they vested in another."

(*h*) *Haynes's Case*, *supra*; 1 Hale, C. L. 515; and see title BURIAL AND CREMATION, Vol. III., pp. 406. 553.

(*i*) *R.* v. *Edwards and Stacey* (1877), 13 Cox, C. C. 384, C. C. R. As to larceny of things found and believed to have been abandoned, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 630.

does not necessarily render him liable for any damage subsequently caused by the thing abandoned (*j*).

SECT. 5. Loss of Possession.

805. Voluntary loss of possession may also be effected by transfer or delivery to another (*k*).

Transfer of possession.

806. Deprivation or the dispossessing of the goods of another without his consent may be legally justifiable or wrongful according to circumstances (*l*). It is rightful or justifiable, for example, when the true owner retakes them from a trespasser (*m*), or when the taking is authorised by law, for example, in a case of public necessity or as being for the true owner's benefit (*n*), or in case of bankruptcy, execution or distress (*o*). It is wrongful when the taking amounts to a trespass for which there is no justification (*p*).

Dispossession

807. The loss of possession may also be occasioned by destruction or extinction of the chattel in fact or in law (*q*).

Destruction of chattel.

808. Where physical possession unaccompanied by a right to possession is legally divested, the former possessor has not the right of recovery which belongs to a person in actual possession (*r*).

Right to recover possession.

Part III.—Ownership.

SECT. 1.—*Nature of Ownership.*

809. Ownership consists of innumerable rights over property, for example, the rights of exclusive enjoyment, of destruction, alteration and alienation, and of maintaining and recovering possession of the property from all other persons. Such rights are conceived not as separately existing, but as merged in one general right of ownership (*s*).

Meaning of ownership.

(*j*) *White* v. *Crisp* (1854), 10 Exch. 312 (abandonment of sunken vessel in navigable river).

(*k*) See p. 404, *post*.

(*l*) Pollock and Wright, Possession in the Common Law, pp. 77, 78.

(*m*) See titles TORT; TRESPASS.

(*n*) *Isaack* v. *Clark* (1615), 2 Bulst. 306, 312.

(*o*) See *Six Carpenters' Case* (1610), 8 Co. Rep. 146 b; 1 Smith, L. C., 11th ed., p. 132; *Charlesworth* v. *Mills*, [1892] A. C. 231 (sheriff's possession); *R.* v. *Lushington, Ex parte Otto* [1894] 1 Q. B. 420 (detention, by court, of alleged stolen property, produced by purchaser under *subpœna duces tecum*); and see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 4; DISTRESS, Vol. XI., p. 117; EXECUTION, Vol. XIV., pp. 3, 4; SHERIFFS AND BAILIFFS.

(*p*) See *R.* v. *Riley* (1853), Dears. C. C. 149, C. C. R.; titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 627 *et seq.*; TORT.

(*q*) *E.g.*, the escape and return to a wild state of a reclaimed wild animal, or the escape of gas, or the placing in the soil of a plant.

(*r*) *Buckley* v. *Gross* (1863), 3 B. & S. 566.

(*s*) 2 Austin's Jurisprudence, 4th ed., p. 817; Markby, Elements of Law, ss. 309, 314, 321, 323. For suggested definitions of ownership, see *ibid.*, s. 318, n.; compare the meaning of "ownership" as applied to land, explained in *Metropolitan Rail. Co.* v. *Fowler* (1891), 60 L. J. (Q. B.) 518, *per* CAVE, J., at p. 525; affirmed, [1892] 1 Q. B. 165, C. A.; and see title REAL PROPERTY AND CHATTELS REAL. As to chattels being the subject of absolute ownership, see Glanv. vii. 5, x. 6; Bract. fol. 60 b, 129 a, 131 a, 407 b; 2 Pollock and Maitland, History of English Law, 0, 176—183.

SECT. 1. Nature of Ownership.

Ownership of chattels.

The ownership of goods (*t*) differs from the ownership of land in several respects (*a*), partly because the common law does not recognise the possibility of the ownership of goods being split up into lesser successive interests or estates, nor does it contemplate remainders or reversions in chattels (*b*).

How far rights of owner divisible.

810. Ownership is nevertheless divisible to some extent. For example, one or more of the *fasciculus* of rights constituting ownership may be detached (*c*). Thus an owner is *primâ facie* entitled to possession (*d*) or to recover possession of his goods against all the world (*e*), a right which a dispossessed owner may exercise by peaceable retaking (*f*). But he may voluntarily or involuntarily part with possession, for example, by the pledging (*g*), lending, hiring out (*h*), bailment (*i*), theft (*k*) or loss of his goods, in any of which cases he is left with a right of ownership without possession, accompanied or not accompanied, as the case may be, with the right to possess. Ownership is also divorced from possession where the goods are in possession of a person who has a lien on them (*l*), or when they are seized under a distress and until a sale is made under the statute (*m*).

Legal and beneficial ownership.

811. In the case of trusts, the legal ownership is said to be in the trustee and the beneficial enjoyment or equitable ownership in the *cestui que trust* (*n*).

SECT. 2.—*Personal Capacity.*

Ownership of corporations;

812. The owner may be a single individual or a legal entity, namely, a corporation; or several individuals may together constitute the owner (*o*). In the case of corporate ownership, the rights and obligations attach to the corporate body, and the existence of such

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(*t*) Our ancient law books, which are founded upon the feudal provisions, do not often condescend to regulate ownership of personal property (2 Bl. Com., p. 385). The law of personal property is said to be founded on the civil law (*ibid.*).

(*a*) See title REAL PROPERTY AND CHATTELS REAL.

(*b*) See p. 413, *post*.

(*c*) Markby, Elements of Law, s. 314. As to who may be described as owner in an indictment for larceny, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 645, note (*d*).

(*d*) As to the possession of owner, see p. 393, *ante*.

(*e*) Pollock and Wright, Possession in the Common Law, p. 25.

(*f*) Littleton's Tenures, s. 497; 3 Bl. Com., pp. 4, 5; see *Blades* v. *Higgs* (1861), 10 C. B. (N. S.) 713; *Re Ware, Ex parte Drake* (1877), 5 Ch. D. 866, 871, C. A.; and title TRESPASS. It is a misdemeanour for an owner to make a bargain with a thief, who has stolen his goods, not to prosecute if the goods are restored (4 Bl. Com., pp. 133, 356; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 503).

(*g*) See title PAWNS AND PLEDGES, pp. 235, 238, *ante*

(*h*) See title BAILMENT, Vol. I., pp. 550 *et seq.*

(*i*) See *ibid.*, p. 524; title CARRIERS, Vol. IV., p. 92.

(*k*) As to the present practice in actions for the recovery of goods or their value, and as to the right of an owner to bring a civil action for goods or their value against a thief before prosecuting him criminally, see titles ACTION, Vol. I., pp. 27, 44; TROVER AND DETINUE.

(*l*) See titles LIEN, Vol. XIX., pp. 2, 16, 18; SALE OF GOODS.

(*m*) Stat. (1689) 2 Will. & Mar. c. 5, s. 2; see title DISTRESS, Vol. XI., p. 168.

(*n*) See title TRUSTS AND TRUSTEES.

(*o*) Markby, Elements of Law, s. 324.

rights and obligations is not affected by the death of individual members of the body (*p*).

There is no restriction placed on the acquisition of personalty by corporations aggregate (*q*) or charities (*r*). and charities.

Aliens are capable of acquiring and holding personal property other than a British ship (*s*). Ownership of aliens.

SECT. 3.—*Acquisition of Ownership.*

SUB-SECT. 1.—*By Succession to Title of Previous Owner.*

813. The acquisition of ownership by succession strictly speaking applies only to corporations aggregate, because in the eye of the law a corporation never dies, and the members by succession acquire the ownership of the corporate property (*t*). Corporation aggregate and sole.

The general rule with regard to corporations sole is that no chattel can be acquired by right of succession (*a*), except in the case of the Crown, or where the corporation sole represents a number of persons, or where by custom it has acquired the right of taking particular chattel interests in succession (*b*).

An individual may, however, be said to acquire ownership by succession (*c*) when he succeeds to the title of a previous owner, for example, in cases of gifts (*d*), sales (*e*), under a will (*f*), or on an intestacy (*g*), or to the possession of another under circumstances depriving the former owner of his ownership, for example, in case of a purchase in market overt (*h*). Individual succession.

SUB-SECT. 2.—*By Change of Possession.*

814. Loss of possession of chattels frequently involves loss of ownership, owing to the practical difficulty of following up the ownership of movables. But a judgment for the recovery of any property other than land or money may be enforced either by writ for delivery of the property, or by writ of attachment, or by writ of sequestration (*i*). Specific goods.

When such a judgment is being enforced by writ of delivery, the court may on the plaintiff's application order that execution shall

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(*p*) Markby, Elements of Law, ss. 326, 774; see title CORPORATIONS, Vol. VIII., p. 365.

(*q*) See *ibid.*, p. 377.

(*r*) See title CHARITIES, Vol. IV., p. 124.

(*s*) Co. Litt. 129 b; 1 Bl. Com., p. 360; *Watford* v. *Marsham* (1596), Moore (K. B.), 431; see titles ALIENS, Vol. I., pp. 306 *et seq.*; SHIPPING AND NAVIGATION.

(*t*) 2 Bl. Com., p. 430; see also title CORPORATIONS, Vol. VIII., p 365.

(*a*) 2 Bl. Com., pp. 432, 433.

(*b*) *Ibid.*, p. 433.

(*c*) See Markby, Elements of Law, pp. 371 *et seq.*

(*d*) See title GIFTS, Vol. XV., pp. 404 *et seq.*

(*e*) See titles SALE OF GOODS; SALE OF LAND.

(*f*) See title WILLS.

(*g*) See titles DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 136.

(*h*) Pollock and Wright, Possession in the Common Law, p. 123; see title MARKETS AND FAIRS, Vol. XX., pp. 53 *et seq.*

(*i*) R. S. C., Ord. 42, r. 6. As to writs of delivery, see title EXECUTION, Vol. XIV., pp. 37, 74, 75; as to writs of attachment, see *ibid.*, p. 75; and as to writs of sequestration, see *ibid.*, pp. 79 *et seq.* See, generally, as to the recovery of goods in *specie*, titles DISTRESS, Vol. XI., pp. 199 *et seq.*; SALE OF GOODS; TROVER AND DETINUE.

SECT. 3. Acquisition of Ownership.

issue for the delivery of the property without giving the defendant the option of retaining this property upon payment of the assessed value (*k*). Such an order may be made without the value of the property being first assessed (*l*).

Coin. Stolen goods.

Ownership also follows possession in the case of coin and negotiable instruments (*m*), but, in the case of stolen goods, unless sold in market overt, the ownership remains in the true owner (*n*), and where they have been sold in market overt to a *bonâ fide* purchaser, the property revests in the true owner upon his prosecuting the thief to conviction, at the date of such conviction (*o*).

Lost goods.

815. Ownership may be acquired by change of possession (1) as against all the world, by occupancy, where a man takes possession of an ownerless thing (*p*); (2) as against all the world except the true owner, by a finder or trespasser taking possession of the goods of another (*q*).

Lapse of time.

816. *De facto* possession, unaccompanied by a right to possession, may be converted into full ownership by lapse of time (*r*).

SUB-SECT. 3.—*By Taking Original Possession.*

Capture.

817. Ownership may be acquired by occupancy of a thing without an owner (*s*), for example, the capture of wild animals (*t*); the appropriation of free natural elements, such as light, air, and

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(*k*) R. S. C., Ord 48, r. 1. Where a writ of delivery is issued giving the defendant the option of retaining the property upon payment of its value, the ownership remains in the plaintiff until the sheriff has levied the value from the defendant's goods (*Re Ware, Ex parte Drake* (1877), 5 Ch. D. 866; *Re Scarth* (1874), 10 Ch. App. 234).

(*l*) *Hymas* v. *Ogden*, [1905] 1 K. B. 246, C. A.

(*m*) See title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 459, 461, 513. As to what are negotiable instruments, see *ibid.*, pp. 459 *et seq.*, 564 *et seq.*

(*n*) *Vilmont* v. *Bentley* (1886), 18 Q. B. D. 322, *per* Lord ESHER, M.R., at pp. 326, 327; affirmed (1887), 12 App. Cas. 471; and see title SALE OF GOODS.

(*o*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 686; MARKETS AND FAIRS, Vol. XX., p. 55; SALE OF GOODS.

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

(*q*) See p. 394, *ante*.

(*r*) See title LIMITATION OF ACTIONS, Vol. XIX., p. 50.

(*s*) 2 Bl. Com., p. 402; Vaugh., pp. 188, 190; 2 Stephen's Commentaries, p. 43; Markby, Elements of Law, ss. 483, 484; Pollock and Wright, Possession in the Common Law, p. 124. As to the relation of occupancy to ownership, see Maine, Ancient Law, c. viii.

(*t*) *Young* v. *Hichens* (1844), 6 Q. B. 606; *Aberdeen Arctic Co.* v. *Sutter* (1862), 4 Macq. 355, H. L.; *Blades* v. *Higgs* (1865), 11 H. L. Cas. 621, 632. Wild animals are not in the possession of the owner of the soil, he having at most a qualified property in them or a right to reduce them into possession (see title ANIMALS, Vol. I., pp. 366, 370; Markby, Elements of Law, s. 361; Savigny, Possession, s. 31, p. 342); but, in the United Kingdom, the ownership of wild animals, except fish in the sea (see *Fennings* v. *Grenville* (*Lord*) (1808), 1 Taunt. 241; *Hogarth* v. *Jackson* (1827), 2 C. & P. 595; title FISHERIES, Vol. XIV., p. 636) other than royal fish (see p. 402, *post*), cannot as a rule be acquired by mere occupancy, sporting rights being enjoyed either by virtue of a franchise (Williams, Rights of Common, pp. 228 *et seq.*), or as incidental to the ownership of land (*ibid.*, p. 240; *Case of Monopolies* (1602), 11 Co. Rep. 84 b, 87 b; 2 Bl. Com. p. 417; and see title GAME, Vol. XV., pp. 211, 212).

water (*a*); the collection of matter, such as seaweed, from the sea or shore (*a*); the severance of a thing, for example, corn or other emblements, from the soil (*b*), and, perhaps, the finding of a thing absolutely abandoned or irretrievably lost (*c*).

Invention.

818. Ownership may also be acquired by invention, as, for example, the right which an author has in his own literary compositions (*d*).

SUB-SECT. 4.—*By Accession.*

Accession.

819. If any corporeal substance receives an accession (*e*) by natural or artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidery of cloth, or the conversion of wood or metal into vessels or utensils, the original owner is entitled by his right of possession to the property in its improved state. But this principle does not apply where the species of the thing is changed, as by making wine, oil, or bread out of another's grapes, olives, or wheat (*f*). The maxim *partus sequitur ventrem* applies in the case of all animals except swans (*g*).

Fixtures.

Similarly, when the goods of one man are attached to the land or chattel, for example, a ship, of another, the ownership in such goods is transferred to the owner of the land or chattel (*h*).

SUB-SECT. 5.—*By Confusion.*

Intermixture.

820. Ownership of goods may be acquired by confusion or intermixture, different principles being applicable where the intermixture takes place by agreement, fraud, or accident (*i*).

(*a*) 2 Bl. Com., p. 402; see title WATERS AND WATERCOURSES.

(*b*) 2 Bl. Com., p. 403; see title AGRICULTURE, Vol. I., p. 282.

(*c*) 2 Bl. Com., pp. 9, 14; Bract. lib. 1, c. 12, fol. 7 b, lib. 2, c. 1, fol 9 a, lib. 3, c. 3, fol. 120 a; see p. 394, *ante*; Markby, Elements of Law, s. 485; and title TROVER AND DETINUE.

(*d*) 2 Bl. Com., pp. 400—405. This kind of ownership has been regulated and protected by numerous statutes; see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 136 *et seq.*; Copyright Act, 1911 (1 & 2 Geo. 5, c. 46); title PATENTS AND INVENTIONS, pp. 125 *et seq.*, *ante*.

(*e*) The acquisition of ownership by "accession" is grounded on the right of occupancy and founded on a doctrine of the Roman law.

(*f*) Bract. fol. 9, 10; *Anon.* (1559), Moore (K. B.), 19, 20; *Anon.* (1594), Poph. 38; *Anon.* (1490), Y. B. 5 Hen. 7, 15, pl. 6; *C.* v. *M.* (1529), Y. B. 12 Hen. 8, 9, 10; 2 Bl. Com., pp. 403, 404, 405; Markby, Elements of Law, s. 489; see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 165.

(*g*) Bro. Abr., tit. Propertie and proprietate probanda, 29; *Case of Swans* (1592), 7 Co. Rep. 15 b, 17 a; 2 Bl. Com., pp. 390, 391; and see title ANIMALS, Vol. I., pp. 365, 366, note (*t*).

(*h*) Markby, Elements of Law, s. 496; title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 260; *Wheeler* v. *Stratton* (1912), 105 L. T. 786; *Forman & Co., Proprietary* v. *Ship "Liddesdale,"* [1900] A. C. 190, P. C. But, as to the rights of a lessee to be compensated for his improvements, see title LANDLORD AND TENANT, Vol. XVIII., pp. 479, 566, 567. The rule in the text is based on the legal maxim *quidquid plantatur solo, solo cedit.*

(*i*) See title BAILMENT, Vol. I., pp. 542, 543.

r. 8, Acquisition of Ownership.

SUB-SECT. 6.—*Under Paramount Authority.*

821. Another method of acquiring property in personal chattels is by the exercise of the Royal Prerogative, whereby a right may accrue either to the Crown itself or to persons claiming under the title of the Crown, or by prescription which supposes an ancient grant (*k*).

Acquisition under Royal Prerogative.

Taxes.

In this class are included taxes and customs, whether constitutionally inherent in the Crown or created by authority of Parliament (*k*).

Crown copyright.

The Crown acquires title by a kind of prerogative copyright in certain books or publications, for example, Acts of Parliament, Proclamations, Orders in Council, liturgies and books of divine service of the Church of England, and the Authorised Version of the Bible (*l*).

Royal fish.

Royal fish, namely, whale and sturgeon, thrown ashore or caught near the coasts are the property of the Crown by prerogative (*m*).

Treasure trove.

Certain things which have been lost or abandoned belong to the Crown by prerogative, namely, treasure trove, waifs, estrays, wreck, jetsam, flotsam, and ligan (*n*).

Transfer of ownership by sovereign authority.

822. Ownership of goods is capable of being acquired, regardless of the title of the previous owner, by force of a statute. Examples of this transfer of ownership occur (1) where the goods of a bankrupt are transferred to the trustee in bankruptcy (*o*); (2) where goods are sold under the Rules of the Supreme Court, pending litigation (*p*); (3) where execution is levied (*q*); (4) where smuggled goods are forfeited (*r*); or (5) where a forfeiture occurs by reason of a breach of the excise laws (*s*) or Merchandise Marks Act, 1887 (*t*);

(*k*) 2 Bl. Com., p. 408; see title CONSTITUTIONAL LAW, Vol. VI., pp. 371 *et seq.*

(*l*) See titles CONSTITUTIONAL LAW, Vol. VI., pp. 496 *et seq.*; COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 172 *et seq.*

(*m*) 2 Bl. Com., pp. 216, 280; Markby, Elements of Law, s. 236, where it is stated that the right is still sometimes claimed in respect of whales by the grantees of the Crown; see, further, titles CONSTITUTIONAL LAW, Vol. VII., p. 215; FISHERIES, Vol. XIV., p. 580.

(*n*) Co. Litt. 114 b; 1 Bl. Com., pp. 291—299; and see title CONSTITUTIONAL LAW, Vol. VI., pp. 479 *et seq.*; Vol. VII., pp. 210 *et seq.*

(*o*) See 2 Bl. Com., p. 471; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 143 *et seq.*

(*p*) R. S. C., Ord. 50, r. 2; see title PRACTICE AND PROCEDURE.

(*q*) See title EXECUTION, Vol. XIV., pp. 4, 14. Where goods are taken in execution to satisfy a judgment, the sheriff has a special property in them between the seizure and the sale (*Wilbraham* v. *Snow* (1670), 2 Saund. 47; see *Re Gourlay, Ex parte Abbott* (1880), 15 Ch. D. 447, C. A.; and title SHERIFFS AND BAILIFFS); but where goods are distrained for rent the goods are *in custodiâ legis*, and the property in them, until sale or other lawful disposal, remains in the original owner, and does not pass to the distrainor (2 Wms. Saund., 5th ed., 47, note (c)); see title DISTRESS, Vol. XI., p. 168.

(*r*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 177; see title REVENUE.

(*s*) Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53), s. 32; see title REVENUE.

(*t*) 50 & 51 Vict. c. 28, s. 12; see title TRADE MARKS, TRADE NAMES, AND DESIGNS.

or (6) where a ship is sold under proceedings against her *in rem* in the Admiralty Division (*a*).

SECT. 4.—*Co-ownership* (*b*).

SUB-SECT. 1.—*Joint Ownership.*

Joint ownership in personalty.

823. A joint ownership or joint tenancy is distinguished by the four unities—of possession, interest, title, and time of commencement (*c*).

Personalty, although it cannot be vested in co-parceners (*d*), may, like real estate, belong to several persons either as joint tenants or as tenants in common (*e*); and expressions contained in any instrument which create a joint tenancy or tenancy in common in realty have the same effect when applied to personalty (*f*).

Survivorship.

The right of survivorship (*g*) attaches to a joint tenancy of personalty (*h*), including choses in possession and in action (*i*), as well as of realty (*k*), until severance (*l*).

Partners.

It has been held that the doctrine of survivorship does not apply to chattels belonging to a trade partnership so as to enable the surviving partners to dispose of such chattels without the concurrence of the legal personal representatives of a deceased partner (*m*); but this exception does not apply in law to choses in action belonging to a partnership (*n*); and, although in equity the share of the deceased partner in the partnership choses in action devolves on his executors or administrator (*o*), the remedy survives to the copartner (*p*).

SUB-SECT. 2.—*Ownership in Common.*

Ownership in common.

824. Owners in common have a unity of possession, but a

(*a*) *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, 428, 429, 442; see titles ACTION, Vol. I., pp. 47, 48; ADMIRALTY, Vol. I., p. 123.

(*b*) Co-ownership probably came into use as a modified form of family ownership—the oldest form of ownership (Markby, Elements of Law, s. 326).

(*c*) 2 Bl. Com., p. 180; see, further, title REAL PROPERTY AND CHATTELS REAL.

(*d*) See title REAL PROPERTY AND CHATTELS REAL.

(*e*) 2 Bl. Com., p. 399.

(*f*) *Ibid.*; see 1 Eq. Cas. Abr. 292. As to what words create, and as to the severance of, a joint tenancy, see 6 Cru. Dig., 4th ed., pp. 329—343, tit. XXXVIII., Devise, c. XV.; titles REAL PROPERTY AND CHATTELS REAL; WILLS.

(*g*) As to the right of survivorship, see titles REAL PROPERTY AND CHATTELS REAL; WILLS.

(*h*) 2 Bl. Com., p. 399; Littleton's Tenures, s. 282.

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

(*k*) See title REAL PROPERTY AND CHATTELS REAL.

(*l*) Co. Litt. 182 a.

(*m*) *Buckley* v. *Barber* (1851), 6 Exch. 164, following Y. B. 38 Edw. 3, fol. 7; Co. Lit. 182a; and *E.* v. *Collector of Customs* (1813), 2 M. & S. 223, and distinguishing *Lake* v. *Gibson* (1729), 1 Eq. Cas. Abr. 291; *Jefferey* v. *Small* (1684), 1 Vern. 217; and *Crawshay* v. *Collins* (1808), 15 Ves. 218. *Buckley* v. *Barber*, *supra*, however, is said to have been disapproved by JAMES, L.J., in *Taylor* v. *Taylor* (1873), 7th March (unreported); and the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 38, would seem now to authorise the surviving partners to dispose of such chattels for the purpose of winding up the partnership.

(*n*) *Martin* v. *Crompe* (1698), 1 Ld. Raym. 340.

(*o*) *Jefferey* v. *Small*, *supra*; *Lake* v. *Craddock* (1732), 3 P. Wms. 158; see title CHOSES IN ACTION, Vol. IV., p. 399.

(*p*) See title PARTNERSHIP, p. 55, *ante*.

SECT. 4. Co-ownership.

distinct and several title to their shares, which need not necessarily be equal (*q*); and there is no right of survivorship between owners in common (*r*). Ownership in common arises (1) from the severance of a joint tenancy (*s*), or (2) from a gift to two or more persons in common (*t*).

Part IV.—Alienation.

SECT. 1.—*In General.*

Method of alienation of chattels.

825. The alienation of chattels differs essentially from the alienation of land. Chattels were never subject to the rules of feudal tenure which in early days restrained the transfer of land (*a*). At the present time, while a deed, or, in the case of registered land, a statutory transfer (*b*), is required to convey land (*c*), chattels in possession may be transferred without deed or writing if possession is delivered (*d*). Chattels are also transferable by deed and by way of sale or gift (*e*).

SECT. 2.—*Voluntary Alienation.*

SUB-SECT. 1.—*By Delivery.*

Delivery.

826. Delivery (*f*) is the voluntary transfer of the possession of goods to another (*g*). Where a movable object is handed over to a person with intent to transfer ownership, for example, in the case of gifts (*h*), or sales (*i*), the property in the goods is transferred.

Delivery for special purpose.

But mere change of custody does not of itself involve a change of ownership, as the article may be transferred for a limited purpose only, as in the case of bailments (*k*). Similarly, delivery of a chattel by a master into the custody of his servant does not give the servant

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(*q*) Littleton's Tenures, s. 292; 2 Bl. Com., p. 191; see, further, title REAL PROPERTY AND CHATTELS REAL.

(*r*) Littleton's Tenures, s. 321.

(*s*) See title REAL PROPERTY AND CHATTELS REAL.

(*t*) Littleton's Tenures, s. 321. As to what words create a tenancy in common, see titles REAL PROPERTY AND CHATTELS REAL; WILLS.

(*a*) See Co. Litt. 145 b, 351 b; title REAL PROPERTY AND CHATTELS REAL.

(*b*) See titles REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

(*c*) See title REAL PROPERTY AND CHATTELS REAL.

(*d*) 2 Bl. Com., p. 441; 1 Shep. Touch. (Preston's ed.), p. 227; Com. Dig., tit. Biens (D 2). According to the old law, no gift or grant of a chattel was effectual to pass it, whether by parol or by deed, and whether with or without consideration, unless accompanied by delivery (*Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, 72, 73, C. A.; and see the text, *infra*).

(*e*) See p. 406, *post*; title GIFTS, Vol. XV., p. 410. As to the alienation of choses in action, see title CHOSES IN ACTION, Vol. IV., pp. 365 *et seq.*

(*f*) See title GIFTS, Vol. XV., p. 412; and, as to gifts *mortis causa*, see *ibid.*, p. 432.

(*g*) Pollock and Wright, Possession in the Common Law, pp. 43, 57, 71.

(*h*) See title GIFTS, Vol. XV., p. 412.

(*i*) See title SALE OF GOODS.

(*k*) See titles BAILMENT, Vol. I., p. 524; PAWNS AND PLEDGES, p. 238, *ante*. As to the effect of delivery to a common carrier, see title CARRIERS, Vol. IV., p. 95.

possession, unless the master makes the servant a bailee (*l*); but, where delivery is made by a third party to a servant on behalf of his master, the possession acquired by the servant is that of bailee (*m*).

Constructive delivery.

827. Possession of ponderous goods and chattels in large quantities, which cannot readily be transferred from hand to hand, may be transferred by any transaction which effectually passes the control to the new possessor (*n*), for example, by handing over the key of a warehouse (*o*), or of a plate chest (*p*), in which the goods are stored, or other *indicia* of property (*q*), with the intention of transferring possession; so possession of goods at sea can be transferred by indorsement and delivery of the bill of lading (*r*).

Part delivery.

The delivery of a part may be a delivery of the whole if it is so intended, but not otherwise (*s*).

Change of character of possession.

Constructive delivery of possession is also effected by a change in the character of the possession without a corresponding change of custody, for example, where a seller ceases to retain possession as owner and becomes a bailee for (*t*), or borrower from (*a*), the buyer, or where chattels are transferred by way of gift *inter vivos* (*b*), or sale (*c*), to a bailee who already has them in his custody, or to a finder or wrongful taker (*d*) already in possession of them, or when goods are in the custody of a bailee, and the bailee, purchaser, and vendor agree that the goods shall be held on behalf of the purchaser (*e*).

(*l*) Pollock and Wright, Possession in the Common Law, p. 60; see note (*b*), p. 394, *ante*; and see title MASTER AND SERVANT, Vol. XX., p 67.

(*m*) Pollock and Wright, Possession in the Common Law, p. 60; see note (*b*), p. 394, *ante*; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 650.

(*n*) *Kilpin* v. *Ratley*, [1892] 1 Q. B. 582; and as to constructive delivery, see, further, titles GIFTS, Vol. XV., p. 413; SALE OF GOODS.

(*o*) *Ellis* v. *Hunt* (1789), 3 Term Rep. 464, 468; *Meyerstein* v. *Barber* (1866), L. R. 2 C. P. 38, 52; *Ancona* v. *Rogers* (1876), 1 Ex. D. 285, 290, C. A.; *Hilton* v. *Tucker* (1888), 39 Ch. D. 669, 676. In some cases the delivery of a key is said to be not merely a symbol of possession, but actually to confer manual control; see *Gough* v. *Everard* (1863), 2 H. & C. 1.

(*p*) *Bowker* v. *Williamson* (1889), 5 T. L. R. 382.

(*q*) *Chaplin* v. *Rogers* (1800), 1 East, 192, 195; *Elmore* v. *Stone* (1809), 1 Taunt. 458.

(*r*) *Sewell* v. *Burdick* (1884), 10 App. Cas. 74, *per* Lord BLACKBURN, at p. 96; and see title SALE OF GOODS. As to the effect of dock warrants and other mercantile documents in transferring possession, see titles SALE OF GOODS; SHIPPING AND NAVIGATION.

(*s*) *Dixon* v. *Yates* (1833), 5 B. & Ad. 313, 339; *Kemp* v. *Falk* (1882), 7 App. Cas. 573, *per* Lord BLACKBURN, at p. 586; and see title SALE OF GOODS.

(*t*) *Elmore* v. *Stone*, *supra*; *Castle* v. *Sworder* (1861), 6 H. & N. 828, Ex. Ch.; and see title SALE OF GOODS.

(*a*) *Marvin* v. *Wallis* (1856), 6 E. & B. 726.

(*b*) *Winter* v. *Winter* (1861), 9 W. R. 747; *Kilpin* v. *Ratley*, *supra*; and see title GIFTS, Vol. XV., p. 412.

(*c*) See *Edan* v. *Dudfield* (1841), 1 Q. B. 302, 307; *Lillywhite* v. *Devereux* (1846), 15 M. & W. 285, 291; and see title SALE OF GOODS.

(*d*) 2 Shep. Touch. (Preston's ed.), pp. 240, 241.

(*e*) See title SALE OF GOODS.

SECT. 2. Voluntry Alienation. Gifts.

In the case of a gift, delivery of possession is necessary to vest a chattel in the donee (*f*), unless the donor expressly or impliedly constitutes himself a trustee for the donee (*g*), or unless the gift is by deed (*h*).

SUB-SECT. 2.—*By Deed.*

Alienation by deed.

828. Chattels, whether capable or incapable of delivery, may be alienated by deed without delivery, and with or without valuable consideration (*i*); but an assignment by way of mortgage or absolute transfer of chattels by deed or writing, if unaccompanied by delivery of possession, must, in certain cases, be registered and attested in accordance with statutory requirements (*k*).

SUB-SECT. 3.—*By Contract of Sale.*

Contract of sale.

829. The most usual way of transferring goods is by means of sale, namely, a transfer in return for a money consideration called the price (*l*). By a contract of sale of goods the seller transfers or agrees to transfer to the buyer the property in the goods for the price (*m*). The contract may be absolute or conditional. Where the property is transferred to the buyer, the contract is called a sale, but, where the transfer is to take place in the future, or subject to a condition precedent, the contract is called an agreement to sell (*n*).

The general rule is that transfer will be effected according to the intention of the parties as appearing from the agreement (*o*). No delivery is necessary to transfer the property in specific or ascertained goods if it is the intention of the parties that the property shall pass before delivery (*p*).

SUB-SECT. 4.—*By Exchange.*

Exchange.

830. The property in chattels may be transferred by a contract of exchange or barter, namely, where the consideration to be given

(*f*) 2 Bl. Com., p. 441; *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551; *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, C. A.; and see title GIFTS, Vol. XV., pp. 412, 413.

(*g*) *Jones* v. *Lock* (1865), 1 Ch. App. 25; see titles GIFTS, Vol. XV., pp. 409, 413.

(*h*) See the text, *infra*; and title GIFTS, Vol. XV., p. 410.

(*i*) 1 Shep. Touch. (Preston's ed.), p. 224; *Anon.* (1467), Y. B. 7 Edw. 4, fol. 20, pl. 21; Bract. fol. 100 b; *Cochrane* v. *Moore*, *supra*, at pp. 72, 73; and see title GIFTS, Vol. XV., p. 410. For forms of deeds of gift of chattels, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 129 *et seq.* As to transfer in equity of property in chattels, see titles GIFTS, Vol. XV., p. 413; TRUSTS AND TRUSTEES. As to alienation by way of contract of sale without delivery, see the text, *infra*.

(*k*) As to the cases referred to, and as to such requirements and the effect of non-compliance, see title BILLS OF SALE, Vol. III., pp. 30 *et seq.* As to instruments which are not within the expression "bill of sale," see title BILLS OF SALE, Vol. III., pp. 16 *et seq.* Assignments by way of mortgage must be in accordance with the statutory form; see *ibid.*, pp. 34 *et seq.*

(*l*) 2 Bl. Com., p. 446; see title SALE OF GOODS.

(*m*) For the numerous cases in which the transfer of property in goods has been considered, see title SALE OF GOODS.

(*n*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 1.

(*o*) *Badische Anilin und Soda Fabrik* v. *Hickson*, [1906] A. C. 419, 424; and see title SALE OF GOODS.

(*p*) *Cochrane* v. *Moore*, *supra*, at pp. 73, 75; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 16, 17.

for the goods is other goods in lieu of money (*q*). The same principles govern the law relating to sales and exchanges (*r*).

SECT. 3.—*Involuntary Alienation.*

Involuntary alienation.

831. The principal cases in which involuntary alienation of personal property occurs are distress, execution, and bankruptcy (*s*); a rarer case is that of forfeiture (*t*).

An owner may also be involuntarily deprived of his ownership of goods by sale thereof in market overt (*a*), or by destruction (*b*), or by the transfer of the goods to a foreign country where by the laws of that country another person gains a valid title to the goods (*c*), or by a complete change in the nature of the goods, for example, where they are converted into real property (*d*), or by dealings under the Factors Act, 1889 (*e*), or under the Sale of Goods Acts, 1893 (*f*), or by the operation of the doctrine of estoppel (*g*), or under the Statute of Limitations (*h*).

Distress.

832. As a rule, the remedy of a creditor is to sue the debtor for the amount owing. Without legal process he cannot obtain redress by seizing the debtor's goods, except where he is entitled to avail himself of the summary remedy of distress (*i*).

Chattels may be distrained for rent in arrear, for rates and taxes, for sums payable by virtue of orders of courts of summary jurisdiction (*k*), and for debts due to the Crown (*l*).

(*q*) *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, 74, C. A.; *South Australian Insurance Co.* v. *Randell* (1869), L. R. 3 P. C. 101; see, further, titles BAILMENT, Vol. I., pp. 540, 541; SALE OF GOODS; and, for the law of exchange of land, see title REAL PROPERTY AND CHATTELS REAL.

(*r*) 2 Bl. Com., p. 446.

(*s*) See the text, *infra*, and p. 408, *post*.

(*t*) As to forfeiture of the goods of an outlaw, see titles CONSTITUTIONAL LAW, Vol. VI., p. 354; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 431, 432.

(*a*) See *Hargreave* v. *Spink*, [1892] 1 Q. B. 25; and see title SALE OF GOODS. As to how far theft affects the owner's title, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 684 *et seq.*

(*b*) See p. 397, *ante*.

(*c*) *Cammell* v. *Sewell* (1860), 5 H. & N. 728, Ex. Ch.; *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414; *Alcock* v. *Smith*, [1892] 1 Ch. 238, C. A.

(*d*) Bac. Abr., tit. Trespass (E.) 2; 2 Bl. Com., pp. 404, 405; *e.g.*, "If I employ a builder to build me a house and he does so with bricks that are not his, I apprehend that they become mine and that their former owner cannot recover them or their value from me" (*Gough* v. *Wood & Co.* (1894), 10 T. L. R. 318, C. A., *per* LINDLEY, L.J. at p. 319); and see *ibid.*, at p. 320.

(*e*) 52 & 53 Vict. c. 45, s. 2; see titles BAILMENT, Vol. I., p. 564, note (*b*); PAWNS AND PLEDGES, p. 239, *ante*; SALE OF GOODS.

(*f*) 56 & 57 Vict. c. 71, s. 25; see title SALE OF GOODS.

(*g*) See title ESTOPPEL, Vol. XIII., pp. 379, 393.

(*h*) Limitation Act, 1623 (21 Jac. I, c. 16), s. 3; *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 206; see titles BAILMENT, Vol. I., p. 565; LIMITATION OF ACTIONS, Vol. XIX., pp. 39, 50.

(*i*) 3 Bl. Com., pp. 4 *et seq.* As to the nature of this remedy, see title DISTRESS, Vol. XI., p. 117.

(*k*) See *ibid.*, pp. 117, 210, 221.

(*l*) Crown Suits, etc. Act, 1865 (28 & 29 Vict. c. 104), s. 47; and see title DISTRESS, Vol. XI., p. 175.

SECT. 3. Involuntary Alienation.

Execution.

833. A debtor's goods are also subject to involuntary alienation when taken in execution of a judgment or order of the court (*m*). As a rule, execution against chattels is made under a writ of *fieri facias* (*n*).

The executor or administrator of a deceased debtor may be sued by a creditor, and execution levied against the debtor's goods (*o*), or administration of the debtor's estate may be granted by the court (*p*).

Bankruptcy.

834. Property, with certain exceptions (*q*), beneficially vested in a bankrupt at the date of his bankruptcy, or acquired by him prior to his discharge, including, *inter alia*, goods in his possession, order or disposition, as reputed owner, and goods mortgaged by him and remaining in his possession in his trade or business, vest in the official receiver, until a trustee is appointed by the creditors, and then in such trustee for their benefit (*r*). Proceedings may also be taken by a creditor for the administration in bankruptcy of the estate of a debtor who has died insolvent (*s*).

SECT. 4.—*Alienation at Death.*

Death.

835. The alienation of personal property may occur on the occasion of death (*t*), either by way of testamentary disposition (*u*), or, in the case of an intestacy, according to the rules regulating the distribution of the personalty of an intestate (*a*).

Every person of full age (*b*) has power to dispose by will of all the real and personal estate (*c*) to which he is entitled at his death and which, if not so disposed of, would devolve upon the heir-at-law

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(*m*) See, further, titles EXECUTION, Vol. XIV., pp. 37 *et seq.*, 125; JUDGMENTS AND ORDERS, Vol. XVIII., p. 221. As to execution in inferior courts, see titles COUNTY COURTS, Vol. VIII., pp. 550 *et seq.*; EXECUTION, Vol. XIV., pp. 128, 129; and, as to the effect of the death of the debtor after judgment, see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 41.

(*n*) See title EXECUTION, Vol. XIV., pp. 37 *et seq.* As to the date from which a writ of execution binds the property in the goods of the execution debtor, see *ibid.*, p. 42.

(*o*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 330 *et seq.*

(*p*) *Ibid.*, pp. 336 *et seq.*

(*q*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 143.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 20, 21, 44, 154; and, as to what is included in the word "property" under the Bankruptcy Acts, see, further, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 14, 140 *et seq.*; see also *Re Hart, Green* v. *Hart* (1912), 28 T. L. R. 482, C. A.

(*s*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 93 *et seq.*, 213, 214

(*t*) See, generally, titles DESCENT AND DISTRIBUTION, Vol. XI., pp. 6, 16 *et seq.*; WILLS.

(*u*) See titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 144, 218 *et seq*; WILLS.

(*a*) See title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.* As to the alienation of personal property owing to the cesser of the life interest of the deceased, see title SETTLEMENTS.

(*b*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 7. As to earlier law, see 2 Bl. Com., pp. 492, 497; Co. Litt. 89 b, note (6); and see title WILLS.

(*c*) As to the meaning of personal estate, see p. 387, *ante*, and title DESCENT AND DISTRIBUTION, Vol. XI., p. 4, note (*h*).

or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator (*d*). This power of disposition extends to all contingent, executory, or other future interests in any personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may have become vested, and notwithstanding that he may become entitled to the property or interests after the date of execution of his will (*e*).

Upon the death of an owner of personal property such property devolves immediately upon his personal representative. If he has appointed an executor, the property accordingly vests in such executor, to be applied after payment of debts according to the directions of the will (*f*). If he dies wholly intestate it vests in the administrator as soon as letters of administration are taken out (*g*).

SECT. 5.—*Future Acquired Property* (*h*).

Assignment of future acquired property.

836. Personal chattels which, at the date of the assignment, are either not in existence, or not the property of the grantor, are not assignable at law (*i*), unless the grantor has a potential property in them (*k*).

An assignment purporting to convey all chattels which are or shall thereafter be in the grantor's house operates to pass the legal ownership only of such articles as are in the house at the date of the assignment (*l*). Such an assignment is void as an assign-

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(*d*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 3; and see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 217 *et seq*; WILLS.

(*e*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 2, 3; see title WILLS.

(*f*) *Smith* v. *Milles* (1786), 1 Term Rep. 475, 480; *Woolley* v. *Clark* (1822), 5 B. & Ald. 744; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 136, 240 *et seq*.

(*g*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 146. As to when the appointment of an administrator is required, see *ibid*., p. 136. As to the person in whom the property vests prior to the grant of letters of administration, see *ibid*., p. 146; title DESCENT AND DISTRIBUTION, Vol. XI., p. 6. As to the rules regulating the distribution of personal estate, see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq*.

(*h*) As to covenants in marriage settlements for settlement of future acquired property by husband or wife, see titles HUSBAND AND WIFE, Vol. XVI., p. 366; SETTLEMENTS.

(*i*) *Robinson* v. *Macdonnell* (1816), 5 M. & S. 228; 14 Vin. Abr. 50, tit. Grants (H. 6); Shep. Touch. (ed. Preston), p. 241; Com. Dig., tit. Grant (D); Perkins, Profitable Booke, ss. 65, 90.

(*k*) Bacon's Maxims of the Law Regula, 14. "The law doth not allow of grants except there be a foundation of interest in the grantor." *E.g.*, a tenant of land may assign all his interest in the future crops of that land, or a parson may grant all the tithe wool that he shall have in such a year, but a man cannot grant all the wool that shall grow on the sheep he may buy hereafter (*Grantham* v. *Hawley* (1615), Hob. 132; *Petch* v. *Tutin* (1846), 15 M. & W. 110; and see title AGRICULTURE, Vol. I., p. 295). As to the assignment of debts to fall due *in futuro* and of debts due at the date of assignment but payable *in futuro*, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 64, 155, note (*e*); CHOSES IN ACTION, Vol. IV., p. 368.

(*l*) See *Tapfield* v. *Hillman* (1843), 6 Man. & G. 245 (where, however, on a question of construction of the instrument, it was held that future chattels were not included); and see titles BILLS OF SALE, Vol. III., p. 68; OF GOODS,

SECT. 5. **Future Acquired Property.**

ment (*m*) as regards future acquired goods, unless ratified by some act done by the grantor with that view after he has acquired the property, but the mere bringing of goods on to the premises of the grantor is not necessarily such an act (*n*).

Operates as contract.

An assignment of after-acquired property operates in equity as a contract to assign, and, when made for valuable consideration (*o*), is enforced specifically if the assignor acquires property answering the description in the contract (*p*). As soon as the assignor acquires the legal interest, the equitable interest passes to the assignee, equity treating as done that which ought to be done (*q*), and the assignor thereupon becomes trustee of the chattels for the assignee (*r*). If possession is actually taken of the property when it comes into existence, then a legal interest is acquired (*s*).

Bill of sale of future property.

A bill of sale of after-acquired chattels given by way of security is void except as against the grantor (*t*).

SECT. 6.—*Restraints on Alienation.*

Repugnant conditions.

837. Conditions repugnant to the estate previously given are void (*a*), and for this reason the courts have always leaned against a restraint on alienation (*b*).

Restrictions on alienation.

An absolute interest in personalty no less than in realty, once given, cannot be fettered by a gift over on alienation (*c*), for, except

(*m*) See p. 406, *ante*. If, however, it is made for valuable consideration, such an assignment operates as a contract to assign and, subject to the Bills of Sale Acts, binds the chattels when they come into the assignor's possession; see the text, *infra*.

(*n*) *Lunn* v. *Thornton* (1845), 1 C. B. 379.

(*o*) A voluntary assignment, even though under seal, of an expectancy does not create an enforceable contract (*Meek* v. *Kettlewell* (1843), 1 Ph. 342; *Re Ellenborough, Towry Law* v. *Burne*, [1903] 1 Ch. 697).

(*p*) *Joseph* v. *Lyons* (1884), 15 Q. B. D. 280, 286, C. A.; *Hallas* v. *Robinson* (1885), 15 Q. B. D. 288, C. A.; *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; *Holroyd* v. *Marshall* (1862), 10 H. L. Cas. 191; *Re Dallas*, [1904] 2 Ch. 385, C. A., *per* BUCKLEY, J., at p. 393; *Re Ellenborough, Towry Law* v. *Burne, supra*, at p. 699; *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769; affirmed, *sub nom. Clough* v. *Samuel*, [1905] A. C. 442; see, further, titles BILLS OF SALE, Vol. III., p. 72; CHOSES IN ACTION, Vol. IV., pp. 375, 376; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 497; EQUITY, Vol. XIII., pp. 74, 104.

(*q*) *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342, 351, C. A.; and see title EQUITY, Vol. XIII., pp. 74, 104.

(*r*) *Holroyd* v. *Marshall, supra*.

(*s*) *Hope* v. *Hayley* (1856), 5 E. & B. 830; *Morris* v. *Delobbel-Flipo*, [1892] 2 Ch. 352, 360.

(*t*) See title BILLS OF SALE, Vol. III., pp. 28 *et seq.*

(*a*) *Re Dugdale, Dugdale* v. *Dugdale* (1888), 38 Ch. D. 176; see title WILLS.

(*b*) *Stogdon* v. *Lee*, [1891] 1 Q. B. 661, C. A., *per* FRY, L.J., at p. 670. As to the validity of partial restraints on alienation, see *Re Rosher, Rosher* v. *Rosher* (1884), 26 Ch. D. 801; *Re Elliot, Kelly* v. *Elliot*, [1896] 2 Ch. 353; and see titles GIFTS, Vol. XV., pp. 422, 423; SETTLEMENTS; WILLS. As to protected life interests, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 275 *et seq.*; SETTLEMENTS. As to the recognition paid by the courts to restraints on alienation valid according to the law of Scotland, see *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, C. A.; title CONFLICT OF LAWS, Vol. VI., pp. 209 *et seq.*

(*c*) *Bradley* v. *Peixoto* (1797), 3 Ves. 324; *Re Jones' Will* (1870), 23 L. T. 211; *Metcalfe* v. *Metcalfe* (1889), 43 Ch. D. 633; *Re Bourke's Trusts* (1891), 27 L. R. Ir. 573; and see title GIFTS, Vol. XV., p. 422.

as regards married women (*d*), the right of alienation is incidental to the beneficial ownership of property (*e*). But a condition that the donee shall not alienate a reversionary interest (*f*), or shall not alienate to a particular person or class of persons (*g*), is valid.

Gifts over on alienation.

A gift over on alienation after a life interest with a power of disposition by will or deed is invalid (*h*). So, too, if an annuity is to be bought in the name of an annuitant, a direction that it is to cease on alienation is inconsistent with the absolute ownership previously conferred, and the annuitant is entitled to demand payment of the sum required to purchase such annuity (*i*).

Equitable interests.

The rule preventing the fettering of absolute interests applies equally to equitable and to legal interests (*k*) Trusts, therefore, cannot be created with a proviso preventing the *cestui que trust* from alienating his interest (*l*), or with a proviso that such interest shall not be made subject to the claims of creditors (*m*).

Married women.

838. The rule which renders restraints on alienation generally invalid is, however, relaxed in favour of married women (*n*), and it is now customary in settlements and wills to provide that a married woman's separate estate shall not be alienated by way of anticipation (*o*). The result is that the utmost a woman so restrained can do is to assign arrears of interest which have actually accrued due (*p*).

(*d*) See title HUSBAND AND WIFE, Vol. XVI., pp. 350, 359 *et seq.*; and see the text, *infra*.

(*e*) *Corbett* v. *Corbett* (1888), 14 P. D. 7, C. A.; *Re Hollis' Hospital (Trustees) and Hague's Contract*, [1899] 2 Ch. 540; see, further, titles GIFTS, Vol. XV., p. 422; REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

(*f*) *Churchill* v. *Marks* (1844), 1 Coll. 441; *Re Payne* (1858), 25 Beav. 556; *Re Porter, Coulson* v. *Capper*, [1892] 3 Ch. 481; and see title PERPETUITIES, pp. 293 *et seq.*, *ante*.

(*g*) Co. Litt. 223 a; *Re Macleay* (1875), L. R. 20 Eq. 186; *Re Rosher, Rosher* v. *Rosher* (1884), 26 Ch. D. 801.

(*h*) *Re Wolstenholme, Marshall* v. *Aizlewood* (1881), 43 L. T. 752; see, further, *Corbett* v. *Corbett, supra*; *Bird* v. *Johnson* (1854), 18 Jur. 976; *Rochford* v. *Hackman* (1852), 9 Hare, 475; and see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 147; WILLS.

(*i*) *Hunt-Foulston* v. *Furber* (1876), 3 Ch. D. 285; *Re Mabbett, Pitman* v. *Holborrow*, [1891] 1 Ch. 707; see title RENTCHARGES AND ANNUITIES.

(*k*) *Corbett* v. *Corbett, supra*; *Snowdon* v. *Dales* (1834), 6 Sim. 524; *Graves* v. *Dolphin* (1826), 1 Sim. 66; *Brandon* v. *Robinson* (1811), 18 Ves. 429; *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, 593, C. A.

(*l*) *Re Dugdale, Dugdale* v. *Dugdale* (1888), 38 Ch. D. 176; *Re Mabbett, Pitman* v. *Holborrow, supra*; *Re Ross, Ashton* v. *Ross*, [1900] 1 Ch. 162; and see title TRUSTS AND TRUSTEES.

(*m*) *Re Fitzgerald, Surman* v. *Fitzgerald, supra*; but see title CONFLICT OF LAWS, Vol. VI., pp. 209, 228. As to forfeiture on alienation, see, further, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 146 *et seq.*

(*n*) *Brandon* v. *Robinson* (1811), 18 Ves. 429, 434; *Corbett* v. *Corbett, supra*; see, further, titles GIFTS, Vol. XV., p. 424; HUSBAND AND WIFE, Vol. XVI., pp. 359 *et seq.*; SETTLEMENTS.

(*o*) See Encyclopædia of Forms and Precedents, Vol. XIII., pp. 416, 426 *et passim*, Vol. XV., pp. 405 *et passim*; *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559, C. A. A restraint on anticipation and a restraint on alienation have the same effect (*Re Bankes, Reynolds* v. *Ellis*, [1902] 2 Ch. 333, *per* BUCKLEY, L.J., at p. 340).

(*p*) *Re Brettle, Jollands* v. *Burdett* (1864), 2 De G. J. & Sm. 79, C. A.; *Hood Barrs* v. *Heriot*, [1896] A. C. 174.

SECT. 6. Restraints on Alienation.

The restraint can only be imposed in respect of separate estate (*q*), whether held for life or for an absolute interest (*r*), and applies only during coverture (*s*). It ceases on widowhood (*t*), but comes again into operation on remarriage (*u*), unless the restraint is limited to the period of the first marriage (*a*).

Extent of restraint.

A married woman cannot deprive herself of the protection afforded by a restraint upon anticipation (*b*); but the court, if satisfied that it is for the benefit of the married woman, may, with her consent, remove the restraint (*c*).

Limitations till alienation

839. Though provisions in restraint of alienation, or excluding the rights of creditors, are generally invalid, there is nothing to prevent property being settled for life estates determinable on alienation, bankruptcy, or insolvency, with a limitation over upon the happening of any of those events (*d*). But the owner of property cannot qualify his own interest in it by a condition determining that interest on his bankruptcy (*e*).

Alienation by particular parties.

840. The capacity of persons under disability, for example, infants and lunatics, to alienate property, and other particular instances of limited powers of alienation, are dealt with elsewhere (*f*).

(*q*) *Stoqdon* v. *Lee*, [1891] 1 Q. B. 661, C. A.; *Tullett* v. *Armstrong* (1838), 1 Beav. 1, 23; and as to the meaning of "separate estate," see, further, titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 158, note (*f*); HUSBAND AND WIFE, Vol. XVI., pp. 341 *et seq.*, 359 *et seq.*

(*r*) *Baggett* v. *Meux* (1844), 1 Coll. 138; *Moore* v. *Morris* (1857), 4 Drew. 33. As to the cases in which a restraint has been held to attach to an absolute interest, see title HUSBAND AND WIFE, Vol. XVI., p. 362; and see *Re Game, Game* v. *Tennent*, [1907] 1 Ch. 276.

(*s*) *Woodmeston* v. *Walker* (1831), 2 Russ. & M. 197; *Tullett* v. *Armstrong, supra.*

(*t*) *Barton* v. *Briscoe* (1822), Jac. 603. As to the effect of dissolution of marriage on the restraint, see title HUSBAND AND WIFE, Vol. XVI., p. 363. As to the power of a *feme sole* to free herself from the restraint, see *ibid.*, p. 375.

(*u*) *Tullett* v. *Armstrong, supra*; *Re Wheeler's Settlement Trusts, Briggs* v. *Ryan*, [1899] 2 Ch. 717.

(*a*) *Moore* v. *Morris* (1857), 4 Drew. 33; *Hamilton* v. *Hamilton*, [1892] 1 Ch. 396.

(*b*) See title HUSBAND AND WIFE, Vol. XVI., p. 366.

(*c*) See *ibid.*, p. 372; title SETTLEMENTS; and see note (*t*), *supra.*

(*d*) *Oldham* v. *Oldham* (1867), L. R. 3 Eq. 404; *Montefiore* v. *Behrens* (1865), 35 Beav. 95; *Hatton* v. *May* (1876), 3 Ch. D. 148; *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1, C. A.; see, further, titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 146, 275 *et seq.*; GIFTS, Vol. XV., p. 424;

(*e*) *Re Brewer's Settlement, Morton* v. *Blackmore*, [1896] 2 Ch. 503; *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505, 511—514; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 146.

(*f*) As to alienation by infants, see titles GIFTS, Vol. XV., p. 402; INFANTS AND CHILDREN, Vol. XVII., pp. 78 *et seq.*; as to alienation by lunatics, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 396 *et seq.*; and as to alienation by convicts, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429; and for other examples see titles AGENCY, Vol. I., pp. 204 *et seq.*; COMPANIES, Vol. V., pp. 334 *et seq.*; CORPORATIONS, Vol. VIII., pp. 365 *et seq.*; PARTNERSHIP, p. 102, *ante*; SETTLEMENTS.

Part V.—Creation of Successive Interests (g).

PART V. Creation of Successive Interests.

Personal property not subject of a remainder.

841. Personal property is the subject of absolute ownership, not of tenure (*h*). Strictly, therefore, in personal property, under which both chattels real and personal are included (*i*), there cannot be a remainder (*k*), though there may be a future property in personal goods (*l*).

Trusts of leaseholds.

842. Successive interests in chattels real may be made to take effect, by will or deed, not by way of particular estate and remainder, but by way of executory limitation (*m*), or through the medium of trusts (*n*). A reversionary interest in leasehold property subject to a life estate, though, perhaps, not strictly a vested interest, is not a mere possibility or chose in action (*o*).

A bequest of a term of years to several successively for life, with no bequest over, confers life interests only, and on the death of the survivor the remainder of the term falls into residue (*p*).

Successive interests in chattels.

843. Successive interests in personal chattels may be created by will without the interposition of trustees (*q*). In such case, however, the ulterior donee, during the life of the first holder, does not take a present or vested interest, and, if he predeceases the first holder, the executory limitation does not take effect (*r*).

(*g*) See, generally, titles SETTLEMENTS; WILLS.

(*h*) See note (*s*), p. 397, *ante*.

(*i*) See p. 388, *ante*.

(*k*) 2 Bl. Com., p. 398; 1 Fearne, Contingent Remainders, 10th ed., p. 401, note (e), and ss. 168, 168 a, 168 b; Jarman on Wills, 1st ed., p. 793; *Re Tritton, Ex parte Singleton* (1889), 61 L. T. 301; and see titles GIFTS, Vol. XV., p. 408; REAL PROPERTY AND CHATTELS REAL; RENT-CHARGES AND ANNUITIES; SETTLEMENTS; WILLS.

(*l*) 2 Bl. Com., p. 398.

(*m*) 1 Fearne, Contingent Remainders, 10th ed., s. 168 a; *Manning's Case* (1609), 8 Co. Rep. 94 b; *Lampet's Case* (1612), 10 Co. Rep. 46 b; *Wright* d. *Plowden* v. *Cartwright* (1757), 1 Burr. 282, 284, 285; *Stevenson* v. *Liverpool Corporation* (1874), L. R. 10 Q. B. 81; *Johns* v. *Pink*, [1900] 1 Ch. 296, *per* STIRLING, J., at p. 305; and, as to successive interests in chattels real, see, further, titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS; WILLS.

(*n*) See p. 414, *post*.

(*o*) *Re Bellamy, Elder* v. *Pearson* (1883), 25 Ch. D. 620, 624; see, further, titles REAL PROPERTY AND CHATTELS REAL; WILLS.

(*p*) *Eyres* v. *Faulkland* (1698), 1 Salk. 231; *Ker* v. *Dungannon* (*Lord*) (1841), 1 Dr. & War. 509, 528.

(*q*) 1 Fearne, Contingent Remainders, 10th ed., s. 168 b; *Hoare* v. *Parker* (1788), 2 Term Rep. 376 (plate); *Re Tritton, Ex parte Singleton* (1889), 61 L. T. 301 (pictures); followed *Re Thynne, Thynne* v. *Grey* [1911] 1 Ch. 282 (in this case there were trustees); and see titles EQUITY, Vol. XIII., p. 96 note (*g*); WILLS. The court will protect the interests of an ulterior legatee in specific chattels, the loss of which cannot be compensated in damages by compelling the legatee for life to give an inventory; see *Foley* v. *Burnell* (1783), 1 Bro. C. C. 274, 279; *Conduit* v. *Soane* (1844), 1 Coll. 285; *Temple* v. *Thring* (1887), 56 L. J. (CH.) 767; and see titles INJUNCTION, Vol. XVII., pp. 266 *et seq*; WILLS.

(*r*) *Re Tritton, Ex parte Singleton, supra*. *Secus* as to chattels real; see *Re Bellamy, Elder* v. *Pearson, supra*; title REAL PROPERTY AND CHATTELS REAL.

PART V. Creation of Successive Interests.

A specific bequest for life of the use and enjoyment of consumables is a gift of the absolute interest in the property, and a gift over after such life estate is void (*s*); but this rule does not apply to farming stock (*t*).

Consumable stores.

Effect of rule against perpetuities.

An executory bequest of chattels must not infringe the rule against perpetuities (*a*). The rules regulating contingent remainders in freehold land do not apply to similar dispositions of personal property (*b*), but future dispositions of personal property must observe the statutory restraints on accumulations of income (*c*).

Trusts of chattels.

844. A trust is the usual mode of creating successive interests in personalty (*d*), the trustees being the legal custodians of the property, and is the essential mode in assignments *inter vivos* of chattels other than chattels real (*e*).

Heirlooms.

845. Where leasehold estates or personal chattels in the nature of heirlooms are required to be settled to descend as far as possible with lands devised in strict settlement, or with a peerage or other title of honour, various expedients are adopted by conveyancers (*f*). The usual practice is to assign the chattels to trustees upon trusts corresponding as far as possible with the uses declared of the land (*g*). But as an estate tail in personalty is legally impossible, the chattels must vest absolutely in the first tenant in tail of the land (*h*). To prevent the chattels being separated from the land on the death of an infant tenant in tail it is customary to provide that the chattels are not to vest absolutely in any tenant in tail by purchase until he attains twenty-one, but at his death under that age are to devolve in the same manner as the settled freeholds (*i*).

Powers of appointment.

846. Future interests in personal property, as in land, may be created by means of powers of appointment (*k*).

Life interest followed by gift to personal representatives.

847. A rule of construction analogous to the rule in *Shelley's Case* (*l*) applies where a life interest in personalty is followed

(*s*) See *Andrew* v. *Andrew* (1845), 1 Coll. 686, 690; *Randall* v. (1817), 3 Mer. 190; *Breton* v. *Mockett* (1878), 9 Ch. D. 95; and see titles GIFTS, Vol. XV., p. 408; WILLS.

(*t*) *Myers* v. *Washbrook*, [1901] 1 Q. B. 360; and see title WILLS.

(*a*) *Re Hill*, *Hill* v. *Hill*, [1902] 1 Ch. 807, C. A.; and see title PERPETUITIES, p. 347, *ante*.

(*b*) See title SETTLEMENTS.

(*c*) See title PERPETUITIES, p. 370, *ante*.

(*d*) See Fearne, Contingent Remainders, 10th ed., p. 407; titles EQUITY, Vol. XIII., p. 96, note (*g*); GIFTS, Vol. XV., p. 408; see, *e.g.*, *Re Bellamy*, *Elder* v. *Pearson* (1883), 25 Ch. D. 620 (successive interests in a term of years), and cases there cited.

(*e*) See titles SETTLEMENTS; TRUSTS AND TRUSTEES; WILLS.

(*f*) See Encyclopædia of Forms and Precedents, Vol. XIII., pp. 306, 583.

(*g*) See titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

(*h*) *Leventhorpe* v. *Ashbie* (1635), 1 Roll. Abr. 831; Tudor, L. C. Real Prop., 4th ed., p 382.

(*i*) *Re Thynne*, *Thynne* v. *Grey*, [1911] 1 Ch. 282; Encyclopædia of Forms and Precedents, Vol. XIII., pp. 324, 325; see, further, titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS; WILLS.

(*k*) See title POWERS.

(*l*) 1 Co. Rep. 93 b; and see title REAL PROPERTY AND CHATTELS REAL. The rule itself does not appear to apply to limitations of personal

by a gift to the personal representatives of the life tenant, the result being that the life tenant is considered to be absolutely entitled (*m*), even though the life interest is liable to forfeiture on bankruptcy (*n*), or a power of appointment by will is inserted between the life interest and the gift to the personal representatives (*o*).

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estate (*Herrick* v. *Franklin* (1868), L. R. 6 Eq. 593, *per* GIFFORD, V.-C., at p. 596; *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276, 281; *Sands* v. *Dixwell* (1738), and *Hodsel* v. *Bussy* (1740), cited 2 Ves. Sen. 652; *contra*, *Comfort* v. *Brown* (1878), 10 Ch. D. 146, *per* BACON, V.-C., at p. 151).

(*m*) Co. Litt. 54 b; *Holloway* v. *Clarkson* (1843), 2 Hare, 521; *Alger* v. *Parrott* (1866), L. R. 3 Eq. 328; *Avern* v. *Lloyd* (1868), L. R. 5 Eq. 383; *Wing* v. *Wing* (1876), 24 W. R. 878; and see titles SETTLEMENTS; WILLS.

(*n*) *Webb* v. *Sadler* (1873), 8 Ch. App. 419.

(*o*) *Deval* v. *Dickins* (1845), 9 Jur. 550; *Saberton* v. *Skeels* (1830), 1 Russ. & M. 587; *A.-G.* v. *Malkin* (1846), 2 Ph. 64; *Page* v. *Soper* (1853), 11 Hare, 321.

PERSONAL REPRESENTATIVES.

See EXECUTORS AND ADMINISTRATORS.

PERSONATION.

See CRIMINAL LAW AND PROCEDURE.

PETITION OF RIGHT.

See CROWN PRACTICE.

PHYSICIANS.

See MEDICINE AND PHARMACY.

PICTURES AND PHOTOGRAPHS.

See COPYRIGHT AND LITERARY PROPERTY.

PIER.

See WATERS AND WATERCOURSES.

PILOT AND PILOTAGE.

See SHIPPING AND NAVIGATION.

PIN-MONEY.

See HUSBAND AND WIFE.

PIRACY.

See CRIMINAL LAW AND PROCEDURE.

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PLATE.

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PLEADING.

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Part I.—In General.

SECT. 1. Nature and Purpose of Pleadings.

SECT. 1.—*Nature and Purpose of Pleadings.*

Meaning of "pleading" as used in law.

848. The word "pleading" is used in English law in two senses, namely, to denote (1) a document (*a*) in which a party to a proceeding in a court of first instance is required by law to formulate in writing his case or part of his case in preparation for the hearing; (2) the act of drafting or settling any such document or part of such document.

Function of pleadings.

The function of pleadings is to define the issues on which the

(*a*) In early times pleadings were oral and not written, and were conducted as follows:—Upon appearance, each side made in open court a verbal statements of the facts on which it relied, from which the court was informed of the nature of the controversy. Oral pleading prevailed in the English courts as late as the reign of Henry III. (Bract. fo. 374 b), and is supposed to have been retained until the reign of Edward III. It was the duty of the judges to moderate this oral controversy in such a way that the cause at length arrived at a point where specific matter was affirmed on one side and denied on the other. When this point was reached the parties were said to be "at issue" (*ad exitum, i.e.*, at the end of their pleading). If an issue thus arrived at was a question of law, it was decided by the judge; if it was a question of fact, it was tried according to one of the modes of trial then in vogue. During the oral contention by which the issues were ascertained, entries were made on a parchment roll by an officer of the court of the allegations made by each party in turn. On this roll was also entered a short notice of the nature of the action and of the acts of the court itself. This parchment roll, called the Record (see title COURTS, Vol. IX., p. 10, note (*o*)), was the official register of the pleadings. It was preserved as a perpetual, intrinsic, and exclusively admissible testimony of all the proceedings to which it referred. These oral pleadings were delivered either by the party himself, or by his pleader (called *narrator* or *advocatus*). In very early times it was established that none but a regular advocate (or barrister) could be a pleader in a case not his own. Gradually it became the practice for the pleader to enter his statement in the first instance on the parchment roll, to which his opponent was allowed to have access in preparing his answer. Then, to lessen inconvenience, a practice arose about the reign of Edward IV. by which the pleader delivered his pleading already written, and its entry on the roll was deferred till a later period in the action. But the abandonment of oral pleading did not change the form of the allegation to be made. The same principles continued to govern the practice of pleaders, and the parties were made to come to an issue in their written pleadings as in former times they had been made to do when they disputed orally at the bar of the court.

At common law there was no distinction between pleading in civil and pleading in criminal cases so far as the rules of pleading were concerned; see remarks of BLACKBURN, J., in *Heymann* v. *R.* (1873), L. R. 8 Q. B. 102, at p. 105; *Castro* v. *R.* (1881), 6 App. Cas. 229, 243; and of Lord RUSSELL OF KILLOWEN, C.J., in *R.* v. *Munslow*, [1895] 1 Q. B. 758, C. C. R., at p. 763. In criminal procedure, the case for the prosecutor is stated in writing in the indictment, but the pleading of the defendant is still stated orally, except in the case of a plea of justification of a libel and special pleas, which must be in writing. Where the indictment is defective the defendant may enter a demurrer, which must be in writing. This is seldom done in modern practice, the more usual course being to take orally any such objection, as would be good ground for a demurrer, by moving before plea to quash the indictment; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 354, 355. As to the Revenue side and Crown side of the King's Bench Division, see p. 419, *post*.

court, in order to determine the matters in dispute between the parties, will have to adjudicate.

SECT. 1. Nature and Purpose of Pleadings.

849. The rules of procedure of a court determine what pleadings are required in that court and in what form they shall be framed (*b*). The rules of procedure in the High Court are peculiar to that court, and, excepting in regard to proceedings for divorce or other matrimonial causes (*c*), proceedings on the Revenue side or on the Crown side of the King's Bench Division, and criminal proceedings (*d*), are wholly contained in the Rules of the Supreme Court, of which the High Court is a branch.

Rules determining practice of pleading.

County courts have a procedure of their own, which is determined by the County Court Rules (*e*) in force for the time being. The only pleadings required in a county court are particulars of claim from a plaintiff (*f*), and from a defendant notice of set-off or counterclaim (*g*) or of special or statutory defence (*h*). The rules as to the form of such particulars, set-off, and counterclaim are the same as those of the High Court (*i*).

County courts.

Every inferior court (*j*), including the Mayor's Court, London (*k*), has its own rules of procedure and therefore its own system of pleading.

Other inferior courts.

The rules hereinafter set out are the rules relating to pleading in the High Court, other than in matters assigned to the Probate, Divorce, and Admiralty Division (*l*).

The term "pleading" includes any petition or summons (*m*), any statement of claim (*n*), defence, counterclaim, or reply (*o*).

Definition of the term.

(*b*) As to pleadings in ecclesiastical courts, see title ECCLESIASTICAL LAW Vol. XI., p. 517.

(*c*) For procedure and practice in divorce and matrimonial causes, see title HUSBAND AND WIFE, Vol. XVI., pp. 468 *et seq.*

(*d*) R. S. C., Ord. 63, r. 1. As to pleadings on the Revenue side and the Crown side, see title CROWN PRACTICE. Vol. X., pp. 11, 23, 32, 120, 139, 154, 205. As to proceedings in criminal matters, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 266.

(*e*) See title COUNTY COURTS, Vol. VIII., pp. 460 *et seq.*

(*f*) See *ibid.*, p. 466.

(*g*) See *ibid.*, p. 485; and title SET-OFF AND COUNTERCLAIM.

(*h*) See title COUNTY COURTS, Vol. VIII., p. 485.

(*i*) The County Court Rules do not prescribe any particular forms of pleading, but by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 164, it is provided that in such a case the general principles of practice in the High Court may be applied.

(*j*) See title COURTS, Vol. IX., p. 132.

(*k*) See title MAYOR'S COURT, LONDON, Vol. XX., pp. 290 *et seq.*

(*l*) See titles ADMIRALTY, Vol. I., pp. 93, 106; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 175; HUSBAND AND WIFE, Vol. XVI., pp. 462 *et seq.*

(*m*) It does not include a writ of summons by which an action is commenced (*Murray* v. *Stephenson* (1887), 19 Q. B. D. 60; *Wallis* v. *Jackson* (1883), 23 Ch. D. 204). A special indorsement on a writ of summons under R. S. C., Ord. 3, r. 6, is deemed to be a pleading so far as the rules relating to statement of claim are concerned (*Anlaby* v. *Praetorius* (1888), 20 Q. B. D. 764, C. A.; *Robertson* v. *Howard* (1878), 3 C. P. D. 280); but for purposes of service such a writ is a writ within the meaning of R. S. C., Ord. 64, r. 11 (*Murray* v. *Stephenson*, *supra*).

(*n*) Including a special indorsement on a writ of summons; see note (*m*), *supra*.

(*o*) The definition of a pleading given in the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100, is:—"'Pleading' shall include any petition or

SECT. 2. Form of Pleadings.

SECT. 2.—*Form of Pleadings.*

SUB-SECT. 1.—*Arrangement of Contents.*

Marking.

850. Every pleading must be marked (*p*) on the face, with the date of the day on which it is delivered, with a reference to the letter and number of the action (*q*), the name of the Division of the High Court to which it is assigned (*r*), the name of the judge, if any, to whom it is assigned (*s*), the title of the action (*t*), and the description of the pleading (*a*).

Marking of amendments.

Whenever any indorsement or pleading is amended, the same, when amended, must be marked with the date of the order, if any, under which the same is so amended, and of the day on which

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summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counterclaim of a defendant." It is provided by R. S. C., Ord. 71, r. 1, that this definition shall apply to the Rules of the Supreme Court. Particulars of a statement in a pleading delivered pursuant to order are part of a pleading for the purposes of the rule as to "striking out" (*Davey* v. *Bentinck*, [1893] 1 Q. B. 185, C. A.); and also in other respects; see note (*l*), p. 428, *post*.

Under the system of pleading in vogue before the passing of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the defendant might in answer to the plaintiff's reply deliver a rejoinder, and the plaintiff in answer to this might deliver a surrejoinder; and the pleadings might be continued by means of a rebutter delivered by the defendant, in answer to which the plaintiff might deliver a surrebutter. Under the rules of procedure now in force the pleadings seldom go beyond reply, but where the reply contains the defence to a counterclaim delivered by the defendant, the latter is, when further pleading is necessary, permitted to deliver a rejoinder. A person not a plaintiff served with a counterclaim under R. S. C., Ord. 21, r. 12, delivers a "defence to counterclaim."

(*p*) *Ibid.*, Ord. 19, r. 11.

(*q*) That is to say, with the date of the year and letter and number entered in the cause book at the Central Office of the High Court, and marked on the writ by which the action is commenced, by the officer who files the copy of the writ left with him by the plaintiff or his solicitor when he applies for the writ to be sealed; see *ibid.*, Ord. 5, r. 13; and title PRACTICE AND PROCEDURE. The letter is always the initial of the surname of the plaintiff, or of the first plaintiff mentioned on the writ.

(*r*) That is to say, the division marked on the writ by the plaintiff or his solicitor when it is issued; see R. S. C., Ord. 5, r. 5; and title PRACTICE AND PROCEDURE.

(*s*) When an action is commenced by a writ issued out of the Chancery Division, the action is at once assigned to a particular judge whose name is marked on the writ; see R. S. C., Ord. 5, r. 9. The same judge's name must be marked on the pleadings in the action. In an action in any other division of the High Court no judge's name is marked on the writ or pleadings.

(*t*) The title of the action means the names of the parties. Thus the heading to a pleading is in the same form as the heading of the writ of summons by which the action is commenced, except that on a statement of claim there should appear immediately before the names of the parties a statement of the day on which the writ was issued.

(*a*) That is to say "statement of claim," "defence," "reply" etc., as the case may be. In cases before the judge dealing with the Commercial List the terms "points of claim" and "points of defence" are used for "statement of claim" and "defence" respectively. Forms of statement of claim and defence are given in R. S. C., Appendices C and D respectively. A statement of claim in an action in the King's Bench Division commenced on the 1st January, 1911, by a plaintiff named William Jones against a defendant named Thomas Robinson, and marked in the cause

such amendment is made, in manner following, namely, "Amended the day of pursuant to order of dated the of " (*b*).

If an action is commenced by a writ issued out of a district registry (*c*), the name of the district registry must be marked on the writ (*d*) and if the action continues in the district registry on the subsequent pleadings. Marking name of district registry.

851. Every pleading must be indorsed with the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor (*e*). Indorsement of name and address of solicitor.

852. Every pleading must be divided into paragraphs numbered consecutively. Dates, sums, and numbers must be expressed in figures and not in words (*f*). Paragraphs.

853. It is not necessary that pleadings be signed by counsel (*g*), but, where a pleading has been settled by counsel, it must be signed by him (*h*). If a pleading has not been settled by counsel, it must be signed by the solicitor of the party by whom it is delivered (*i*), or by the party himself if he appears in person (*k*). Signature.

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book with the number 30, would have the following heading in accordance with the law as to marking :—

1911. J. No. 30.

In the High Court of Justice.
King's Bench Division,
Writ issued 1st January, 1911.
Between William Jones . . . . . Plaintiff.
and
Thomas Robinson . . . . . Defendant.

STATEMENT OF CLAIM.

(*b*) R. S. C., Ord. 28, r. 9. The amended pleading should have the word "amended" inserted before the name of the pleading, *e.g.*, "amended statement of claim." The signature (see the text, *infra*) should be repeated with the word "amended" in brackets placed in front of the repetition. The usual practice is to make the amendment in red ink; see Yearly Practice of Supreme Court, 1912, p. 348; and see, further, p. 438, *post*; title PRACTICE AND PROCEDURE. As to amendment generally, see p. 437, *post*.

(*c*) See title PRACTICE AND PROCEDURE.

(*d*) R. S. C., Ord. 5, r. 13.

(*e*) *Ibid.*, Ord. 19, r. 11.

(*f*) *Ibid.*, r. 4. Where a defendant sets up a set-off or counterclaim, the set-off or counterclaim is set out in the same document as the defence, and the paragraphs of the set-off or counterclaim should be numbered in continuation of the numbers of the paragraphs of the defence.

(*g*) A petition under the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), must be signed by counsel (*Re Boulton's Trusts* (1882), 30 W. R. 596).

(*h*) R. S. C., Ord. 19, r. 4. If a pleading is signed by counsel, the court will pay to it the greatest possible respect on the ground that such signature implies that the pleading is not a mere fiction (*Great Australian Gold Mining Co.* v. *Martin* (1877), 5 Ch. D. 1, 10, C. A.). If counsel signs the draft pleading, that is a sufficient compliance with the rule, and his name may be printed or otherwise reproduced in the pleading actually delivered.

(*i*) The signature of a solicitor to a plaint delivered under the County Court Rules must, if the solicitor wishes to recover his costs in respect thereof, be signed and not lithographed (*R.* v. *Cowper* (1890), 24 Q. B. D. 533, C. A.). In such a case, however, signature by the solicitor's clerk is sufficient (*France* v. *Dutton*, [1891] 2 Q. B. 208).

(*k*) R. S. C., Ord. 19, r. 4; and see title BARRISTERS, Vol. II., pp. 378, 379.

SECT. 2. Form of Pleadings.

Written or printed pleadings.

854. Every pleading (*l*) which contains less than ten folios (*m*) may be either written or printed, or partly printed and partly written (*n*), and every other pleading, not being a petition or summons (*o*), must be printed.

SUB-SECT. 2.—*Mode of Setting out a Party's Own Case.*

Statement in summary form of material facts.

855. Every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved (*p*).

No technical objection may be raised to any pleading on the ground of any alleged want of form (*q*).

Requisites of a good pleading.

856. The requisites of a good pleading are that it should contain a statement of:—

(1) Facts not law (*r*).

(*l*) A letter sent by the defendant to the plaintiff's solicitor stating what the defendant believes to be his defence, but not in the form required by R. S. C., Ord. 19, r. 11, is not a pleading (*Marshall* v. *Jones* (1888), 52 J. P. 423).

(*m*) A folio is seventy-two words. If numbers occur, each numeral is counted as a word (R. S. C., Ord. 19, r. 9). It was held by JELF, J., in chambers that ten folios mean 720 words exclusive of the indorsement (*Bagot* v. *Gardner* (1902), 13th February, unreported).

(*n*) "Written" includes typewritten.

(*o*) An originating summons, therefore, is not a pleading within the meaning of this rule. As to originating summonses, see title PRACTICE AND PROCEDURE.

(*p*) R. S. C., Ord. 19, r. 4. The rules as to what a pleading should or should not contain are not absolute, but lay down the guiding principles according to which pleadings should be framed. If they are not observed the court or a judge may order the pleading to be amended or struck out; see p. 434, *post*. As to the meaning of the expression "the court or a judge," see title PRACTICE AND PROCEDURE. The limits to be observed by the pleader depend in some degree on the view taken by the particular tribunal which has to decide whether the pleading is good or bad. The broad general principles have been sufficiently ascertained by judicial decision, but as regards minor points the rules are variously interpreted according to the individual view of the judicial authority before whom a particular point comes for decision; in cases in the Commercial List the rules of pleading are less strictly interpreted as regards minor points than in the other courts of the King's Bench Division. Forms of pleadings are given in R. S. C., Appendices C, D, and E, but these are mere outlines of the pleadings that become necessary in practice when the facts in dispute assume any complexity; see title ADMIRALTY, Vol. I., pp. 94, 95; and see p. 424, *post*.

(*q*) R. S. C., Ord. 19, r. 26. The pleader must state sufficient facts to support one of the old forms of action (see tittle ACTION, Vol. I., p. 32), or some cause of action created since the Judicature Act, 1873 (36 & 37 Vict. c. 66), or facts that would have been ground for relief in equity before the Act, but he need not name or identify his cause of action.

(*r*) As a general rule inferences of law should not be pleaded, but only the facts from which such inferences are sought to be drawn (*Hanmer (Lord)* v. *Flight* (1876), 24 W. R. 346, *per* BRETT, J., at p. 347; see p. 424, *post*); but it may be useful on occasion to state the legal conclusion sought to be drawn from the facts, or the nature of the legal provision on which the party pleading intends to rely, either by way of emphasis, or to prevent any doubt in the mind of the other party as to the nature of the case which is alleged against him. It is, and indeed always was, bad pleading to state an inference or conclusion of law without setting out the facts by which the conclusion or inference is to be supported, and such a pleading will be

(2) Material facts only (*s*).
(3) Facts not evidence (*t*).
(4) Facts stated in a summary form (*u*).

struck out as bad (*Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371). A party need not plead to any matter of law set out in his opponent's pleading, but may treat the same as surplusage.

(*s*) All facts which must be proved in order to establish the ground of claim or defence are material (*Philipps* v. *Philipps* (1878), 4 Q. B. D. 127, 133, 134, C. A.). So also are facts which, if not alleged, could reasonably be said to take the other party by surprise when proved at the trial, even if not necessary to the mere statement of the ground of claim or defence; see p. 446, *post*. As to pleading matters in aggravation or mitigation of damage, see p. 425, *post*. A fact which was not material in the initial stages of a case may become material at a later stage. For example, a plaintiff need not plead facts merely in anticipation that a certain contention will be raised in the defence which he will seek to rebut. Until the contention has actually been raised such facts are not material; if the contention is raised in the defence, they then become material and should be pleaded in the reply. If the plaintiff's own statement of claim shows on the face of it that there is an absolute defence available to the defendant, the statement of claim may be struck out (*Hubbuck & Sons, Ltd.* v. *Wilkinson, Heywood and Clark*, [1899] 1 Q. B. 86, C. A.; *Law* v. *Llewellyn*, [1906] 1 K. B. 487, C. A.; *Vacher & Sons* v. *London Society of Compositors and Others* (1912), 28 T. L. R. 366). If the plaintiff seeks to escape from the Statute of Limitations on the ground of fraudulent concealment, he should set out his claim with the greatest particularity in order to prevent it being struck out as embarrassing (*Riddell* v. *Strathmore* (*Earl*) (1887), 3 T. L. R. 329, C. A.). The Rules of the Supreme Court themselves lay down in some cases what facts are material to be alleged (see R. S. C., Ord. 19, rr. 14—25); and the decisions on *ibid.*, r. 6, as to what particulars must be given, when an allegation is placed on the record, further define what facts are material; see p. 453, *post*.

(*t*) Facts which are merely evidence of material facts, though necessary to be proved at the trial, should not be pleaded. The dividing line between these two classes of facts is often very difficult to draw; but a fact as to which there is a doubt whether it should be placed in the one class or the other should be pleaded. A pleading might be struck out if such a fact were material and had been omitted; but if a fact were pleaded as to which there was a doubt whether the fact was material or not, no such order would be made; see note (*t*), p. 434, *post*, and *Millington* v. *Loring* (1880), 6 Q. B. D. 190, C. A.

Where a fact is such that, unless that fact is proved, the party relying on it will fail in his claim or defence, it is a material fact and is called a *factum probandum*. But where a fact is such that, even though the party relying on it should fail to prove it, he may nevertheless succeed in his claim or defence on proof of some other fact, then it is not a material fact, but only evidence of a material fact. Facts of this kind are called *facta probantia* and should not be pleaded. Thus where a verbal agreement is relied upon, it should be alleged as a fact that such an agreement was entered into. The interviews which will be proved in support of such an allegation should not be described in the pleadings, though what took place at them must be proved at the trial. So, generally, when a state of facts is relied upon, it is enough to allege it without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegation (*Williams* v. *Wilcox* (1838), 8 Ad. & El. 314, 331). Where a conversation is material it is sufficient to state its substance (*Eade* v. *Jacobs* (1877), 3 Ex. D. 335, C. A.). The fact that an admission has been made by a party, if it is no more than evidence, should not be pleaded (*Davy* v. *Garrett* (1878), 7 Ch. D. 473, C. A.; *Lumb* v. *Beaumont* (1884), 49 L. T. 772), though it may be a most important fact to be proved at the trial (*Steuart* v. *Gladstone* (1879), 10 Ch. D. 626, 644, C. A.).

(*u*) This means that the facts should be stated concisely and briefly.

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Brevity.

857. Pleadings must be as brief as the nature of the case will admit, and the taxing officer in adjusting the costs of the action must at the instance of any party, or may without any request, inquire into any unnecessary prolixity and order the costs occasioned thereby to be borne by the party chargeable with the same (*a*).

Applicability of prescribed forms.

858. The forms of pleadings given in the Rules of the Supreme Court (*b*) are to be used when applicable, and where they are not applicable, forms of the like character, as near as may be, are to be used for all pleadings, and, where such forms are applicable and sufficient, any longer forms are deemed to be prolix, and the costs occasioned by such prolixity shall be disallowed to or borne by the party so using the same as the case may be (*c*).

Statement of legal relationship or inference of law.

859. Where any legal relation is alleged to exist, or any conclusion or inference of law is alleged to arise, the facts which show the existence of such legal relation, or from which it is sought to draw such conclusion or inference, must be set out in the pleadings (*d*).

In good pleading it is also advisable that the facts should be stated in chronological order. Undue prolixity involves penalties as to costs under R. S. C., Ord. 19, rr. 2, 5; moreover, the court has an inherent jurisdiction to deal with documents which are so prolix as to be an abuse of the process of the court (*Hill* v. *Hart-Davis* (1884), 26 Ch. D. 470, C. A.). When a pleading is prolix it may be struck out, or, if it be a statement of claim, the action may be stayed; see R. S. C., Ord. 19, r. 27; Ord. 25, r. 4.

(*a*) *Ibid.*, Ord. 19, r. 2. This rule has to be read subject to *ibid.*, Ord. 30, which provides that the court or a judge may give such directions as it thinks proper as to the pleadings to be delivered. No pleading is prolix simply by reason of being lengthy or containing a statement of numerous facts. Prolixity is undue length and verbosity not reasonably necessary in view of the nature of the facts material to be stated. The penalties prescribed for prolixity are seldom enforced.

(*b*) See R. S. C., Appendices C, D, and E.

(*c*) *Ibid.*, Ord. 19, r. 5. In practice the forms in the Appendices to the Rules are found to be insufficient where the case involves any complex statement of facts, and pleadings are as a rule much longer than those given in these forms. In any case, the forms must not be slavishly adhered to, but the pleader must use his own discretion as to what is necessary to the due presentment of his client's case. In *The Isis* (1883), 8 P. D. 227, the plaintiff delivered a statement of claim exactly in accordance with R. S. C., Appendix C, s. III., Form No. 6, but HANNEN, P., ordered a further and better statement of claim to be delivered on the ground that the form was insufficient; and see title ADMIRALTY, Vol. I., p. 94. Similarly, in *Wethered* v. *Cox*, [1888] W. N. 165, KAY, J., held R. S. C., Appendix C, s. II., Form No. 5, insufficient.

(*d*) Thus, where breach of duty is alleged, the facts upon which the alleged duty is founded must be pleaded. Where negligence is alleged, the facts must be set out which show a duty to take reasonable care and in what respects such duty has been disregarded (*Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371, 374; *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K. B. 391, 399). In an action for the recovery of land of which the plaintiff has never been in possession, the statement of claim must set out the facts which show the plaintiff's title (*Philipps* v. *Philipps* (1878), 4 Q. B. D. 127, C. A.). Where a plaintiff, as assignee of the reversion to a lease, sues for breach of covenants contained in the lease, he must set out the facts showing how the reversion

Statement of particulars of misrepresentation, fraud etc.

860. In all cases in which the party pleading relies on any misrepresentation, fraud (*e*), breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the prescribed forms (*f*), particulars, with dates and items if necessary, must be stated in the pleading; provided that, if the particulars be of debt, expenses, or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading (*g*).

Presumptions.

861. Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side (*h*), unless the same has first been specifically denied (*i*). For example, where a plaintiff sues on a bill of exchange, and does not rely on the consideration for which the bill was given as a substantive ground of claim, he need not allege in his statement of claim that the bill was given for good consideration (*k*).

Pleading in aggravation or mitigation of damage.

862. A plaintiff need not plead facts on which he will rely only in aggravation of damage (*l*), but if he does plead such facts the

has become vested in him (*Davis* v. *James* (1884), 26 Ch. D. 778). It was never, and still is not, sufficient to allege that A. is the heir-at-law of B., but the facts which show how this relation arose must be pleaded (*Dumsday* v. *Hughes* (1803), 3 Bos. & P. 453; *Palmer* v. *Palmer*, [1892] 1 Q. B. 319; *Darbyshire* v. *Leigh*, [1896] 1 Q. B. 554, C. A.). So if it is alleged that A. is trustee for B., the facts or documents relied upon as constituting A. trustee must be pleaded (*Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613, C. A.). Similarly, in showing title to a chattel it is not sufficient to allege that a deceased person "two days before his death made a good and valid *donatio mortis causâ*," but the facts must be set out which show that such a *donatio* was made (*Re Parton* (1882), 30 W. R. 287). Similarly, it is not sufficient to allege that an agreement is illegal, or not binding, or discharged, but the facts must be pleaded on which the court may hold that this is so; see R. S. C., Ord. 19, r. 15). As to defences which must be specially pleaded, see pp. 446 *et seq.*, *post*.

(*e*) See title MISREPRESENTATION AND FRAUD, Vol. XX., p. 732.

(*f*) *I.e.*, the forms in R. S. C., Appendices C, D and E; see note (*c*), p. 424, *ante*.

(*g*) R. S. C., Ord. 19, r. 6; and see pp. 453 *et seq.*, *post*.

(*h*) Thus a plaintiff suing on a contract for the sale of land (*Catling* v. *King* (1877), 5 Ch. D. 660, C. A.), or on an agreement not to be performed within a year (*Fraser* v. *Pape* (1904), 20 T. L. R. 798), need not allege that the Statute of Frauds has been complied with. In an action against a husband and wife for an ante-nuptial debt of the wife the plaintiff need not allege that the husband has received assets of the wife (*Matthews* v. *Whittle* (1880), 13 Ch. D. 811).

(*i*) R. S. C., Ord. 19, r. 25. When a defence denies the existence of a fact it is not necessary to deliver a reply asserting the contrary; see *ibid.*, Ord. 27, r. 13.

(*k*) *Ibid.*, Ord. 19, r. 25; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20; and see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 461, 496.

(*l*) For example, in actions for defamation the plaintiff may prove that the defendant has published other libels or slanders (*Pearson* v. *Lemaitre* (1843), 5 Man. & G. 700, 719; *Anderson* v. *Calvert* (1908), 24 T. L. R. 399, C. A.), or has otherwise been guilty of conduct showing malice (*Praed* v.

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court will not strike them out as embarrassing or tending to prejudice the fair trial of the action, for such facts are material facts (*m*). A defendant need not plead facts on which he relies only in mitigation of damage, evidence of such facts being admissible in support of a traverse of the plaintiff's allegation of damage, which traverse is always implied even though there is no express traverse in the defence (*n*). A defendant may not plead only in mitigation of damage any fact that would tend to justify the acts complained of in the plaintiff's statement of claim, or otherwise support a defence to the action which has not been pleaded (*o*). A defendant in an action for defamation (*p*), who does not, by his defence, justify the words complained of, may not, without the leave of the judge at the trial, give evidence with a view to mitigation of damages as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, unless, seven days at least before trial, he furnishes to the plaintiff particulars of the matters as to which he intends to give evidence (*q*).

Performance of condition precedent

863. The performance or occurrence of every condition precedent is presumed in favour of the party against whom such condition would operate, unless the other party specially pleads that such condition has not been fulfilled (*a*).

Graham (1889), 24 Q. B. D. 53, C. A.). The *dicta* in *Scott* v. *Sampson* (1882), 8 Q. B. D. 491, which imply that facts in aggravation cannot be proved unless pleaded, cannot be supported, though the decision in that case remains good so far as it decides what evidence is admissible where it is sought to mitigate the damage; see *Mangena* v. *Wright*, [1909] 2 K. B. 958; and see titles DAMAGES, Vol. X., p. 325; LIBEL AND SLANDER, Vol XVIII., pp. 720, 724.

(*m*) That is, material in the secondary sense that they have an important bearing on the issue; see *Millington* v. *Loring* (1880), 6 Q. B. D. 190, 194, C. A.; *Whitney* v. *Moignard* (1890), 24 Q B D. 630.

(*n*) *Wood* v. *Durham* (*Earl*) (1888), 21 Q. B. D. 501; R. S. C., Ord. 21, r. 4; and see title DAMAGES, Vol. X., p. 346.

(*o*) *Watson* v. *Christie* (1800), 2 Bos. & P. 224; *Speck* v. *Phillips* (1839), 5 M. & W. 279; *Wood* v. *Cox* (1888), 4 T. L. R. 550; *Watt* v. *Watt*, [1905] A. C. 115, 118.

(*p*) As to aggravation and mitigation of damages in actions for defamation, see title LIBEL AND SLANDER, Vol. XVIII., pp. 720 *et seq.* If the defendant relies on an apology as mitigating damages he may either plead it in his defence or make it the subject of a notice under R. S. C., Ord. 36, r. 37.

(*q*) R. S. C., Ord. 36, r. 37. This provision must be read subject to the preceding provision, as a defendant in an action for defamation is not allowed to prove in mitigation facts tending to justify the defamatory words, nor may he cross-examine as to facts of that nature (*Watt* v. *Watt*, *supra*). R. S. C., Ord. 36, r. 37, does not make admissible any fact which is not otherwise admissible. The notice may form part of the defence or be delivered separately; and see, further, title LIBEL AND SLANDER, Vol. XVIII., pp. 728, 729.

(*a*) This is the effect of R. S. C., Ord. 19, r. 14, which is somewhat clumsily worded as follows:—"Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading." Where a plaintiff sues by specially indorsed writ for payment of money agreed to be paid on the happening of a certain event

864. Wherever the contents of any document are material it is sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document are material (*b*).

Contents of documents.

865. Whenever any contract or any relation between any parties is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it is sufficient to allege such a contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. If in such circumstances the person so pleading desires to rely in the alternative upon more contracts or relations than one as being implied from such circumstances, he may state them in the alternative (*c*).

Allegation as to condition of mind.

866. Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it is sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred (*d*), but a charge of fraud must be made specifically (*e*) and the respects in which the party is accused of being fraudulent must be set out (*f*).

Allegation of notice.

867. Wherever it is material to allege notice to any person of any fact, matter, or thing, it is sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material (*g*).

Pleading a statement of account.

868. In every case in which the cause of action is a stated or settled account, the same must be alleged with particulars; but in every case in which a statement of account is relied on by way of

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he need not allege that such event has happened (*Bradley* v. *Chamberlyn*, [1893] 1 Q. B. 439). An assignee of a debt suing in the same way to recover the debt need not allege that notice of the assignment was given (*Satchwell* v. *Clarke* (1892), 66 L. T. 641, C. A.); but in an action on a dishonoured bill of exchange the plaintiff must allege notice of dishonour (*Fruhauf* v. *Grosvenor & Co.* (1892), 61 L. J. (Q. B.) 717; *May* v. *Chidley*, [1894] 1 Q. B. 451; *Roberts* v. *Plant*, [1895] 1 Q. B. 597, C. A.).

(*b*) R. S. C., Ord. 19, r. 21. If a party asserts that a document has a particular effect he must set out so much of the document as is necessary to show that the document has the effect alleged (*Philipps* v. *Philipps* (1878), 4 Q. B. D. 127, C. A.; *Riddell* v. *Strathmore (Earl)* (1887), 3 T. L. R. 329, C. A.; *Davis* v. *James* (1884), 26 Ch. D. 778). In an action for libel or slander the precise words are material and must be set out (*Harris* v. *Warre* (1879), 4 C. P. D. 125, 128; see title LIBEL AND SLANDER, Vol. XVIII., p. 643).

(*c*) R. S. C., Ord. 19, r. 24. For an example of a contract to be inferred from a series of letters, see *Brogden* v. *Metropolitan Rail. Co.* (1877), 2 App. Cas. 666. As to the effect of an alternative allegation in such a case, see title ESTOPPEL, Vol. XIII., pp. 357, 358, note (*l*). In alleging a conversation only the substance need be set out (*Eade* v. *Jacobs* (1877), 3 Ex. D. 335, C. A.).

(*d*) R. S. C., Ord. 19, r. 22.

(*e*) *Davy* v. *Garrett* (1878), 7 Ch. D. 473, 489, C. A.; see pp. 423, 424, *ante*.

(*f*) *Re Rica Gold Washing Co.* (1879), 11 Ch. D. 36, C. A.; *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685; *Smith* v. *Chadwick* (1882), 20 Ch. D. 27, C. A.; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, C. A.; and see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 724.

(*g*) R. S. C., Ord. 19, r. 23.

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evidence or admission of any cause of action which is pleaded, the same is not to be alleged in the pleadings (*h*).

Distinct claims.

869. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct grounds, they must be stated, as far as may be, separately and distinctly; and the same rule applies where the defendant relies upon several distinct grounds of defence, set-off, or counterclaim founded upon separate and distinct facts (*i*). But where a person pleading relies upon the same facts as giving rise to one or the other of two or more causes of action or grounds of defence, he must state in the alternative the different causes of action or grounds of defence which he intends to assert arise from those facts (*k*).

Further and better particulars.

870. A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding, may in all cases be ordered upon such terms as to costs and otherwise as may be just (*l*).

(*h*) R. S. C., Ord. 20, r. 8. A mere admission is not a material fact, but only evidence of such a fact, and so need not be pleaded (*Davy* v. *Garrett* (1878), 7 Ch. D. 473, C. A.; *Lumb* v. *Beaumont* (1884), 49 L. T. 772). But where one person admits liability to another for a balance found to be due on the stating of accounts between them, a cause of action is created on which that other can sue for such balance; see *Williams* v. *Moor* (1843), 11 M. & W. 256, 265; *Lemere* v. *Elliott* (1861), 6 H. & N. 656; and see title CONTRACT, Vol. VII., p. 382.

(*i*) R. S. C., Ord. 20, r. 7. A pleading is not necessarily embarrassing because the different averments are inconsistent (*Re Morgan, Owen* v. *Morgan* (1887), 35 Ch. D. 492, C. A.).

(*k*) This is the effect of the latter part of R. S. C., Ord. 19, r. 24. The different causes of action or grounds of defence must be clearly expressed in such a manner as not to embarrass the other party or leave him in doubt as to which facts are relied on in support of each separate contention. For this reason it is advisable to allege each separate cause of action in a separate paragraph and each ground of defence in a separate paragraph. As to pleading in the alternative the three ways in which a claim for prescription may arise, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 257.

(*l*) R. S. C., Ord. 19, r. 7; and, as to particulars, see further, p. 453, *post*. The function of particulars is to give the other party notice of the exact nature of the case he will have to meet at the trial (*Spedding* v. *Fitzpatrick* (1889), 38 Ch. D. 410, C. A.). Hence the court frequently orders a party to give particulars beyond the mere facts that must be alleged in order to show a cause of action. In some cases particulars are required by a statute to be given before a ground of action or a defence under the statute can be shown; see, for example, Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 4; and see title NEGLIGENCE, Vol. XXI., p. 457. As to particulars in an action for infringement of a patent, see title PATENTS AND INVENTIONS, pp. 216 *et seq.*, *ante*. In all other cases the court has a discretion in saying what particulars shall be given beyond the facts necessary to show a cause of action or ground of defence, and will order particulars whenever it thinks that the party pleading should put the other party in possession of further information as to the nature of the case he will have to meet. If a party does not plead with sufficient particularity, he exposes himself to attack in the form of an application for further and better particulars. If an order for such particulars is made against him he

SUB-SECT. 3.—*Mode of Answering an Opponent's Case.*

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When allegations presumed to be admitted.

871. Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated in the pleading of the opposite party not to be admitted (*m*), is taken to be admitted (*n*), except as against an infant, lunatic, or person of unsound mind not so found by inquisition (*o*).

General denial insufficient.

872. It is not sufficient for a defendant in his defence to deny (*p*) generally (*q*) the grounds alleged by the statement of

may have to pay the costs of the application, and may be subjected to an order that unless such particulars are delivered within a given time the allegation be struck out, or that he be precluded from giving any evidence thereof at the trial, or, if he be a plaintiff, that the action be stayed. The numerous decisions on what particulars should be given are dealt with at p. 453, *post*.

A party is bound by his pleadings unless allowed by the judge to amend at the trial (see title ESTOPPEL, Vol. XIII., p. 357), and is therefore bound by his particulars, which are in effect part of the pleading under which they are delivered (*Arnold and Butler* v. *Bottomley*, [1908] 2 K. B. 151, 155, C. A.; *Milbank* v. *Milbank*, [1900] 1 Ch. 376, 385, C. A.; *Davey* v. *Bentinck*, [1893] 1 Q. B. 185, C. A.; *United Telephone Co.* v. *Smith, Same* v. *Mitchell* (1890), 61 L. T. 617; *Cass* v. *Fitzgerald*, [1884] W. N. 18).

(*m*) R. S. C., Ord. 19, r. 13. Whether a pleading states that an allegation is "denied," or states that it is "not admitted," the effect is the same (*Hall* v. *London and North Western Rail. Co.* (1877), 35 L. T. 848, *per* GROVE, J., at p. 849). The distinction usually observed is that a party "does not admit" matters as to which he intends to put the other party to the proof, and "denies" those things which he not only requires to be proved but contends never happened at all. In either case the allegation is said to be traversed. An allegation which is not expressly traversed is regarded as admitted and requires no proof (*Byrd* v. *Nunn* (1877), 5 Ch. D. 781; affirmed 7 Ch. D. 284, C. A.; *Green* v. *Sevin* (1879), 13 Ch. D. 589; *Symonds* v. *Jenkins* (1876), 34 L. T. 277). Where a defendant alleges specifically that an allegation is untrue in certain respects although at the same time he denies the allegation generally, he may incur a risk of being precluded from proving the untruth of the allegation except in the respects covered by the specific denial (*Collette* v. *Goode* (1878), 7 Ch. D. 842).

(*n*) General damages are never taken as admitted unless expressly admitted in the defence (R. S. C., Ord. 21, r. 4). If sufficient admissions are made in the defence the plaintiff may forthwith move for judgment under *ibid.*, Ord. 32, r. 6. A party may in some cases be allowed to withdraw an admission made by mistake (*Hollis* v. *Burton*, [1892] 3 Ch. 226, C. A.).

(*o*) Where an infant or person of unsound mind does not traverse an allegation the plaintiff cannot move for judgment under *ibid.*, on the ground that his claim has been admitted (*Byrne* v. *Byrne* (1880), 5 L. R. Ir. 134; *National and Provincial Bank* v. *Evans* (1881), 30 W. R. 177; see title INFANTS AND CHILDREN, Vol. XVII., p. 142). The plaintiff must prove his case by evidence on affidavit (*Re Fitzwater, Fitzwater* v. *Waterhouse* (1882), 52 L. J. (CH.) 83; *Gardner* v. *Tapling* (1885), 33 W. R. 473; *Cheek* v. *Cheek*, [1910] W. N. 87). In some cases the affidavit may be dispensed with where the interests of the party under disability are otherwise safeguarded (*Ripley* v. *Sawyer* (1886), 31 Ch. D. 494).

(*p*) This rule applies equally strictly whether by his traverse a party "denies" or "does not admit." In either case the traverse must be so worded that the other party knows exactly how much is admitted and how much is put in issue (*Thorp* v. *Holdsworth* (1876), 3 Ch. D. 637, 640; *Hall* v. *London and North Western Rail. Co.* (1877), 35 L. T. 848).

(*q*) The object in prohibiting general denials was to do away with the old pleas of "never indebted," "*non assumpsit*," "not guilty," and other

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claim, or for a plaintiff in his reply to deny generally (*r*) the grounds alleged in a defence by way of counterclaim, but each party must deal specifically (*a*) with each allegation of fact of which he does not admit the truth, except damages (*b*).

Rule as to damages.

No denial or defence is necessary as to damages claimed or their amount; but they are deemed to be put in issue in all cases unless expressly admitted (*c*).

Denial of allegation of fact.

873. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party he must not do so evasively, but must answer the point of substance (*d*). Thus, if it

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"general issues" used under the old forms of pleading, which left the plaintiff completely in the dark as to the nature of the case to be made against him at the trial; see pp. 445 *et seq.*, *post*.

(*r*) A plaintiff in pleading to a counterclaim is bound by the same rules as govern a defendant pleading to a statement of claim.

(*a*) It has been held that a traverse in the form "the defendant puts the plaintiffs to the proof of the several allegations in their statement of claim" is a contravention of this rule, and that the plaintiffs are entitled to judgment on the ground that the allegations in the statement of claim must be taken to have been admitted (*Harris* v. *Gamble* (1878), 7 Ch. D. 877). So where a defendant pleaded that he did "not admit the correctness of the statements set forth in paragraphs 1, 2, 3 and 6 of the plaintiff's statement of claim and required further proof thereof," the court held that the allegations in those paragraphs had not been traversed (*Rutter* v. *Tregent* (1879), 12 Ch. D. 758); and, where a defendant pleaded: "Save as herein appears the defendant denies all the allegations contained in the statement of claim," he was ordered to amend his pleading as being embarrassing (*British and Colonial Land Association* v. *Foster and Robins* (1891), 4 T. L. R. 574). It has, however, become a common practice to use a traverse in the form: "The defendant denies each and every allegation in paragraph 5 of the statement of claim as though the same were set out and traversed specifically"; and, though there is some doubt whether such a traverse is within the rules, it has been held that if a defendant pleads to an allegation of negligence in the form: "The defendant denies each and all the several allegations set out in paragraph 2 of the statement of claim," the pleading is good (*Adkins* v. *North Metropolitan Tramways Co.* (1893), 63 L. J. (Q. B.) 361).

(*b*) R. S. C., Ord. 19, r. 17.

(*c*) *Ibid.*, Ord. 21, r. 4. The rule is wide enough to cover all kinds of damage, but in practice special damage is usually traversed if it is not intended to be admitted. If it is intended to contest special damage on the ground that it is too remote in law, this objection should be specially pleaded; see *ibid.*, Appendix E, s. III., Form No. 2; and see p. 446, *post*.

(*d*) *Ibid.*, Ord. 19, r. 19. A denial must show clearly how much of the allegation pleaded to is denied and how much admitted. Where it is alleged that an agreement or terms of arrangement have been arrived at, the denial must deny that any agreement or any terms of arrangement were come to, if that is what is meant; if it is intended to admit that some of the terms of arrangement were come to, the pleader should deny that any terms were come to "except the following," and then set out the ones admitted. It is not sufficient to deny that the terms of the arrangement were definitely agreed as alleged (*Thorp* v. *Holdsworth* (1876), 3 Ch. D. 637). Where a plaintiff alleged an agreement entered into by a duly authorised agent of A., and the defendant denied that A. agreed by his lawfully authorised agent, and further averred that at the date of the alleged agreement A. was of unsound mind and incapable of giving a lawful authority, it was held that the defendant could not rely on any ground for saying that the alleged agent was not lawfully authorised except unsoundness of mind (*Byrd* v. *Nunn* (1877), 5 Ch. D. 781; affirmed (1878), 7 Ch. D. 284, C. A.). Where a denial is

be alleged that he received a certain sum of money, it is not sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. If an allegation is made with divers circumstances it is not sufficient to deny it along with those circumstances (*e*).

Joinder of issue operating as denial.

874. The plaintiff by his reply may join issue (*f*) upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue operates as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and then operates as a denial of the facts not so admitted (*g*).

Denial of contract, promise, or agreement.

875. Where a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party is construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law (*h*), and not as a denial of the legality or sufficiency

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a denial of a whole chain of circumstances, which might be sustained by proof that any one of the circumstances was not true, the denial is evasive and is treated as an admission of the circumstantial allegation to which it is pleaded. In such case the allegation of each circumstance should be traversed specifically (*Tildesley* v. *Harper* (1878), 7 Ch. D. 403; 10 Ch. D. 393, C. A.). Where in an action for defamation it is alleged that words were published "falsely and maliciously" it is embarrassing to deny that the words were published "falsely or maliciously." If it is intended to put in issue the falsity of the words, a plea of justification, with particulars of the facts relied on as showing justification, must be placed on the record. Malice in such an action is presumed and should not be traversed unless a defence of privilege or fair comment is pleaded, when it should be alleged as part of the defence that the words were published "*bonâ fide* and without malice" (*Bell* v. *Lewes* (1882), 51 L. J. (Q. B.) 359; *Penrhyn* v. *Licensed Victuallers' Mirror* (1890), 7 T. L. R. 1; see title LIBEL AND SLANDER, Vol. XVIII., p. 608). Where a libel or slander contains two specific charges and is divisible, that is to say the words making one charge are clearly separable from those making the other, a defendant may justify one charge and admit liability as to the other, but such a plea must clearly state how much is justified and as to how much liability is admitted (*Fleming* v. *Dollar* (1889), 23 Q. B. D. 388; *Clarke* v. *Taylor* (1836), 2 Bing. (N. C.) 654; *Churchill (Lord)* v. *Hunt* (1819), 2 B. & Ald. 685; *Davis* v. *Billing* (1891), 8 T. L. R. 58, C. A.). So where a defendant pleaded a set-off, and further paid a sum of money into court with a denial of liability, and alleged that such sum, together with the amount of the set-off, was sufficient to satisfy the plaintiff's claim, if any, in the action, the Court of Appeal struck out as embarrassing so much of the plea of payment into court as sought to take the benefit of the set-off, on the ground that the plea of set-off could only avail if the denial of liability should turn out to be unavailing (*Stohwasser* v. *Millar* (1910), March (unreported)).

(*e*) R. S. C., Ord. 19, r. 19.

(*f*) The form of joinder of issue in a reply given in *ibid.*, Appendix E, is: "The plaintiff as to the defence says that he joins issue." Unless by his reply or a subsequent pleading a party wishes to plead otherwise than by mere traverse, no pleading is necessary, and leave to deliver such a pleading will be refused, as non-delivery is deemed to amount to a traverse.

(*g*) *Ibid.*, Ord. 19, r. 18.

(*h*) *Ibid.*, r. 20. This must be read with R. S. C., Ord. 19, rr. 17, 19, as to which see note (*d*), p. 430, *ante*; and R. S. C., Ord. 21, as to which see

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in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds (*i*) or otherwise.

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pp. 445 *et seq.*, *post*. If it is desired further to contend that, assuming the facts alleged to be proved, the agreement which *primâ facie* arises does not bind the party pleading, such further contention must be expressly and clearly raised; see pp. 447, 448, *post*, and notes thereto. A plea of this kind is called a confession and avoidance. In effect it confesses or admits that the allegations of the other party are true, but seeks to avoid the legal inference that would otherwise be drawn from such admission by setting out fresh facts to show that in the circumstances such inference should not be drawn. A party should observe great caution in pleading a confession and avoidance, except as an alternative to a traverse of the allegations of the other party; for if the sole plea in reference to such allegations is a confession and avoidance, the party raising such plea is concluded by his confession, even though it should appear in evidence that the facts were not correctly alleged by the other party (*Hewitt* v. *Macquire* (1851), 7 Exch. 80; and see title ESTOPPEL, Vol. XIII., p. 358). The facts relied upon as constituting an avoidance must be specially pleaded, and the burden of proof is on the party relying on such plea. It is not sufficient merely to traverse allegations made by the other party in anticipation of such a plea being raised (*Clarke* v. *Callow* (1876), 46 L. J. (Q. B.) 53). Thus a plea that a document alleged to have been made by the party pleading is not his deed and does not bind him because its purport and effect was misrepresented to him before he made it, must be specially pleaded, and the facts in avoidance must be specially set out. As to the cases in which such a plea may be raised, see *Lewis* v. *Clay* (1897), 67 L. J. (Q. B.) 224; *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704; *Howatson* v. *Webb*, [1907] 1 Ch. 537; affirmed, [1908] 1 Ch. 1, C. A. Under the old system of pleading, the execution of a deed alleged was put in issue by a plea of *non est factum*; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 404. Under this plea the party pleading had the benefit of any variance in the deed as alleged and the deed produced in evidence (*Trott* v. *Smith* (1844), 12 M. & W. 688, Ex. Ch.; *North* v. *Wakefield* (1849), 13 Q. B. 536); and this was the proper plea by which to dispute the alleged effect of the deed (*Smith* v. *Scott* (1859), 6 C. B. (N. S.) 771). All other defences had to be specially pleaded, including matters which made the deed absolutely void, as well as those which made it voidable (Regulæ Generales as to Pleading, Hilary Term, 1853, No. 10). Where a party desires to avoid a contract on the ground that he was induced to enter into it by fraud, such fraud must be specially pleaded. If he seeks to be released from it on the ground that he was induced to enter into it by untrue representations not made fraudulently (see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 737 *et seq.*), he must counterclaim for rescission and obtain a decree of the court rescinding the contract, as it is only in case of fraudulent misrepresentation that the contract is voidable at the option of the party without the intervention of the court (*Kennedy* v. *Panama etc. Mail Co.* (1867), L. R. 2 Q. B. 580, 587; *Reese River Silver Mining Co.* v. *Smith* (1869), L. R. 4 H. L. 64, 73, 74; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, C. A.; *Adam* v. *Newbigging* (1888), 13 App. Cas. 308). The decree of rescission dates back to the commencement of the proceedings for rescission (*ibid.*). When a defendant succeeds on a claim for rescission, the agreement is destroyed and the plaintiff is thereby deprived of any cause of action arising out of the agreement, and the defendant thus succeeds in his defence to such cause of action (see *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145). If a party who seeks to enforce an agreement proves facts which show to the court that the agreement sought to be enforced is illegal, *e.g.*, as being contrary to the Gaming Acts, the court will not enforce such agreement even though the defence of illegality has not been raised on the pleadings (*Begbie* v. *Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491; and see *Illegality*, note (*d*), p. 448, *post*).

(*i*) The Statute of Frauds (29 Car. 2, c. 3) must be specially pleaded by

876. Any party is entitled to raise by his pleading any point of law (*k*), and any point so raised must be disposed of by the judge who tries the cause at or after the trial, but, by consent of the parties, or by order of a court or a judge on the application of either party, it may be set down for hearing and disposed of at any time before the trial. No demurrer is allowed (*l*). Point of law. Special hearing.

SECT. 3.—*Delivery of Pleadings.*

877. Every pleading must be delivered (*m*) between the parties (*n*). Delivery.

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a party who relies on the fact that its provisions have not been complied with (R. S. C., Ord. 19, s. 15); see note (*d*), pp. 447, 448, *post*. No particular section need be named, but where a defendant pleaded that he relied on the Statute of Frauds (29 Car. 2, c. 3), s. 4, he was not allowed to amend by substituting *ibid.*, s. 7 (*James* v. *Smith*, [1891] 1 Ch. 384). The statute must also be pleaded in such a way as to show clearly to the other party exactly the point raised and in what respect it will be contended that the statute applies (*Pullen* v. *Snelus* (1879), 40 L. T. 363). If a plaintiff alleges a written agreement he is not entitled to prove an oral one unless the judge allows an amendment of the statement of claim; and if such amendment is allowed, the defendant should be allowed to amend by pleading the statute, if it affords a ground of defence (*Brunning* v. *Odhams Brothers, Ltd.* (1896), 75 L. T. 602, H. L.).

(*k*) A point of law taken on the pleadings, in answer to the allegations in the other party's pleading, is called an objection in point of law. An objection in point of law assumes as true the facts alleged by the opposite party and declares that those facts are not sufficient to raise the legal inference or to afford the ground of relief for which the other party contends. It differs from a confession and avoidance in that it does not seek to place upon the facts alleged, or to prove additional facts in support of, some fresh inference other than that on which the party whose pleading is objected to relies, but merely declares that that party's own allegations are insufficient to support the contention which he puts forward. The usual form of pleading an objection in point of law is: "The defendant will object that the statement of claim is bad in law and discloses no cause of action on the ground that . . ."; or "The defendant will object that . . ."; the latter form being given in R. S. C., Appendix E, s. III. Subject to the preceding rules as to matters that must be specially pleaded (see pp. 446, 448, *post*), a party may raise at the trial any point of law, even though it has not been pleaded; but, if he wishes to prove facts in support of his legal contention, he will not be allowed to do so unless he has pleaded them. An objection in point of law should be taken clearly and in a separate paragraph of the pleading, and should not be mixed up with traverses of facts (*Stokes* v. *Grant* (1879), 4 C. P. D. 25).

(*l*) R. S. C., Ord. 25, rr. 1, 2. A demurrer was a form of pleading under the old system, by which a party objected that his opponent's pleading disclosed no cause of action, or ground of defence, as the case might be. When a demurrer was pleaded the question raised was forthwith set down for argument and decision. Although this procedure has been abolished, the court may, on the application of a party who has taken on his pleading an objection in point of law, set down the point so raised for special argument and determination. The case is then put into what is called the Special Paper, and is heard by a single judge in open court. All the allegations of fact in the pleading are assumed on the argument of the point of law to be true. Unless the objection taken is such that, if upheld, it will dispose of the whole action or some substantial issue therein, the court will not order it to be set down for special hearing (*London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.* (1885), 53 L. T. 109, 111).

(*m*) R. S. C., Ord. 19, r. 11. A pleading is said to be "delivered" when

(*n*) For note (*n*) see next page.

SECT. 3. Delivery of Pleadings.

Every pleading or other document (*o*) required to be delivered to a party, or between parties, must be delivered to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor; but, if no appearance (*p*) has been entered for any party, then such pleading or document must be delivered by being filed with the proper officer (*q*).

SECT. 4.—*Objections to Pleadings.*

Striking out unnecessary or scandalous matter.

878. The court or a judge may at any stage of the proceedings (*r*) order (*s*) to be struck out or amended any matter in any indorsement or pleading which may be unnecessary (*t*), or

it is handed by one party, or the solicitor acting for him, to an opposite party or his solicitor. Where a plaintiff, who was represented by a solicitor on the record, delivered a statement of claim himself, it was struck out (*Yeatman* v. *Snow* (1880), 28 W. R. 574). Delivery is distinguished from "service"; see title PRACTICE AND PROCEDURE. This distinction is not always very clearly or carefully observed in the Rules of the Supreme Court. Writs, notices of motion, summonses, citations and petitions all require to be "served," but pleadings, notices and documents not of the nature of process require to be "delivered." Process can be commenced only by a document requiring "service," and "delivery" can only take place of appropriate documents in the course of process which has been thus initiated. A counterclaim is "delivered" as between the original parties to an action, but if it is desired to make a stranger a co-defendant to a counterclaim (see title SET-OFF AND COUNTERCLAIM), the counterclaim must be served on him (see R. S. C., Ord. 21, rr. 11, 12; title PRACTICE AND PROCEDURE). The date of delivery of a pleading should be stated at the end.

(*n*) In early times pleadings were delivered to an officer of the court, by whom they were entered on the record; see p. 418, *ante*. Now they are delivered direct to the party. Where an indorsement on a writ is amended but not so as to make it a new writ, it need not be re-served personally on a defendant who has made default in entering an appearance unless an order to that effect be made, but may be filed at the Central Office (*Jamaica Rail. Co.* v. *Colonial Bank*, [1905] 1 Ch. 677, C. A.).

(*o*) *E.g.*, interrogatories; see R. S. C., Ord. 31, r. 1.

(*p*) See title PRACTICE AND PROCEDURE.

(*q*) R. S. C., Ord. 19, r. 10. Pleadings so filed must have the date of filing and the name of the defendant against whom they were filed written on them, and be entered in the cause books under the head of pleadings, and such entry must show the date of filing, the nature of the documents, and the name of the party against whom they are filed.

(*r*) R. S. C., Ord. 19, r. 27. A party desiring to have a pleading or part of a pleading struck out under this rule should apply by notice under the summons for directions, stating the ground of the application. The application should be made promptly (*Gent* v. *Harrison* (1893), 69 L. T. 307). Where such an application was not made till after the close of the pleadings, the court thought there had been undue delay and refused to entertain it (*Cross* v. *Howe (Earl)* (1892), 62 L. J. (CH.) 342). A co-defendant may apply to have part of another defendant's defence struck out as scandalous (*Bright* v. *Marner*, [1878] W. N. 211), and possibly a stranger could apply (*Cracknall* v. *Janson* (1879), 11 Ch. D. 1, 13, C. A.); and see note (*a*), p. 435, *post*.

(*s*) The power to make the order is discretionary (*Golding* v. *Wharton Saltworks Co.* (1876), 1 Q. B. D. 374, C. A.), but it is the duty of the judge to apply the rule in a fit case (*Knowles* v. *Roberts* (1888), 38 Ch. D. 263, C. A.), a party being entitled *ex debito justitiæ* to have the case against him presented in an intelligible manner (*Davy* v. *Garrett* (1878), 7 Ch. D. 473, C. A.), and if the objectionable parts cannot be severed from the rest the whole pleading may be struck out (*Williamson* v. *London and North Western Rail. Co.* (1879), 12 Ch. D. 787).

(*t*) As a general rule matter in a pleading will not be struck out as

scandalous (*a*), or which may tend to prejudice (*b*), embarrass (*c*), or delay the fair trial of the action; and may in any such case, if they or he think fit, order the costs of the application to be paid between solicitor and client (*d*).

Striking out pleading showing no cause of action.

879. The court or a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer (*e*), and in any such case, or in case of the action or defence

unnecessary unless it is also scandalous or embarrassing (*Rock* v. *Pursell* (1887), 84 L. T. Jo. 45; *Tomkinson* v. *South Eastern Rail. Co.* (No. 2) (1887), 57 L. T. 358; *Knowles* v. *Roberts* (1888), 38 Ch. D. 263, C. A.).

(*a*) *E.g.*, indecent or offensive matters, or allegations made for the purpose of abusing or prejudicing the opposite party (*Coyle* v. *Cuming* (1879), 40 L. T. 455; *Cashin* v. *Cradock* (1876), 3 Ch. D. 376, C. A.). But if the allegation is relevant it cannot be struck out because in other ways it is scandalous (*Cracknall* v. *Janson* (1879), 11 Ch. D. 1, C. A.; *Christie* v. *Christie* (1873), 8 Ch. App. 499; *Millington* v. *Loring* (1880), 6 Q. B. D. 190, C. A.; *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93; *Ex parte Simpson* (1809), 15 Ves. 476; *St. John* (*Lord*) v. *St. John* (*Lady*) (1805), 11 Ves. 525).

(*b*) If a pleading tends to prejudice a party at any stage it may be struck out (*Berdan* v. *Greenwood* (1878), 3 Ex. D. 251, 256).

(*c*) A statement of claim is embarrassing if it raises a claim which the plaintiff is not entitled to make (*Knowles* v. *Roberts*, *supra*), or shows that parties have been improperly joined (*Smith* v. *Richardson* (1878), 4 C. P. D. 112), or seeks to treat the action as supplemental to another action (*Nitrate Securities Trust, Ltd.* v. *Williams* (1912), 106 L. T. 730). So also is a defence which raises in defence matters that obviously afford no defence, or raises them in a manner not allowed under the rules (*Preston* v. *Lamont* (1876), 1 Ex. D. 361; *Smith & Co.* v. *British Marine Insurance Association*, [1883] W. N. 232; *Liardet* v. *Hammond Electric Light and Power Supply Co.*, [1883] W. N. 96). If the defendant wishes to admit liability as to part of the claim and dispute the rest, his pleading must show exactly what is admitted and what is not (*Fleming* v. *Dollar* (1889), 23 Q. B. D. 388; *Davis* v. *Billing* (1891), 8 T. L. R. 58, C. A.); and see note (*d*), p. 430, *ante*. A defendant in an action for defamation may not plead that the words are true in some other sense than that alleged by the plaintiff (*Bassam* v. *Budge*, [1893] 1 Q. B. 571).

(*d*) R. S. C., Ord. 19, r. 27.

(*e*) *Ibid.*, Ord. 25, r. 4. Under this part of the rule the court may strike out any pleading which in itself shows that the facts alleged are insufficient in point of law to sustain a reasonable cause of action or a defence to the plaintiff's claim, as the case may be. In judging of the sufficiency of a pleading under this rule the court will assume all the allegations therein to be true and that they are admitted by the opposite party. If the statement of claim shows on the face of it that the action is not maintainable, or that there is an absolute defence to the action, the court will deal with it under this rule; see pp. 423, 428, *et seq.*, *ante*. A pleading will, however, not be struck out if it is merely demurrable; it must be so bad that no legitimate amendment can cure the defect (*Peru Republic* v. *Peruvian Guano Co.* (1887), 36 Ch. D. 489, *per* CHITTY, J., at p. 496; *Dodswell* v. *Jacobs* (1887), 34 Ch. D. 278, C. A.; *Worthington & Co.* v. *Bellon* (1902), 18 T. L. R. 438, C. A.; *Robinson* v. *Fenner* (1912), 106 L. T. 722, C. A.). The mere fact that the case is weak and not likely to succeed is no ground for striking it out (*Boaler* v. *Holder* (1886), 54 L. T. 298; *Cowper* v. *Stoneham* (1893), 68 L. T. 18; *Anderson* v. *Gorrie* (1892), 36 Sol. Jo. 256; *Goodson* v. *Grierson*, [1908] 1 K. B. 761, C. A.); nor that the Statute of Frauds (29 Car. 2, c. 3), will, if pleaded, afford a defence (*Fraser* v. *Pape* (1904), 91 L. T. 340, C. A.). Where a statement of claim is defective by reason of an essential averment being omitted, the court does not dismiss the action but gives leave to amend (*Griffiths* v. *London and St. Katharine Docks Co.* (1884), 13 Q. B. D. 259, 261, n., C. A.; *New Chile Mining Co.* v. *Lee* (1888), 4 T. L. R. 444; *Reid* v. *Hooley* (1897),

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being shown by the pleadings (*f*) to be frivolous or vexatious (*g*), the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just (*h*).

Prevention of abuse of process.

880. The court or a judge may in virtue of the inherent jurisdiction of the court strike out any pleading or stay any action which is shown to be an abuse of the process of the court (*i*).

13 T. L. R. 398; *Edwards* v. *Pneumatic Tyre Co.* (1900), 16 T. L. R. 308, C. A.). But if the pleading cannot be cured by amendment the court will strike it out (*Hubbuck & Sons* v. *Wilkinson, Heywood and Clark*, [1899] 1 Q. B. 86, 94, C. A.; *Woods* v. *Lyttelton* (1909), 25 T. L. R. 665, C. A.).

(*f*) Under this rule no evidence can be given either by affidavit or otherwise in support of the application. In this respect, such an application is different from one made to the court to strike out or stay in virtue of its inherent jurisdiction; see the text, *infra*. In *Kershaw* v. *Sievier* (1905), 21 T. L. R. 40, an affidavit was allowed to be read apparently on the ground that the application could be regarded as made under the inherent jurisdiction of the court. See note (*i*), *infra*. Where the applicant desires to rely on the inherent jurisdiction, he need not say so in his summons even though he seeks to sustain it under the rules as well (*Vinson* v. *Prior Fibres Consolidated, Ltd.*, [1906] W. N. 209; *Willis* v. *Howe* (*Earl*), [1893] 2 Ch. 545, C. A.).

(*g*) The pleading, to come within these words, must be obviously vexatious or frivolous or unsustainable (*A.-G. of the Duchy of Lancaster* v. *London and North Western Rail. Co.*, [1892] 3 Ch. 274, C. A., *per* LINDLEY, L.J., at p. 277; *Kellaway* v. *Bury* (1892), 66 L. T. 599, 602, C. A.; *Bean* v. *Flower* (1895), 73 L. T. 371, C. A.). The pleading must be so clearly frivolous that to put it forward would be an abuse of the process of the court (*Young* v. *Holloway*, [1895] P. 87, 90).

(*h*) R. S. C., Ord. 25, r. 4. The rule was not intended to apply to pleadings which raise a question of general importance or serious question of law (*Dyson* v. *A.-G.*, [1911] 1 K. B. 410, C. A.), and the court will not proceed under it where the point to be decided is an important or difficult one, unless it is clear and obvious that the action will not lie (see *Hubbuck & Sons* v. *Wilkinson, Heywood and Clark*, *supra*, *per* LINDLEY, L.J., at p. 91; *Roberts* v. *Charing Cross, Euston, and Hampstead Rail. Co.* (1903), 87 L. T. 732, *per* FARWELL J.). In the latter case the summons was amended and the application treated as being under R. S. C., Ord. 25, r. 2, which is the appropriate procedure where important or difficult points have to be decided (see note (*l*), p. 433, *ante*). Nevertheless, some very important points have been decided on applications to strike out (see *Law* v. *Llewellyn*, [1906] 1 K. B. 487, C. A.; *Burr* v. *Smith*, [1909] 2 K. B. 306, C. A.; *Woods* v. *Lyttelton*, *supra*). An action may be regarded by the court as frivolous and vexatious, and therefore proper to be stayed under this rule, on the ground that the court is not a *forum conveniens*, and that the plaintiff, having a perfectly good remedy in some other court, cannot be allowed to continue his action without injustice to the defendant (*Logan* v. *Bank of Scotland* (No. 2), [1906] 1 K. B. 141, C. A.; *Egbert* v. *Short*, [1907] 2 Ch. 205; *Levy* v. *Levy and De Romance* (1908), 24 T. L. R. 466; *Re Norton's Settlement, Norton* v. *Norton*, [1908] 1 Ch. 471, C. A.); but when the plaintiff's proceedings in this country are taken *bonâ fide* they will not be stayed on the mere ground that there is a balance of convenience in favour of proceedings elsewhere (*Re Norton's Settlement, Norton* v. *Norton*, *supra*, at p. 481); and see title CONFLICT OF LAWS, Vol. VI., pp. 298 *et seq.*

(*i*) This jurisdiction exists apart from the powers conferred by the Rules of the Supreme Court It is not confined to cases where the abuse is manifest from the pleadings, but may be exercised where facts are proved by affidavit which show that the action is brought *malâ fide* and in an attempt to use the process of the court for wrong ends. This jurisdiction is only exercised in plain cases and with the greatest care. For cases where it has been exercised, see *Castro* v. *Murray* (1875), L. R. 10 Exch. 213;

SECT. 5.—*Amendment of Pleadings* (*k*).

SECT. 5. Amendment of Pleadings.

881. No pleading not being a petition or summons may, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same (*l*).

New ground of claim raised by amendment.

882. The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ (*m*) or not, once at any time before the time limited for reply and before replying; or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared; or, where defence is delivered, but no order for reply is made, within ten days from delivery of the defence, or the last of the defences where there are more than one (*n*).

Amendment without leave of statement of claim.

Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement on the writ (*o*); but, if the action is one for libel, and the plaintiff wishes to rely in his statement of claim on publications not particularised in the indorsement on the writ, he should apply for leave to amend the writ (*p*).

Dawkins v. *Saxe Weimar* (*Prince Edward*) (1876), 1 Q. B. D. 499; *Willis* v. *Beauchamp* (*Earl*) (1886), 11 P. D. 59, C. A.; *Stephenson* v. *Garnett*, [1898] 1 Q. B. 677, C. A.; *Macdougall* v. *Knight* (1890), 25 Q. B. D. 1, C. A.; *Reichel* v. *Magrath* (1889), 14 App. Cas. 665; *Re Chaffers* (1897), 13 T. L. R. 363, C. A.; *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210; *Haggard* v. *Pélicier Frères*, [1892] A. C. 61, P. C.; *Chaffers* v. *Goldsmid*, [1894] 1 Q. B. 186; *Huntly* (*Marchioness*) v. *Gaskell*, [1905] 2 Ch. 656, C. A.; *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613, C. A.; *Re Norton's Settlement*, *Norton* v. *Norton*, [1908] 1 Ch. 471; *Remmington* v. *Scoles*, [1897] 2 Ch 1, C. A.; *Critchell* v. *London and South Western Railway*, [1907] 1 K. B. 860, C. A.

(*k*) See also title PRACTICE AND PROCEDURE.

(*l*) R. S. C., Ord. 19, r. 16.

(*m*) A statement of claim specially indorsed on the writ may be amended under this rule even after the plaintiff has taken out a summons for judgment under *ibid.*, Ord. 14, and whilst such summons is pending (*Roberts* v. *Plant*, [1895] 1 Q. B. 597, C. A.).

(*n*) R. S. C., Ord. 28, r. 2.

(*o*) *Ibid.*, Ord. 20, r 4; *Lewis and Lewis* v. *Durnford* (1907), 24 T. L. R. 64. Where a plaintiff claimed on his writ damages for fraud against a company and its directors, and the company went into liquidation after the issue of the writ and before delivery of statement of claim, and the plaintiff claimed on his writ rescission of a contract entered into with the company and did not claim relief in that form in the statement of claim, the court, holding that the circumstances showed an intention in the plaintiff to claim rescission in the winding up of the company, refused to allow him to amend his statement of claim by including a claim for rescission of the contract (*Cargill* v. *Bower* (1878), 10 Ch. D. 502, 508). If an action in which a statement of claim has been delivered is remitted to the county court, the plaintiff may rely on any cause of action therein alleged even if it is not named on the writ (*Johnson* v. *Palmer* (1879) 4 C. P. D. 258).

(*p*) R. S. C., Ord 3, r. 9. When the defendant makes default in appearance and the statement of claim is filed under *ibid.*, Ord. 13, r. 12, or Ord. 19, r. 10 (see p. 434, *ante*), the plaintiff cannot get judgment in default except in accordance with the indorsement on the writ, and if he desires to amend his statement of claim he should get leave to amend the writ and amend both so that they are in harmony (*Law* v. *Philby* (No. 2) (1887), 56 L. T. 522; *Gee* v. *Bell* (1887), 35 Ch. D. 160; *Kingdon* v. *Kirk* (1887), 37 Ch. D. 141; *Jamaica Railway* v. *Colonial Bank*, [1905] 1 Ch.

SECT. 5. Amendment of Pleadings.

Amendment without leave of counter-claim or set-off.

A defendant who has set up any counterclaim or set-off may, without any leave, amend such counterclaim or set-off (*q*) at any time before the expiration of the time allowed him for answering the reply (*r*) and before such answer, or in case there is no reply, then at any time before the expiration of twenty-eight days from defence (*s*).

Disallowance of amendment and costs.

883. When any party has amended his pleading under the preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the court or a judge to disallow the amendment, or any part thereof, and the court or judge may, if satisfied that the justice of the case requires it, disallow the amendment, or allow it subject to such terms as to costs or otherwise as may be just (*t*). The costs of and occasioned by any amendment made as aforesaid are to be borne by the party making the same, unless the court or a judge otherwise orders (*a*).

Pleading to amendments.

884. Where any party has amended his pleading under the preceding rules (*b*), the opposite party must plead to the amended pleading, or amend his pleading within the time he then has to plead or within eight days from the delivery of the amendment, whichever shall last expire; and, in case the opposite party has pleaded before the delivery of the amendment, and does not plead again or amend within the time above mentioned, he is deemed to rely on his original pleading in answer to such amendment (*c*).

General rules as to leave to amend.

885. The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings (*d*) in such manner and on such terms as may be just (*e*), and all such

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677, 688, 690, C. A.; *Southall Development Syndicate, Ltd.* v. *Dunsdon* (1907), 96 L T. 109

(*q*) No part of the defence other than a plea of set-off can be amended without the leave of the court or a judge; and as to such leave, see the text, *infra*.

(*r*) The time is the time limited by the order giving leave to answer the reply, or if no time is so limited, then four days from delivery of reply.

(*s*) R. S. C., Ord. 28, r. 3.

(*t*) *Ibid*, r. 4. These rules do not permit a plaintiff to amend by adding a cause of action that has arisen since the issue of the writ (*Tottenham Local Board of Health* v. *Lea Conservancy Board* (1886), 2 T. L. R. 410, C. A.), or a fresh cause of action which since the issue of the writ has become barred by the Statute of Limitations (*Weldon* v. *Neal* (1887), 19 Q. B. D. 394, C. A.). A plaintiff who amends by setting up a new cause of action may be ordered to pay all the costs down to the date of amendment (*Cave* v. *Crew* (1893), 62 L. J. (CH.) 530). Where a plaintiff by amendment abandons one cause of action and substitutes another, the defendant should proceed under R. S. C., Ord. 28, r. 4 (*Bourne* v. *Coulter* (1884), 53 L. J. (CH.) 699).

(*a*) R. S. C., Ord. 28, r. 13

(*b*) See the text, *supra*.

(*c*) R. S. C., Ord. 28, r. 5.

(*d*) This includes particulars delivered separately from a pleading (*Clarapede & Co.* v. *Commercial Union Association* (1883), 32 W. R. 262; *Woolley* v *Broad*, [1892] 2 Q. B. 317, C. A.). If leave to amend the statement of claim is obtained, there is no need to amend the writ (*Large* v. *Large*, [1877] W. N. 198).

(*e*) Any amendment is allowed, subject to payment of costs, that enables the court the more effectually to determine the matter in controversy between the parties unless it can be shown that the party applying

amendments are to be made as may be necessary for the purpose of determining the real questions in controversy between the parties (*f*).

If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend is granted if the amendment can be made without injustice to the other side (*g*). There is no injustice if the other side can be compensated by an order as to costs (*h*); but if, owing to the way in which the pleading has been framed, the other party has been put into such a position that an injury would be done to him by an amendment, the court will not give the necessary leave (*i*).

As a general rule, a party is not allowed to amend by pleading fraud where fraud was not charged in the first instance, unless the application is made at an early stage in the proceedings and the circumstances are such as to justify it (*k*).

In all cases not provided for by the preceding rules (*l*), application (*m*) for leave to amend may be made by either party to the court or a judge, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just (*n*). If an adjournment is necessary to enable the other party to meet the case against him as amended, such adjournment is granted; but, as a general rule, no amendment is allowed at the trial which will enable a party to set up an entirely new case or to change completely the nature of his case (*o*).

When order for leave to amend becomes void.

886. If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, becomes *ipso facto* void, unless the time is extended by the court or a judge (*p*).

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for leave to amend is acting *malâ fide*, or that his opponent will be injured in a manner that cannot be compensated in costs (*Tildesley* v. *Harper* (1878), 10 Ch. D. 393, C. A.; *Steward* v. *North Metropolitan Tramways Co.* (1886), 16 Q. B. D. 556, C. A.; *Re Trufort, Trafford* v. *Blanc* (1885), 53 L. T. 498; *Cropper* v. *Smith* (1884), 26 Ch. D. 700, C. A.; 10 App. Cas. 259, H. L.; *Shoe Machinery Co.* v. *Cutlan*, [1896] 1 Ch. 108, C. A.; *Roe* v. *Davies* (1876), 2 Ch. D. 729). If an amendment is made, the opposite party is allowed to amend in order to raise any defence that would be available to the new matter introduced by the amendment (*Morris* v. *Carnarvon County Council*, [1910] 1 K. B. 159).

(*f*) R. S. C., Ord. 28, r. 1.

(*g*) *Clarapede & Co.* v. *Commercial Union Association* (1883), 32 W. R. 262. *per* BRETT, M.R., at p. 263.

(*h*) See cases cited in note (*t*), p. 438, *ante*, and note (*e*), p. 438, *ante*.

(*i*) *The Alert* (1894), 72 L. T. 124: *Raleigh* v *Goschen*, [1898] 1 Ch. 73.

(*k*) *Lever & Co.* v. *Goodwin Brothers*, [1887] W. N. 107, C. A.; *Hendriks* v. *Montagu* (1881), 50 L. J. (CH.) 257, C. A.; *Symond* v. *City Bank* (1886), 34 W. R. 364; *Bentley & Co.* v. *Black* (1893), 9 T. L. R. 580, C. A.

(*l*) See p 437, *ante*.

(*m*) The application is made under the summons for directions; see title PRACTICE AND PROCEDURE.

(*n*) R. S. C., Ord. 28, r. 6; and see *ibid.*, rr. 11, 12.

(*o*) *King* v. *Corke* (1875), 1 Ch. D. 57; *Newby* v. *Sharpe* (1878), 8 Ch. D. 39, C. A.; *Halse* v. *Brotherhood* (1880), 15 Ch. D. 514; *Ellis* v. *Manchester Carriage Co.* (1876), 2 C. P. D. 13; *Budding* v. *Murdoch* (1875), 1 Ch. D. 42.

(*p*) R. S. C., Ord. 28, r. 7.

SECT. 5. **Amendment of Pleadings.**

Written or printed amendments.

887. A pleading may be amended by written alterations in the copy which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the document difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the document as amended (*q*).

General jurisdiction to amend defects or errors.

888. The court or a judge may at any time, and on such terms as to costs or otherwise as the court or a judge may think just, amend any defect or error in any proceedings, and all necessary amendments are to be made for the purpose of determining the real question or issue raised by or depending on the proceedings (*a*).

Part II.—Pleadings and Particulars.

SECT. 1.—*Statement of Claim.*

Definition.

889. A statement of claim is the pleading in which the plaintiff sets out the facts on which he relies as showing that he is entitled to the intervention of the court in his favour or against the defendant. It must set out the material facts (*b*) on which he bases his claim to relief, and must state and show ground for the particular kind of relief claimed (*c*). If the claim is for a liquidated demand or otherwise such as entitles the plaintiff to apply for summary judgment (*d*), it may be indorsed on the writ. In all other cases it must be delivered in a separate document and in accordance with the provisions set out below (*e*).

Not required in case of specially indorsed writ.

890. Where a writ is specially indorsed (*f*), no further statement of claim (*g*) need be delivered unless the court or a judge otherwise order (*h*), or unless the plaintiff desires to amend his

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(*q*) R. S. C., Ord. 28, r. 8. The new matter inserted on amendment made by leave is usually written or printed in a different colour from the original pleading, and the practice is to print it in red; see note (*b*), p. 421, *ante*.

(*a*) R. S. C., Ord. 28, r. 12. This rule gives power to amend any defect or error in the pleadings or proceedings if such amendment will enable the court to do substantial justice (*Armitage* v. *Parsons*, [1908] 2 K. B. 410, C. A.). Any amendment of a pleading made at the trial under this rule should be formulated in writing and formally made by the judge (*Hyams* v. *Stuart King*, [1908] 2 K. B. 696, C. A.).

(*b*) As to what are material facts see pp. 422, 428, *ante*, and pp. 442 *et seq.*, *post*, and notes thereto.

(*c*) See pp. 444, 445, *post*, and notes thereto.

(*d*) See titles JUDGMENTS AND ORDERS, Vol. XVIII., pp. 190 *et seq.*; PRACTICE AND PROCEDURE; R. S. C., Ord. 3, r. 6.

(*e*) See the text, *infra*

(*f*) Under R. S. C., Ord. 3, r. 6; see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 190 *et seq.*

(*g*) The special indorsement is for all purposes of pleading a statement of claim which is delivered when the writ is served (*Anlaby* v. *Praetorius* (1888), 20 Q. B. D. 764, C. A.).

(*h*) As a rule, when a writ is specially indorsed, the plaintiff takes out a summons, under R. S. C., Ord. 14 (see title JUDGMENTS AND ORDERS,

claim (*i*) as indorsed on the writ, but the indorsement on the writ is deemed to be the statement of claim (*j*).

Not required in case of writ indorsed with claim for account.

891. Where a writ is indorsed with a claim for an account (*k*) or with a claim that involves the taking of an account, if the defendant fails to appear, or does not after appearance, by affidavit or otherwise, satisfy the court or a judge that there is some preliminary question to be tried, an order for proper accounts, with all necessary inquiries and directions now usual in the Chancery Division (*l*) in similar cases, is forthwith made, and no statement of claim is necessary (*m*).

Application for statement of claim when writ indorsed for trial without pleadings.

892. Where a plaintiff has indorsed his writ for trial without pleadings (*n*), and the defendant has appeared (*o*), the action may be tried without pleadings; but a defendant who has appeared to such a writ may within ten days after appearance apply by summons for an order for delivery of a statement of claim, and on the hearing of such summons the court or a judge may order the plaintiff to deliver a statement of claim, or to deliver particulars (*p*) of his claim, or that the action shall be tried without pleadings (*q*).

Filing statement of claim on non-appearance of defendant.

893. If in an action the defendant does not, on service of the writ, appear within the time limited by the Rules of the Supreme Court for appearance (*r*), the plaintiff, unless the writ is indorsed with a special indorsement (*s*), or with a claim involving the taking of an account (*t*), or is such that interlocutory judgment may be

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Vol. XVIII., p. 190), for leave to sign summary judgment. If leave to defend the action is given, the master on the hearing of such summons may, under R. S. C., Ord. 30, r. 1 (c), treat it as a summons for directions (see titles JUDGMENTS AND ORDERS, Vol. XVIII., p. 191, note (*p*); PRACTICE AND PROCEDURE), and, if a better or more detailed statement of claim is necessary, order the plaintiff, notwithstanding that his writ is specially indorsed, to deliver an amended statement of claim. Sometimes the summons for judgment is dismissed, particularly when the plaintiff is attempting to make improper use of the procedure (R. S. C., Ord. 14, r. 9 (b)), without any order for directions being made. Either party may, in such a case, thereupon take out a summons for directions, under R. S. C., Ord. 30, r. 1 (d), in the usual way, on the hearing of which the court or a judge may order a further statement of claim, if it is considered necessary. If the writ is specially indorsed and no such summons is taken out, the defendant must deliver his defence within ten days of the time limited for appearance (R. S. C., Ord. 21, r. 6). But if a summons for judgment is taken out he should wait till the summons is heard and then ask for directions (*Hobson* v. *Monks*, [1884] W. N. 8).

(*i*) As to amendment by a party of his own pleading, see p. 438, *ante*.

(*j*) R. S. C., Ord. 20, r. 1 (a).

(*k*) See *ibid.*, Ord. 3, r. 8; and see title PRACTICE AND PROCEDURE.

(*l*) See R. S. C., Ord. 15; *ibid.*, Ord. 33, r. 2.

(*m*) *Ibid.*, Ord. 15, r. 1; the application is by summons, supported if necessary by affidavit (*ibid.*, r. 2).

(*n*) *Ibid.*, Ord. 18A; see title PRACTICE AND PROCEDURE.

(*o*) If the defendant has not appeared, the plaintiff must file a statement of claim and affidavit of service (R. S. C., Ord. 13, r. 12); see p. 442, *post*.

(*p*) As to particulars, see pp. 425, 428, *ante*, and pp. 453, 458, *post*.

(*q*) R. S. C., Ord. 18A, r. 3. The summons may, under *ibid.*, Ord. 30, r. 1 (c), be treated as a summons for directions.

(*r*) See title PRACTICE AND PROCEDURE.

(*s*) Under R. S. C., Ord. 3, r. 6; see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 190 *et seq.*

(*t*) *I.e.*, which may be dealt with under R. S. C., Ord. 15; see the text, *supra*.

SECT. 1. Statement of Claim.

entered (*u*), should file a statement of claim together with an affidavit of service of the writ (*a*), and the action may then proceed as if the defendant had appeared (*b*).

Order for pleadings on summons for directions.

894. If interlocutory judgment is signed in an action where no defendant has appeared and the writ is indorsed with a claim in damages or a claim for detention of goods, with or without damages (*c*), or a claim for recovery of land with mesne profits or damages (*d*), the court or a judge may order that a statement of claim be filed before such damages or mesne profits are assessed (*e*).

Parties.

895. In cases where, after entry of appearance by the defendant within the time limited by the Rules of the Supreme Court, the plaintiff must (*f*) take out a summons for directions (*g*), the court or a judge, on the hearing of such summons, makes such order as may be just as to the pleadings or particulars that shall be delivered (*h*).

Contents as to plaintiff's cause of action.

896. The persons named on the writ as plaintiffs and defendants respectively are the only persons who may be named as plaintiffs or defendants, as the case may be, in the statement of claim. If it is sought to name as a plaintiff or as a defendant in the statement of claim a person not so named on the writ, leave to amend the writ must be obtained, and the writ must be amended by adding such person as a party. The capacity in which a party sues, or is sued, must be stated on the statement of claim as on the writ, and should be stated in the claim itself (*i*).

Statement of material facts.

897. A statement of claim must contain in a summary form a statement of the material facts (*k*) on which the plaintiff relies as

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(*u*) See title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 186 *et seq.*

(*a*) See title PRACTICE AND PROCEDURE.

(*b*) R. S. C., Ord. 13, r. 12. The plaintiff must follow this procedure even though the writ is indorsed for trial without pleadings (*Greene* v. *St. John's Mansions, Ltd*, [1900] W. N. 9).

(*c*) See title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 186 *et seq.*

(*d*) See *ibid.*, p. 187.

(*e*) See *ibid*, p. 185.

(*f*) As to the steps which a plaintiff may take before the summons for directions, see title PRACTICE AND PROCEDURE.

(*g*) See title PRACTICE AND PROCEDURE.

(*h*) See R. S. C., Ord. 15, and Ord. 30, r. 1; see title PRACTICE AND PROCEDURE. No summons for directions need be taken out where the writ is specially indorsed under R. S. C., Ord. 3, r. 6 (see titles JUDGMENTS AND ORDERS, Vol. XVIII., p. 190; PRACTICE AND PROCEDURE); or is indorsed for trial without pleadings (see p. 441, *ante*); or where an order for an account is made under R. S. C., Ord. 15 (see p. 441, *ante*). When the summons for directions is heard, the order made as to pleadings on such summons almost invariably prescribes that both statement of claim and defence shall be delivered at the respective times named in the order.

(*i*) See as to parties, title PRACTICE AND PROCEDURE.

(*k*) As to what are material facts, and as to the manner in which they are to be pleaded, see p. 423, *ante*. It is usual to state when material the business or profession of the plaintiff and the nature of any office held by him and to set out such facts as show how the cause of action arose, if they tend to elucidate the matter, as matter of inducement leading up to the facts which show the cause of action itself. The pleader has to use his

showing that he has a cause of action (*l*) against the defendant and that he is entitled to relief at the hands of the court.

Where there are several plaintiffs.

898. Where there are several plaintiffs the statement of claim must show either (1) that they have a joint cause of action (*m*); or (2) that their several causes of action arise out of the same transaction, or series of transactions, and are such that if the plaintiffs had each brought separate actions some common question of law or of fact would have arisen in all those actions (*n*). Subject as aforesaid, plaintiffs having different causes of action against the same defendant may join in one action whether they allege that as regards any one or more of the causes of action they sue jointly, severally, or in the alternative (*o*).

Where there are several defendants.

899. Where there are several defendants the statement of claim must show that each of the causes of action alleged is a joint cause of action, that is, such that all the defendants are jointly liable thereon, or that any cause of action which is not joint is alleged only in the alternative (*p*); but a plaintiff may at his option join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract (*q*), including parties to bills of exchange and promissory notes (*r*).

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own discretion as to how far he alleges matter of inducement. In some cases such matter may be very material to the cause of action, *e.g.*, in actions of defamation, where the averment that the plaintiff carries on a particular trade or profession may give him an additional cause of action, or his only cause of action (see *Gallwey* v. *Marshall* (1853), 9 Exch. 204, 300; *Ayre* v. *Craven* (1834), 2 Ad. & El. 2; *James* v. *Brook* (1846), 9 Q. B. 7; *Hatchard* v. *Mège* (1887), 18 Q. B. D. 771; *Chattell* v. "*Daily Mail*" *Publishing Co.* (1901), 18 T. L. R. 167, C. A.). As to the material allegations in a statement of claim in an action for defamation, see title LIBEL AND SLANDER, Vol. XVIII., pp. 608, 645, 652, 656.

(*l*) A plaintiff is said to have a cause of action when he can show that the defendant has done some act which is an invasion of a right in the plaintiff, conferred or sanctioned by substantive law, or has failed to do some act, or to discharge some duty or obligation, to the performance or fulfilment of which the plaintiff is entitled under the substantive law. As to cause of action in a claim in respect of nuisance, see *Ayers* v. *Hanson* (1912), 133 L. T. Jo. 253.

(*m*) This was so even before the Judicature Act, 1873 (36 & 37 Vict. c. 66); see *Booth* v. *Briscoe* (1877), 2 Q. B. D. 496, C. A.

(*n*) This is the practice introduced since the Judicature Act, 1873 (36 & 37 Vict. c. 66), by the amendment in 1896 of R. S. C., Ord. 16, r. 1.

(*o*) *Ibid.*, Ord. 18, r. 6; and see title PRACTICE AND PROCEDURE.

(*p*) The authorities on the law of joinder are in an unsatisfactory condition. In *Gower* v. *Couldridge*, [1898] 1 Q. B. 348, C. A., the Court of Appeal decided that if the plaintiff alleges a joint tort X against A. and B. he cannot join in the same statement of claim a separate tort Y against B. only. But this case has since been distinguished, and it is submitted that, since the decisions in *Bullock* v. *London General Omnibus Co.*, [1907] 1 K. B. 264, C. A., and in *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co., Ltd.*, [1910] 2 K. B. 354, C. A., the law must be taken to be as laid down above. There are *dicta* in those cases which show a tendency to relax the restrictions placed by the decision of the House of Lords in *Sadler* v. *Great Western Rail. Co.*, [1896] A. C. 450, on joinder of defendants, and to declare the law in the wide terms laid down in R. S. C., Ord. 16, r. 4. See, further, title PRACTICE AND PROCEDURE.

(*q*) This is not so in tort. A plaintiff may not, in his statement of claim, allege separate torts against separate defendants (*Sadler* v. *Great Western Rail. Co.*, *supra*; *Pope* v. *Hawtrey* (1901), 85 L. T. 263, C. A.).

(*r*) R. S. C., Ord. 16, r. 6.

SECT. 1. Statement of Claim.

entered (*u*), should file a statement of claim together with an affidavit of service of the writ (*a*), and the action may then proceed as if the defendant had appeared (*b*).

Order for pleadings on summons for directions.

894. If interlocutory judgment is signed in an action where no defendant has appeared and the writ is indorsed with a claim in damages or a claim for detention of goods, with or without damages (*c*), or a claim for recovery of land with mesne profits or damages (*d*), the court or a judge may order that a statement of claim be filed before such damages or mesne profits are assessed (*e*).

Parties.

895. In cases where, after entry of appearance by the defendant within the time limited by the Rules of the Supreme Court, the plaintiff must (*f*) take out a summons for directions (*g*), the court or a judge, on the hearing of such summons, makes such order as may be just as to the pleadings or particulars that shall be delivered (*h*).

Contents as to plaintiff's cause of action.

896. The persons named on the writ as plaintiffs and defendants respectively are the only persons who may be named as plaintiffs or defendants, as the case may be, in the statement of claim. If it is sought to name as a plaintiff or as a defendant in the statement of claim a person not so named on the writ, leave to amend the writ must be obtained, and the writ must be amended by adding such person as a party. The capacity in which a party sues, or is sued, must be stated on the statement of claim as on the writ, and should be stated in the claim itself (*i*).

Statement of material facts.

897. A statement of claim must contain in a summary form a statement of the material facts (*k*) on which the plaintiff relies as

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(*u*) See title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 186 *et seq.*

(*a*) See title PRACTICE AND PROCEDURE.

(*b*) R. S. C., Ord. 13, r. 12. The plaintiff must follow this procedure even though the writ is indorsed for trial without pleadings (*Greene* v. *St. John's Mansions, Ltd*, [1900] W. N. 9).

(*c*) See title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 186 *et seq.*

(*d*) See *ibid.*, p. 187.

(*e*) See *ibid*, p. 185.

(*f*) As to the steps which a plaintiff may take before the summons for directions, see title PRACTICE AND PROCEDURE.

(*g*) See title PRACTICE AND PROCEDURE.

(*h*) See R. S. C., Ord. 15, and Ord. 30, r. 1; see title PRACTICE AND PROCEDURE. No summons for directions need be taken out where the writ is specially indorsed under R. S. C., Ord. 3, r. 6 (see titles JUDGMENTS AND ORDERS, Vol. XVIII., p. 190; PRACTICE AND PROCEDURE); or is indorsed for trial without pleadings (see p. 441, *ante*); or where an order for an account is made under R. S. C., Ord. 15 (see p. 441, *ante*). When the summons for directions is heard, the order made as to pleadings on such summons almost invariably prescribes that both statement of claim and defence shall be delivered at the respective times named in the order.

(*i*) See as to parties, title PRACTICE AND PROCEDURE.

(*k*) As to what are material facts, and as to the manner in which they are to be pleaded, see p. 423, *ante*. It is usual to state when material the business or profession of the plaintiff and the nature of any office held by him and to set out such facts as show how the cause of action arose, if they tend to elucidate the matter, as matter of inducement leading up to the facts which show the cause of action itself. The pleader has to use his

showing that he has a cause of action (*l*) against the defendant and that he is entitled to relief at the hands of the court.

Where there are several plaintiffs.

898. Where there are several plaintiffs the statement of claim must show either (1) that they have a joint cause of action (*m*); or (2) that their several causes of action arise out of the same transaction, or series of transactions, and are such that if the plaintiffs had each brought separate actions some common question of law or of fact would have arisen in all those actions (*n*). Subject as aforesaid, plaintiffs having different causes of action against the same defendant may join in one action whether they allege that as regards any one or more of the causes of action they sue jointly, severally, or in the alternative (*o*).

Where there are several defendants.

899. Where there are several defendants the statement of claim must show that each of the causes of action alleged is a joint cause of action, that is, such that all the defendants are jointly liable thereon, or that any cause of action which is not joint is alleged only in the alternative (*p*); but a plaintiff may at his option join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract (*q*), including parties to bills of exchange and promissory notes (*r*).

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own discretion as to how far he alleges matter of inducement. In some cases such matter may be very material to the cause of action, *e.g.*, in actions of defamation, where the averment that the plaintiff carries on a particular trade or profession may give him an additional cause of action, or his only cause of action (see *Gallwey* v. *Marshall* (1853), 9 Exch. 204, 300; *Ayre* v. *Craven* (1834), 2 Ad. & El. 2; *James* v. *Brook* (1846), 9 Q. B. 7; *Hatchard* v. *Mège* (1887), 18 Q. B. D. 771; *Chattell* v. "*Daily Mail*" *Publishing Co.* (1901), 18 T. L. R. 167, C. A.). As to the material allegations in a statement of claim in an action for defamation, see title LIBEL AND SLANDER, Vol. XVIII., pp. 608, 645, 652, 656.

(*l*) A plaintiff is said to have a cause of action when he can show that the defendant has done some act which is an invasion of a right in the plaintiff, conferred or sanctioned by substantive law, or has failed to do some act, or to discharge some duty or obligation, to the performance or fulfilment of which the plaintiff is entitled under the substantive law. As to cause of action in a claim in respect of nuisance, see *Ayers* v. *Hanson* (1912), 133 L. T. Jo. 253.

(*m*) This was so even before the Judicature Act, 1873 (36 & 37 Vict. c. 66); see *Booth* v. *Briscoe* (1877), 2 Q. B. D. 496, C. A.

(*n*) This is the practice introduced since the Judicature Act, 1873 (36 & 37 Vict. c. 66), by the amendment in 1896 of R. S. C., Ord. 16, r. 1.

(*o*) *Ibid.*, Ord. 18, r. 6; and see title PRACTICE AND PROCEDURE.

(*p*) The authorities on the law of joinder are in an unsatisfactory condition. In *Gower* v. *Couldridge*, [1898] 1 Q. B. 348, C. A., the Court of Appeal decided that if the plaintiff alleges a joint tort X against A. and B. he cannot join in the same statement of claim a separate tort Y against B. only. But this case has since been distinguished, and it is submitted that, since the decisions in *Bullock* v. *London General Omnibus Co.*, [1907] 1 K. B. 264, C. A., and in *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co., Ltd.*, [1910] 2 K. B. 354, C. A., the law must be taken to be as laid down above. There are *dicta* in those cases which show a tendency to relax the restrictions placed by the decision of the House of Lords in *Sadler* v. *Great Western Rail. Co.*, [1896] A. C. 450, on joinder of defendants, and to declare the law in the wide terms laid down in R. S. C., Ord. 16, r. 4. See, further, title PRACTICE AND PROCEDURE.

(*q*) This is not so in tort. A plaintiff may not, in his statement of claim, allege separate torts against separate defendants (*Sadler* v. *Great Western Rail. Co.*, *supra*; *Pope* v. *Hawtrey* (1901), 85 L. T. 263, C. A.).

(*r*) R. S. C., Ord. 16, r. 6.

SECT. 1. **Statement of Claim.**

Claims by or against husband and wife or personal representatives.

900. Claims by or against a husband and wife may be joined with claims by or against either of them separately (*s*). Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (*t*).

Power of court with regard to improper joinder of parties or causes.

901. The court or a judge may, on the application of any defendant (1) where several plaintiffs have been joined, and such joinder might embarrass or delay the trial of the action, order separate trials, or make such other order as may be expedient (*u*); (2) where separate causes of action have been joined which cannot all be conveniently tried together, exclude any of such causes of action and order consequential amendments to be made (*a*); (3) where any parties have been improperly joined, whether as plaintiffs or defendants, order the name of such parties to be struck out (*b*).

Joinder of causes in action for recovery of land.

902. No cause of action may, unless by leave of the court or a judge (*c*), be joined with an action for the recovery of land (*d*), except claims in respect of mesne profits or arrears of rent, or double value in respect of premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed. This provision, however, does not prevent any plaintiff in an action for foreclosure or redemption from asking for or obtaining an order against the defendant for delivery of the possession of the mortgaged property to the plaintiff on or after the order absolute for foreclosure or redemption, as the case may be, and such an action for foreclosure or redemption, and for such delivery of possession, is not to be deemed an action for the recovery of land within the meaning of the above rule (*e*).

Statement of specific relief necessary,

903. Every statement of claim must state specifically the relief (*f*) which the plaintiff claims, either simply or in the

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(*s*) R. S. C., Ord. 18, r. 4.
(*t*) *Ibid.*, r. 5.
(*u*) *Ibid.*, Ord. 16, r. 1.
(*a*) *Ibid.*, Ord. 18, r. 9.
(*b*) *Ibid.*, Ord. 16, r. 11. As to striking out the name of a trade union as defendants on the ground that the action would clearly not lie against them on account of the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), see *Vacher & Sons, Ltd.* v. *London Society of Compositors and Others* (1912), 28 T. L. R. 366.
(*c*) Leave is usually obtained before writ.
(*d*) An action for recovery of land is any action in which possession of land is claimed (*Gledhill* v. *Hunter* (1880), 14 Ch. D. 492). An action merely to restrain trespass to, or entry on, premises is not such an action (*Spear's Glass Works, Ltd.* v. *Spear* (1902), 37 L. J. 578); and see, further, titles LANDLORD AND TENANT, Vol. XVIII., pp. 558, 559; REAL PROPERTY AND CHATTELS REAL.
(*e*) R. S. C., Ord. 18, r. 2; and see, further, titles MORTGAGE, Vol. XXI., pp. 151, 283; PRACTICE AND PROCEDURE.
(*f*) R. S. C., Ord. 20, r. 6. "Relief" must be distinguished from "cause of action." It may be that a plaintiff or plaintiffs is or are entitled to different

alternative, and it is not necessary to ask for general or other relief (*g*), which may always be given, as the court or a judge may think just, to the same extent as if it had been asked for (*h*).

Statement of general relief unnecessary.

Separate grounds of relief:

(1) as regards defendants;

(2) as regards claims.

904. It is not necessary that every defendant should be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest (*i*).

Where a plaintiff seeks relief in respect of several distinct claims or causes of complaint (*k*) founded upon separate and distinct grounds, they must be stated, as far as may be, separately and distinctly (*l*).

Default.

905. Where the plaintiff, being bound to deliver a statement of claim, does not do so within the time limited for that purpose or where an order has been made by the court or a judge for the delivery of a statement of claim, and the plaintiff has not complied with such order within the time allowed for that purpose (*m*), the defendant may apply to the court or a judge to dismiss the action for want of prosecution, and on the hearing of such application the court or judge may, if no statement of claim has been delivered, order the action to be dismissed accordingly, or may make such other order and do so on such terms as the court or judge thinks just (*n*).

SECT. 2.—*Defence.*

Denial in general.

906. The defendant must plead to the allegations contained in the statement of claim in accordance with the rules hereinbefore

forms of relief as against different defendants in respect of the same cause of action, and in such a case the different defendants are properly joined (*Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, C. A.); see, further, title PRACTICE AND PROCEDURE.

(*g*) For example, costs.

(*h*) The same rule applies to any counterclaim made, or relief claimed, by the defendant in his defence (R. S. C., Ord. 20, r. 6); and see p. 451, *post*, and title SET-OFF AND COUNTERCLAIM.

(*i*) R. S. C., Ord. 16, r. 5.

(*k*) These may be inconsistent, but in such a case should be alleged in the alternative (*Bagot* v. *Easton* (1878), 7 Ch. D. 1, C. A.; *Philipps* v. *Philipps* (1878), 4 Q. B. D. 127, 134, C. A.).

(*l*) The facts belonging to the respective claims or causes of complaint should not be mixed up, but should be stated separately, so as to show on which facts each cause of action is based, and in respect of which facts each form of relief is claimed (*Davy* v. *Garrett* (1878), 7 Ch. D. 473, 489, C. A.; *Watson* v. *Hawkins* (1876), 24 W. R. 884). The same rule as is stated in the text, *supra*, applies where the defendant relies upon several distinct grounds of defence, set-off, or counterclaim founded upon separate and distinct facts (R. S. C., Ord. 20, r. 7).

(*m*) If no time is named in the order the time is twenty-one days under R. S. C., Ord. 20, r. 1 (c).

(*n*) *Ibid.*, Ord. 27, r. 1; and see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 188.

SECT. 2. Defence.

set out, and if he denies any such allegation must do so specifically and not evasively (*o*).

Actions for debt or liquidated demands.

In actions for debt or liquidated demand in money comprised in R. S. C., Ord. 3, r. 6, a mere denial of the debt is inadmissible (*p*).

In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact, for example, the drawing, making, indorsing, accepting, presenting, or notice of dishonour of the bill or note (*q*).

In actions comprised in R. S. C., Ord. 3, r. 6, clauses (A) and (B), a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed, for example, in actions for goods bargained and sold, or sold and delivered, the defence must deny the order or contract, the delivery, or the amount claimed (*r*); in an action for money had and received, it must deny the receipt of the money, or the existence of those facts which are alleged to make such receipt by the defendant a receipt to the use of the plaintiff (*s*).

Damages.

907. No denial or defence is necessary as to damages (*t*) claimed or their amount; but they are deemed to be put in issue in all cases unless expressly admitted (*u*).

Representative or other capacity of plaintiff.

908. If a defendant wishes to deny the right of a plaintiff to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of a partnership firm, he must deny the same specifically (*a*).

Improper denial or admission.

909. Where of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the court or judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted (*b*).

Matters which must be specially pleaded.

910. The defendant must raise by his defence all matters which show the action not to be maintainable, or that the transaction on which the plaintiff relies is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the plaintiff by surprise, or would raise issues of fact not arising out of the statement of claim, as, for instance, fraud, Statute

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(*o*) See pp. 429 *et seq.*, *ante*.
(*p*) R. S. C., Ord. 21, r. 1.
(*q*) *Ibid.*, r. 2.
(*r*) See title SALE OF GOODS.
(*s*) R. S. C., Ord. 21, r. 3; and see title CONTRACT, Vol. VII., pp. 473 *et seq.*
(*t*) Where special damage is alleged in the statement of claim the defence should deal with such damage, so that at the trial the plaintiff may not contend that he has been taken by surprise as to that part of defendant's case. As to damages generally, see title DAMAGES, Vol. X., pp. 301 *et seq.*; and see p. 430, *ante*.
(*u*) R. S. C., Ord. 21, r. 4.
(*a*) *Ibid.*, r. 5.
(*b*) *Ibid.*, r. 9.

of Limitations, release, payment, performance, facts showing illegality either by statute or common law (*c*), or Statute of Frauds (*d*), or any ground of objection to the jurisdiction of the court (*e*).

(*c*) If the words of a statute are pleaded and are such that they are consistent with each of two meanings, *e.g.*, fraud or illegality, the pleader must state on which meaning he relies (*Bullivant* v. *A.-G. for Victoria*, [1901] A. C. 196, 204, P. C.).

(*d*) R. S. C., Ord. 19, r. 15; and see pp. 429, 432, *ante*; and see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 732. The rule does not give an exhaustive list of the matters that must be specially pleaded in the defence. In addition to those enumerated in the rule, or mentioned at pp. 422, 423, *ante*, the following grounds of defence must be specially pleaded:—

Accord and satisfaction. This is a good plea in all cases "where nothing but amends is to be recovered in damages" (*Peytoe's Case* (1611), 9 Co. Rep. 77 b, 79 b). In order to sustain such a plea the defendant must show that the satisfaction could be reasonably accepted, and that the plaintiff knowingly agreed to accept it (*Cumber* v. *Wane* (1721), 1 Stra. 425; 1 Smith, L. C., 11th ed., p. 338; *Sibree* v. *Tripp* (1846), 15 M. & W. 23; *Day* v. *McLea* (1889), 22 Q. B. D. 610, C. A.; *Hirachand Punamchand* v. *Temple*, [1911] 2 K. B. 330, C. A., doubting *Goddard* v. *O'Brien* (1882), 9 Q. B. D. 37). An agreement based on good consideration must be shown (*Rideal* v. *Great Western Rail Co* (1860), 1 F. & F. 706; *Lea* v. *Lancashire and Yorkshire Rail Co.* (1871), 6 Ch. App. 527; *Roberts* v. *Eastern Counties Rail. Co.* (1859), 1 F. & F. 460; *Foakes* v. *Beer* (1884), 9 App. Cas. 605). Accord and satisfaction may be a good defence to an action on a bond (*Steeds* v. *Steeds* (1889), 22 Q. B. D. 537). As to accord and satisfaction generally, see title CONTRACT, Vol. VII., pp. 441 *et seq.*

Acknowledgment. See *Statutes of Limitation, infra.*

Aggravation of damage. See p. 425, *ante.*

Authority. Want of authority, if relied upon, should be specially pleaded (*Byrd* v. *Nunn* (1877), 7 Ch. D. 284, C. A.); but see *Johnson* v. *Kearley*, [1908] 2 K. B. 82, 514; and see title AGENCY, Vol. I., pp. 207, 233—236.

Concealed fraud. If this is relied upon as taking a case out of the Statutes of Limitation, it should be specially pleaded; see titles EQUITY, Vol. XIII., p. 13; LIMITATION OF ACTIONS, Vol. XIX., pp. 143, 187; MISREPRESENTATION AND FRAUD, Vol. XX., pp. 681, 732.

Conditions precedent. See pp. 426, 427, *ante.*

Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14. See title LANDLORD AND TENANT, Vol. XVIII., pp. 539, 540.

Contributory negligence. See *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41; *S.S.* "*Pleiades*" (*Owners*) *and Page* (*Master*) v. *Page* (*Master*) *and S.S.* "*Jane*" (*Owners*) *and Lesser*, [1891] A. C. 259, P. C.; and see title NEGLIGENCE, Vol. XXI., pp. 445 *et seq.*

Equitable defences. The defendant may set up any ground which formerly would have entitled him to file a bill in Chancery to restrain plaintiff from proceeding with his action (*Bankes* v. *Jarvis*, [1903] 1 K. B. 549, 552). As to particulars, see p. 455, *post.*

Estoppel. See title ESTOPPEL, Vol. XIII., pp. 321 *et seq.*

Fair comment, in an action for defamation, must be specially pleaded, As to particulars to be given, see p. 455, *post*; and see title LIBEL AND SLANDER, Vol. XVIII., pp. 669 *et seq.*

Fraud. This must always be specially pleaded with full particulars; see p. 427, *ante*, and p. 456, *post.*

Gaming Acts. These should be specially pleaded, but the court will refuse to assist a plaintiff who cannot maintain his action without showing that his claim is based on a gaming transaction (*Scott* v. *Brown, Doering, McNab & Co.*, *Slaughter and May* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A.), and will strike out the statement of claim if admitted to be based on gaming and wagering transactions (*Kershaw* v. *Sievier* (1904),

(*e*) For note (*e*) see next page.

SECT. 2. Defence.

911. In every case in which a defendant pleads the general issue (*f*), intending to give the special matter in evidence by virtue

Pleading the general issue by statute.

21 T. L. R. 40, C. A.). See note on *Illegality, infra;* and see *Luckett* v. *Wood* (1908), 24 T. L. R. 617; *Pooley* v. *O'Connor* (1912), 28 T. L. R. 460, C. A.

Illegality. This should be specially pleaded by the express terms of R. S. C., Ord. 19, r. 15; and see *Clarke* v. *Callow* (1877), 46 L. J. (Q. B.) 53, C. A.; *Bullivant* v. *A.-G. for Victoria*, [1901] A. C. 196, 204, P. C.; but, if it comes to the knowledge of the court that an agreement relied on is tainted with illegality, the court will take notice of the illegality even though not pleaded (*Scott* v. *Brown, Doering, McNab & Co., Slaughter and May* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A.; *Gedge* v. *Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214; *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Vega*, [1902] 2 K. B. 384, C. A.; *Connolly* v. *Consumers' Cordage Co.* (1903), 89 L. T. 347, P. C.; *Kershaw* v. *Sievier, supra; Thomas* v. *Dey* (1908), 24 T. L. R. 272; *Re Robinson's Settlement, Gant* v. *Hobbs*, [1912] 1 Ch. 717, C. A.).

Inevitable accident need not be specially pleaded (*Rumbold* v. *London County Council* (1909), 25 T. L. R. 541, C. A.); and see title NEGLIGENCE, Vol. XXI., p. 468.

Judgment against one of two or more persons jointly liable, if relied upon as a merger, should be pleaded (*McLeod* v. *Power*, [1898] 2 Ch. 295; *Edevain* v. *Cohen* (1889), 43 Ch. D. 187, C. A.; *Houston* v. *Sligo* (*Marquis*) (1885), 29 Ch. D. 448, C. A.).

Justification, in an action for defamation, must be specially pleaded (*Belt* v. *Lawes* (1882), 51 L. J. (Q. B.) 359; see title LIBEL AND SLANDER, Vol. XVIII., p. 669.

Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), should be specially pleaded; see *Worthington & Co.* v. *Belton* (1902), 18 T. L. R. 438, C. A.; and see titles CONTRACT, Vol. VII., p. 491; GUARANTEE, Vol. XV., pp. 454 *et seq.*

Money-lenders Act, 1900 (63 & 64 Vict. c. 51). The court will take cognisance of this as invalidating the plaintiff's claim even though it is not specially pleaded, unless it can be shown that the plaintiff is taken by surprise (*Re Robinson's Settlement, Gant* v. *Hobbs, supra*).

Non est factum should be specially pleaded (*Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704; *Howatson* v. *Webb*, [1908] 1 Ch. 1, C. A.); and see note (*h*), p. 432, *ante;* title MISREPRESENTATION AND FRAUD, Vol. XX., p. 739.

Non-joinder of parties. This should not be pleaded; see note (*k*), p. 449, *post.*

Part performance, if relied on to take a case out of the Statute of Frauds, should be specially pleaded (*Maddison* v. *Alderson* (1883), 8 App. Cas. 467); and see title CONTRACT, Vol. VII., p. 379.

Plaintiff's title to sue, if intended to be put in issue, must be denied in the defence.

Representative capacity of plaintiff, if intended to be contested, should be denied in the defence (R. S. C., Ord. 21, r. 5).

Res judicata must be specially pleaded; see *supra;* and see title ESTOPPEL, Vol. XIII., p. 331.

Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). See *Statute of Frauds, infra.*

Statute of Frauds (29 Car. 2, c. 3), or *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), must be specially pleaded if any reliance is placed on non-compliance with its provisions (*Clarke* v. *Callow* (1876), 46 L. J. (Q. B.) 53, C. A.; *James* v. *Smith*, [1891] 1 Ch. 384; and see note (*i*), p. 432, *ante*).

Statutes of Limitation. These should be specially pleaded (*Re Burge, Gillard* v. *Lawrenson* (1887), 57 L. T. 364), as should also facts to take the case out of the operation of the statutes, *e.g.*, acknowledgment (*Skeet* v. *Lindsay* (1877), 2 Ex. D. 314; *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59, C. A.; *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474, C. A.; *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351, P. C.); see title LIMITATION OF ACTIONS, Vol. XIX., pp. 182 *et seq.*

(*e*) *Crosfield & Sons, Ltd.* v. *Manchester Ship Canal Co.* (1904), 90 L. T. 557, 567, C. A.; and see title COURTS, Vol. IX., pp. 12, 14.

(*f*) That is to say, a plea of "Not guilty," which was the ordinary plea by which, before the Judicature Act, 1873 (36 & 37 Vict. c. 66), a defendant denied that he had committed an alleged tortious act or breach of contract

of an Act of Parliament, he must insert in the margin of his pleading the words "by statute" (*g*), together with the year of the reign in which the Act of Parliament on which he relies was passed, and also the chapter and section of such Act, and must specify whether such Act is public or not; otherwise such defence is taken not to have been pleaded by virtue of any Act of Parliament (*h*). If a defendant pleads "Not guilty by statute" as aforesaid, he may not plead any other defence to the same cause of action without the leave of the court or a judge (*i*).

Plea in abatement.

912. No plea or defence in abatement may be pleaded (*k*).

Plea of possession.

913. No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff; but, except in the cases above mentioned, it is sufficient to state by way of defence that he is so in possession, and it is taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the plaintiff's statement of claim. He may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned (*l*).

Time for delivery.

914. Where a defendant has appeared to a specially indorsed writ of summons (*m*), he must deliver his defence within ten days

(*g*) The plea of "Not guilty by statute" can be pleaded only by certain public bodies and persons on whom the right so to plead has been conferred by statute. It enables a defendant to prove any fact or raise any construction that would support a defence. This privilege has in most cases been abolished by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), but as that Act has been held to apply only to public authorities (*A.-G.* v. *Margate Pier and Harbour (Company of Proprietors)*, [1900] 1 Ch. 749; see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS; *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1, 13, C. A.), it would seem that there are still cases where the privilege exists. It is wiser to plead specially in these cases.

(*h*) R. S C., Ord. 21, r. 19.

(*i*) *Ibid.*, Ord. 19, r. 12.

(*k*) *Ibid.*, Ord. 21, r. 20. A plea in abatement was a plea by which, before the Judicature Act, 1873 (36 & 37 Vict. c. 66), the defendant, while not denying the cause of action alleged by the plaintiff, pleaded that on some ground not going to the cause of action the plaintiff ought not to be allowed to proceed. For example, one of several joint debtors might have pleaded that his co-debtors had not been joined, and this would have been a good ground for the abatement of the action. All such points are now dealt with by means of applications in chambers. If judgment has been signed against one of several joint defendants, that can be pleaded as a defence by the rest (*Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547, Ex. Ch.), except in cases where judgment has been obtained under R. S. C., Ord. 14, r. 5, or Ord. 13, r. 4, or Ord. 27, r. 3; and see titles ESTOPPEL, Vol. XIII., p. 335; LIBEL AND SLANDER, Vol. XVIII., p. 616, note (*a*).

(*l*) R. S. C., Ord. 21, r. 21. Under this plea the defendant can prove any facts which establish a defence, *e.g.*, insufficient notice to quit, possessory title, or that the plaintiff has not the legal estate (*Danford* v. *McAnulty* (1883), 8 App. Cas. 456; *Allen* v. *Woods* (1893), 68 L. T. 143, C. A.). If he relies on an equitable interest in himself, he must specially plead it and give particulars (*Sutcliffe* v. *James* (1879), 40 L. T. 875).

(*m*) *I.e.*, under R. S. C., Ord. 3, r. 6; see titles JUDGMENTS AND ORDERS, Vol XVIII., pp. 190 *et seq.*; PRACTICE AND PROCEDURE.

SECT. 2. Defence.

(1) Defence to claim on specially indorsed writ;

from the time limited for appearance, unless such time is extended by the court or a judge, or unless in the meantime the plaintiff serves a summons for judgment (*n*) or a summons for directions (*o*).

Where the writ has been specially indorsed and leave has been given to a defendant to defend (*p*), he must deliver his defence, if any, within such time as is limited by the order giving him leave to defend; or, if no time is thereby limited, within eight days after the order (*q*).

(2) defence pursuant to order or in default of appearance.

915. When a statement of claim is delivered pursuant to an order, or in default of appearance (*r*), the defendant, unless otherwise ordered, must deliver his defence within such time if, any, as is specified in such order, or, if no time is so specified, within ten days from the delivery, or filing in default, of the statement of claim (*r*), unless in either case the time is extended by the court or a judge (*s*).

Ground of defence arising after action brought.

916. Any ground of defence (*t*) which has arisen after action brought (*u*), but before the defendant has delivered his defence, and before the time limited for his doing so has expired, may be raised by the defendant in his defence, either alone or together with other grounds of defence (*a*).

Further defence by leave.

917. Where any ground of defence arises after the defendant has delivered a defence, or after the time limited for his doing so has expired, the defendant may within eight days after such ground of defence has arisen, or at any subsequent time by leave of the court or a judge, deliver a further defence (*b*).

Confession of further defence.

918. Whenever any defendant, in his defence, or in any further defence, as in the last paragraph mentioned, alleges any ground of

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(*n*) *I.e.*, under R. S. C., Ord. 14; see titles JUDGMENTS AND ORDERS, Vol. XVIII., pp. 190 *et seq.*; PRACTICE AND PROCEDURE.

(*o*) R. S. C., Ord. 21, r. 6.

(*p*) *I.e.*, under *ibid.*, Ord. 14; see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 190 *et seq.*

(*q*) R. S. C., Ord. 21, r. 7.

(*r*) *I.e.*, under *ibid.*, Ord. 13, r. 12; see p. 442, *ante*.

(*s*) R. S. C., Ord. 21, r. 8.

(*t*) This applies only to defences proper, not to matters of counterclaim (*Beddall* v. *Maitland* (1881), 17 Ch. D. 174, 181); and see note (*d*), p. 447, *ante*.

(*u*) Bankruptcy either of plaintiff or of defendant after action brought is such a ground of defence (*Foster* v. *Gamgee* (1876), 1 Q. B. D. 666; *Herbert* v. *Sayer* (1844), 5 Q. B. 965; *Barker* v. *Johnson* (1889), 60 L. T. 64); but a receiving order against the plaintiff without adjudication is not such a ground of defence (*Rhodes* v. *Dawson* (1886), 16 Q. B. D. 548, C. A.; *Re Berry, Duffield* v. *Williams*, [1896] 1 Ch. 939). If after action brought the plaintiff becomes bankrupt and the trustee declines to proceed with the action, it may be stayed by an order in chambers (*Warder* v. *Saunders* (1882), 10 Q. B. D. 114). Performance after action on a contract a breach of which is alleged in the statement of claim is not such a ground of defence (*Callander* v. *Hawkins* (1877), 2 C. P. D. 592).

(*a*) R. S. C., Ord. 24, r. 1.

(*b*) *Ibid.*, r. 2. Such a plea, before the Judicature Act, 1873 (36 & 37 Vict. c. 66), was called a plea *puis darrein continuance*, and was a waiver of all previous pleas; it is said to still have this effect (*Foster* v. *Gamgee supra*).

defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence (*c*), and may thereupon sign judgment for his costs (*d*) up to the time of the pleading of such defence, unless the court or a judge, either before or after the delivery of such confession, otherwise orders (*e*).

Set-off and counterclaim.

919. A defendant in an action may set off or set up by way of counterclaim against the claim alleged by the plaintiff any right or claim, whether such set-off or counterclaim (*f*) sounds in damages or not, and such set-off or counterclaim has the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim; but the court or a judge may, on the application of the plaintiff before trial, refuse permission to the defendant to avail himself of such set-off or counterclaim if in the opinion of the court or a judge it cannot be conveniently disposed of in the pending action, or ought not to be allowed (*g*).

Default in delivery of defence:

(1) In action of debt or liquidated demand;

920. If the plaintiff's claim (*h*) is only for a debt or liquidated demand and the defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs (*i*). If one of several defendants in such an action makes such

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(*c*) Which confession may be in Form No. 5 of R. S. C., Appendix B, with such variations as circumstances may require. The form given is: "The plaintiff confesses the defence stated in the paragraph of the defendant's defence" [*or* "further defence"]. On the delivery of such a confession the defendant cannot insist on the other defences being tried out (*Wood* v. *Goodwin*, [1884] W. N. 17). When the plaintiff confesses the new defence, the court can look at the old defence for the purpose of seeing whether the plaintiff hould be deprived of costs (*Harrison* v. *Abergavenny* (*Marquis*) (1887), 57 L. T. 360).

(*d*) The right to sign judgment for costs is not absolute (*Houghton* v. *Tottenham and Forest Gate Rail. Co.*, [1892] W. N. 88; *Bridgetown Water-works Co.* v. *Barbados Water Supply Co.* (1888), 38 Ch. D. 378; *Harrison* v. *Abergavenny* (*Marquis*) (1887), 57 L. T. 360; *Hopkins* v. *Vickers* (1887), 3 T. L. R. 610, C. A.). There is no appeal from a refusal of a judge to allow a plaintiff to sign judgment for his costs under this rule (*Perkins* v. *Beresford* (1882), 47 L. T. 515); and see title PRACTICE AND PROCEDURE.

Where judgment is signed under this rule, an end is put to the litigation as it stands at the time of the confession, and the plaintiff cannot afterwards bring a fresh action on a claim which he might have set up in the action in which he has confessed the defence (*Newington* v. *Levy* (1870), L. R. 5 C. P. 607; *Bennett* v. *Gamgee* (1876), 2 Ex. D. 11, 14). If the plaintiff becomes bankrupt and, on the defendant pleading the bankruptcy proceedings in bar, confesses the defence of bankruptcy, such a confession does not, however, bar a fresh action by the trustee (*Bennett* v. *Gamgee*, *supra*). If a plaintiff under this rule confesses the defence and signs judgment for his costs against one of two co-defendants, he cannot afterwards proceed against the other (*Pascall* v. *Horsley* (1828), 3 C. & P. 372).

(*e*) R. S. C., Ord. 24, r. 3.

(*f*) For the law as to set-off and counterclaim, see title SET-OFF AND COUNTERCLAIM; and see title GUARANTEE, Vol. XV., p. 508.

(*g*) R. S. C., Ord. 19, r. 3.

(*h*) This does not include a counterclaim; see *Jones* v. *Macaulay*, [1891] 1 Q. B. 221, C. A.; *Roberts* v. *Booth*, [1893] 1 Ch. 52.

(*i*) R. S. C., Ord. 27, r. 2; and, as to default generally, see title JUDGMENTS AND ORDERS, Vol XVIII., pp. 184 *et seq.*

SECT. 2. Defence.

default, the plaintiff may enter judgment against him and issue execution without prejudice to his right to proceed with his action against the other defendants (*k*).

(2) in claims for pecuniary damages or for detention of goods;

921. If the plaintiff's claim is for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, and the defendant, or all the defendants if more than one, make default as aforesaid in delivering defence, the plaintiff may enter an interlocutory judgment against the defendant or defendants, as the case may be, and a writ of inquiry will issue to assess the value of the goods and the damages, or the damages only (*l*), as the case may be, unless the court or a judge orders the value and amount of the damages, or either of them, to be ascertained in any other way which the court may direct (*m*). But if there are several defendants in such an action, and one or more, but not all, of the defendants make default as aforesaid, the plaintiff may enter an interlocutory judgment against such defendant or defendants, and proceed with his action against the others, and the value and amount of damages against the defendant or defendants so making default will be assessed at the trial of the action or issues against the other defendant or defendants, unless the court or a judge otherwise orders (*n*).

(3) in claims for debt or liquidated demand, and for pecuniary damages or detention of goods;

922. If the plaintiff's claim is for a debt or liquidated demand, and also for pecuniary damages, or for detention of goods with or without a claim for pecuniary damages, and any defendant makes default as aforesaid in delivering defence, the plaintiff may enter final judgment for the debt or liquidated demand, and also enter interlocutory judgment for the damages and, where there is a claim for detention of goods, for the value of the goods, and the case then proceeds as above mentioned (*o*).

(4) in actions for recovery of land, with claim for mesne profits etc.

923. In an action for recovery of land, if the defendant makes default as aforesaid in delivering defence, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs (*p*). If in such an action the plaintiff has also indorsed on his writ a claim for mesne profits, or arrears of rent, or double value in respect of the premises claimed, or any part of them, or damages for breach of contract, or wrong or injury to the premises claimed, and the defendant, or any of the defendants, if there are more than one, makes such default, the plaintiff may enter interlocutory judgment

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(*k*) R. S. C., Ord. 27, r. 3. As to enforcing judgment by execution, see, generally, title EXECUTION, Vol. XIV., pp. 1 *et seq.*

(*l*) If a sum is specified in the statement of claim as damages, and the jury award a larger sum, the plaintiff cannot enter judgment for such larger sum without obtaining leave to amend the statement of claim (*Chattell* v. "*Daily Mail*" *Publishing Co.* (1901), 18 T. L. R. 165, C. A.).

(*m*) R. S. C., Ord. 27, r. 4.

(*n*) *Ibid.*, r. 5. As to interlocutory judgments generally, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 178 *et seq.*

(*o*) R. S. C., Ord. 27, r. 6; and see the text, *supra*.

(*p*) R. S. C., Ord. 27, r. 7.

against such defendant or defendants and proceed as above mentioned (*q*).

924. If the plaintiff's claim be for a debt or liquidated demand, for pecuniary damages only, or for the detention of goods, with or without a claim for pecuniary damages, or for any of such matters, or for the recovery of land, and the defendant delivers a defence which purports to offer an answer to part only of the plaintiff's alleged cause of action, the plaintiff may, by leave of the court or a judge, enter judgment, final or interlocutory, as the case may be, as above mentioned (*r*), for the part unanswered; provided that the unanswered part consists of a separate cause of action, or is severable from the rest, as in the case of part of a debt or liquidated demand; but where there is a counterclaim, execution on any such judgment as above mentioned in respect of the plaintiff's claim cannot issue without the leave of the court or a judge (*s*). Defence in answer to part only of claim.

925. In all other actions than those above mentioned, if the defendant makes default in delivering a defence (*t*), the plaintiff may set down the action on motion for judgment, and obtain such judgment as upon the statement of claim the court or a judge considers the plaintiff to be entitled to (*u*). Default in other cases.

SECT. 3.—*Particulars.*

926. A further and better statement of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered (*a*) upon such terms as to costs and otherwise as may be just (*b*). When ordered.

927. The function of particulars is to limit the generality of the allegations in the pleadings (*c*), and thus to define the issues which have to be tried and as to which discovery must be given (*d*). Function of particulars.

(*q*) R. S. C., Ord. 27, r. 8; and see p. 452, *ante*; and generally, as to actions for recovery of land, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 558 *et seq.*; REAL PROPERTY AND CHATTELS REAL.

(*r*) See p. 452, *ante*.

(*s*) R. S. C., Ord. 27, r. 9.

(*t*) This rule applies where the defendant has delivered a defence and gets leave to withdraw it (*Cooper-Dean* v. *Badham*, [1908] W. N. 100).

(*u*) R. S. C., Ord. 27, r. 11.

(*a*) The order is only made where a special application has been made to the court or a judge. Such application is made under the summons for directions; see title PRACTICE AND PROCEDURE.

(*b*) R. S. C., Ord. 19, r. 7. Particulars are a pleading within the meaning of *ibid.*, Ord. 25, r. 4, which deals with striking out pleadings (*Davey* v. *Bentinck*, [1893] 1 Q. B. 185, C. A.), and a party is bound by them as by a pleading (*United Telephone Co.* v. *Smith*, *Same* v. *Mitchell* (1890), 61 L. T. 617; *Arnold and Butler* v. *Bottomley*, [1908] 2 K. B. 151, 155, C. A.).

(*c*) *Saunders* v. *Jones* (1877), 7 Ch. D. 435, C. A., *per* THESIGER, L.J., at p. 451; *Hewson* v. *Cleeve*, [1904] 2 I. R. 536, 556, C. A.; *Temperton* v. *Russell* (1893), 9 T. L. R. 319, C. A.

(*d*) *Yorkshire Provident Life Assurance Co.* v. *Gilbert and Rivington*, [1895] 2 Q. B. 148, C. A.; *Arnold and Butler* v. *Bottomley*, [1908] 2 K. B. 151, C. A.

SECT. 8. Particulars.

Each party is entitled to know the case that is intended to be made against him at the trial, and to have such particulars of his opponent's case as will prevent him from being taken by surprise (*e*).

Degree of particularity required.

928. No precise rule can be laid down as to the degree of particularity required in any given case, but as much certainty and particularity is insisted on as is reasonable having regard to the circumstances and the nature of the acts alleged (*f*).

(*e*) *Young & Co.* v. *Scottish Union and National Insurance Co.* (1907), 24 T. L. R. 73, C. A.; *Spedding* v. *Fitzpatrick* (1889), 38 Ch. D. 410, C. A.; *Newport (Mon.) Slipway Dry Dock and Engineering Co.* v. *Paynter* (1886), 34 Ch. D. 88, C. A.; *Hennessy* v. *Wright* (1888), 57 L. J. (Q. B.) 594, C. A.; *The Rory* (1882), 7 P. D. 117, C. A.; *Duke & Sons* v. *Wisden & Co.* (1897), 77 L. T. 67, 68, C. A.; *Philipps* v. *Philipps* (1878), 4 Q. B. D. 127, 139, C. A.

(*f*) "To insist upon less would be to relax old and intelligible principles. To insist on more would be the vainest pedantry" (*Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A., *per* BOWEN, L.J., at p. 533). Whenever either party imputes fraud, negligence or misconduct to his opponent the facts must be stated with especial particularity. So when a defendant in an action for defamation justifies the charge, he must set out all the facts which he intends to prove as showing that the charge is true. See p. 456, *post*.

There are many decided cases which illustrate the general principles underlying the law as to particulars, and show how these principles have been applied in individual cases. These decisions may for convenience of reference be arranged under headings as follows:—

Account.—Where only an account is asked for, particulars will not be ordered, but where a specific sum is claimed particulars must be given showing how such sum is made up (*Blackie* v. *Osmaston* (1884), 28 Ch. D. 119, 123, C. A.; *Augustinus* v. *Nerinckx* (1880), 16 Ch. D. 13, 17, C. A.; *Carr* v. *Anderson* (1901), 18 T. L. R. 206, C. A.). If, however, it is unnecessary to take an account the court may order particulars to be given (*Kemp* v. *Goldberg* (1887), 36 Ch. D. 505); and see p. 427 *ante*.

Admiralty.—See title ADMIRALTY, Vol. I., pp. 93 (preliminary act), 106, 109, 133.

Adultery.—See title HUSBAND AND WIFE, Vol. XVI., p. 512.

Agreement.—See *Contract*, p. 455, *post*.

Assignment.—If a plaintiff sues in his own name under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6), he must in his statement of claim set out the facts sufficient to bring him within such provision (*Seear* v. *Lawson* (1880), 16 Ch. D. 121, C. A.; *Read* v. *Brown* (1888), 22 Q. B. D. 128, C. A.); and see title CHOSES IN ACTION, Vol. IV., pp. 367, 373). But a special indorsement of a writ may be sufficient for the purposes of R. S. C., Ord. 14, although there be no averment that notice of assignment was given (*Satchwell* v. *Clarke* (1892), 66 L. T. 641, C. A.; *Bradley* v. *Chamberlyn*, [1893] 1 Q. B. 439, 441, 442). As to assignee of a reversion, see *Recovery of Land*, p. 458, *post*.

Belief.—If a person alleges that he had reasonable grounds for belief of a certain state of things, he may be ordered to give particulars (*Alman* v. *Oppert*, [1901] 2 K. B. 576, C. A.; and see *Fitzgerald* v. *Campbell* (1866), 15 L. T. 74).

Condition of Mind.—This may be alleged as a fact without setting out the circumstances from which it is to be inferred (R. S. C., Ord. 19, r. 22); and see p. 427, *ante*.

Condition Precedent.—See p. 426, *ante*. Particulars must be given (*Abbs* v. *Matheson & Co.* (1898), 104 L. T. Jo. 268; compare *Hopley* v. *Tarvin Parish Council* (1910), 74 J. P. 209).

Conspiracy.—In an action for conspiring to induce persons by threats to

break their contracts, the defendants are entitled to particulars stating the name of each such person, the kind of threat used in each case, when and by whom each such threat was made and whether verbally or in writing, and, if in writing, identifying the document (*Temperton* v. *Russell* (1893), 9 T. L. R. 319; and see title TRADE AND TRADE UNIONS).

Contract.—See p. 427, *ante*. Where a contract is relied on, the pleader must state whether it is express or implied. If express he must state whether verbal or in writing, and identify the document if it is in writing. The date and names of parties must be given (*Turquand* v. *Fearon* (1879), 48 L. J. (Q. B.) 703; *Abbs* v. *Matheson & Co.* (1898), 104 L. T. Jo. 268; *Smith* v. *West*, [1876] W. N. 55); and see title CONTRACT, Vol. VII., pp. 327 *et seq.*

Contributory Negligence.—The defendant should give particulars of the facts relied upon as supporting such a plea. The court will order them, if some good reason for such an order is shown (*Toppin* v. *Belfast Corporation*, [1909] 2 I. R. 181, C. A.; *Martin* v. *M'Taggart*, [1906] 2 I. R. 120); and see title NEGLIGENCE, Vol. XXI., p. 445 *et seq.*; p. 447, *ante*.

Credit.—Where a plaintiff wishes to give credit in his statement of claim he should not do so for a lump sum, but should set out the items which make up such sum (*Godden* v. *Corsten* (1879), 5 C. P. D. 17; *Kemp* v. *Goldberg* (1887), 36 Ch. D. 505).

Cruelty.—See title HUSBAND AND WIFE, Vol. XVI., p. 512.

Damages.—No particulars need be given of general damages (*London and Northern Bank* v. *George Newnes, Ltd.* (1900), 16 T. L. R. 433, C. A.); and see title DAMAGES, Vol. X., p. 346. As to special damage, see *Special Damage*, p. 458, *post*.

Defamation.—Particulars must be given of the persons to whom, and the dates when, the words complained of were published (*Davey* v. *Bentinck*, [1893] 1 Q. B. 185, C. A.; *Roselle* v. *Buchanan* (1886), 16 Q. B. D. 656; *Bradbury* v. *Cooper* (1883), 12 Q. B. D. 94). An application for such particulars must be made promptly (*Gouraud* v. *Fitzgerald* (1888), 37 W. R. 265). If the words have been published in a newspaper, or otherwise to the public at large, names of persons need not be given, but the mode of publication must be alleged (*Wingard* v. *Cox*, [1876] W. N. 106). If the words were spoken in a public room, the plaintiff must give the best particulars he can of the names of those present (*Williams* v. *Ramsdale* (1887), 36 W. R. 125). If they are contained in a telegram, publication will be presumed until the contrary is proved (*Sadgrove* v. *Hole*, [1901] 2 K. B. 1, C. A.). But if all the names of the persons to whom publication has been made are not known to the plaintiff, he may plead that he is unable to give better particulars until after discovery (*Russell* v. *Stubbs, Ltd.* (1908), 52 Sol. Jo. 580, H. L.; and see title LIBEL AND SLANDER, Vol. XVIII., p. 657, note (*s*)). As to *Fair Comment, Justification*, and *Privilege*, see *infra*, and p. 457, *post*. As to *Mitigation of Damages*, see p. 426, *ante*, and notes thereto. No particulars will be ordered in support of an innuendo (*Heaton* v. *Goldney*, [1910] 1 K. B. 754, 757, C. A.).

Delusions.—See R. S. C., Ord. 19, r. 25A.

Equitable Interest.—This must be specially pleaded, and full particulars given to show how the equitable interest arises (*Sutcliffe* v. *James* (1879), 40 L. T. 875).

Extraordinary Traffic.—Where the plaintiff alleged that a sum claimed as extraordinary expenses of repairing a highway was arrived at by deducting from the actual expense of repair the average expense of repairing similar highways in the neighbourhood he was ordered to give particulars of the names of the similar highways and the average cost of repairing each of them (*Colchester Corporation* v. *Gepp*, [1912] 1 K. B. 477).

Fair Comment.—Particulars must be given showing the basis of comment (*Walker (Peter) & Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239, 243). If a defendant pleads that the statements of fact he has made are true and his expressions of opinion fair comment, the usual order is for particulars of the facts relied on as showing that the statements of fact are true (*Fleming* v. *Dollar* (1889), 23 Q. B. D. 388; *Yorkshire Provident Life Assurance Co.* v. *Gilbert and Rivington*, [1895] 2 Q. B. 148, C. A.). If, however, the statements of fact are merely the reproduction of the plaintiff's own

SECT. 3. Particulars.

words, the defendant will not be ordered to give particulars showing that they are true (*Digby* v. *Financial News, Ltd.*, [1907] 1 K. B. 502, C. A.; *Lyons* v. *Financial News, Ltd.* (1909), 53 Sol. Jo. 671, C. A.); and see title LIBEL AND SLANDER, Vol. XVIII., p. 699.

False Entries.—A party alleging that entries in his opponent's books or documents are false must give particulars stating which entries are objected to and the nature of the objection to each of them (*Newport (Mon.) Slipway Dry Dock and Engineering Co.* v. *Paynter* (1886), 34 Ch. D. 88, C. A.; *Harbord* v. *Monk* (1878), 38 L. T. 411).

Fatal Accidents Act.—A plaintiff suing under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), must deliver with the statement of claim "a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered" (*ibid.*, s. 4); and see title NEGLIGENCE, Vol. XXI., p. 455.

Fraud.—General allegations of fraud are not permitted (*Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685, 697). Where the assignee of a chose in action sues, the defendant cannot set up in defence that the assignment was obtained by the fraud of a third person (*Staffordshire Financial Co.* v. *Hill* (1909), 53 Sol. Jo. 446, H. L.). The party who alleges fraud must do so clearly and specifically, and with full particulars; see p. 425, *ante*. Thus a party alleging misrepresentation must give the date of each misrepresentation and state by whom it was made, and whether verbally or in writing, and, if in writing, identify the document (*Seligmann* v. *Young*, [1884] W. N. 93; *Symonds* v. *City Bank* (1886), 34 W. R. 364; *Briton Medical and General Life Association* v. *Britannia Fire Association and Whinney* (1888), 59 L. T. 888). In certain cases, where the plaintiff cannot know the details of the fraud, the court will allow particulars to be postponed until after discovery (*Whyte* v. *Ahrens* (1884), 26 Ch. D. 717, C. A.; *Leitch* v. *Abbott* (1886), 31 Ch. D. 374, C. A.; *Waynes Merthyr Co.* v. *Radford (D.) & Co.*, [1896] 1 Ch. 29); and see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 724, 740, 742.

Goods Sold and Delivered.—The date and amount of each delivery should be set out (*Parpaite Frères* v. *Dickinson* (1878), 38 L. T. 178). If a plaintiff alleges that the prices are fair and reasonable, a defendant who merely traverses such allegation cannot be ordered to give particulars in support of his traverse (*James* v. *Radnor County Council* (1890), 6 T. L. R. 240); and see title SALE OF GOODS.

Heirship Pedigree.—The claimant must show in his pleading how he is heir (*Palmer* v. *Palmer*, [1892] 1 Q. B. 319). He must give the best pedigree he can from the materials in his possession (*Blacklidge* v. *Anderton*, [1893] W. N. 112). As to pedigrees as evidence, see title EVIDENCE, Vol. XIII., p. 469.

Highway.—If in an action of trespass to land the defendant justifies on the ground that there is a right of way over the land, and that he was lawfully using the same, he need not give particulars showing the course of the path. If it is a public highway he need not state the termini, but, if it is a private way, he must give the *terminus a quo* and the *terminus ad quem* (*Rouse* v. *Bardin* (1790), 1 Hy. Bl. 351; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 140). Formerly it was the rule that the mode of dedication need not be alleged (*Williams* v. *Wilcox* (1838), 8 Ad. & El. 314, 331); but now particulars must be given of the facts, other than user by the public, relied on as showing dedication, and, where the defendant alleges that the plaintiff, or his predecessors, had dedicated a highway, he may be ordered to give the names and dates of the acts of dedication or declarations of intention to dedicate, and the names of the persons to whom such dedications were made (*Spedding* v. *Fitzpatrick* (1889), 38 Ch. D. 410, C. A.).

Immaterial Allegations.—No particulars of such allegations will be ordered (*Cave* v. *Torre* (1886), 54 L. T. 515, C. A.; *General Stock Exchange* v. *Bethell* (1886), 2 T. L. R. 683).

Inevitable Accident.—No particulars are necessary. The defence can be raised at trial without being pleaded at all (*Rumbold* v. *London County Council* (1909), 25 T. L. R. 541, C. A.; and see title NEGLIGENCE, Vol. XXI., p. 467).

Insurance.—In an action on a fire policy, particulars showing the cause and place of origin of fire will not be ordered (*Young* v. *Scottish Union and National Insurance Co.* (1907), 24 T. L. R. 73, C. A.); and, as to such claims, see title INSURANCE, Vol. XVII. p. 530).

Intention.—Where fraudulent intention is alleged no particulars need be given of the circumstances from which it is to be inferred (R. S. C., Ord. 19, r. 22; and see *Condition of Mind*, p. 454, *ante*).

Justification.—A defendant must give full particulars of the facts he relies on as showing that a defamatory statement is true, if required, to prevent the plaintiff from being taken by surprise (see title LIBEL AND SLANDER, Vol. XVIII., p. 673; *Emden* v. *Burns* (1894), 10 T. L. R. 400; *Arnold and Butler* v. *Bottomley*, [1908] 2 K. B. 151, C. A.).

Libel.—Where the libel complained of is of great length a plaintiff may be ordered to give particulars of the portions which he contends are untrue (*Oakey Hall* v. *Bryce* (1890), 6 T. L. R. 284).

Lump Sums.—Whenever a lump sum is claimed or credited, particulars showing how the lump sum is made up must be given (*Philipps* v. *Philipps* (1878), 4 Q. B. D. 127, 131, C. A.; *Godden* v. *Corsten* (1879), 5 C. P. D. 17; *Hall* v. *Symons* (1892), 92 L. T. Jo. 337, C. A.). If the claim is for money paid, the particulars must show when and to whom each item was paid (*Gunn* v. *Tucker* (1891), 7 T. L. R. 280; and see title CONTRACT, Vol. VII., pp. 444 *et seq.*). If the claim is based on different grounds, *e.g.*, carriage and warehousing of goods, and work and labour done, the particulars must show how much is claimed on each ground, and when and how each such claim arose (*ibid.*; and see *Sedgwick* v. *Yedras Mining Co.* (1887), 4 T. L. R. 17; *Mansion House Association on Railway and Canal Traffic for the United Kingdom* v. *Great Western Rail. Co.*, [1895] 2 Q. B. 141, C. A.).

Malice.—No particulars need be given of the circumstances from which malice is to be inferred (R. S C., Ord. 19, r. 22; and see *Intention, supra.*

Misconduct.—In an action for wrongful dismissal, particulars must be given of the misconduct relied upon as entitling the defendant to dismiss the plaintiff (*Saunders* v. *Jones* (1877), 7 Ch. D. 435, C. A.; *Benbow* v. *Low* (1880), 16 Ch. D. 93, C. A.; *Marshall* v. *Inter-Oceanic Steam Yachting Co.* (1885), 1 T. L. R. 394); and as to such grounds, see title MASTER AND SERVANT, Vol. XX., pp. 98, 105.

Misrepresentation.—See *Fraud*, p. 456, *ante*.

Money Claims.—See *Credit*, p. 455, *ante*; *Lump Sums, supra.*

Negligence.—A person alleging negligence must set out the respects in which he alleges his opponent was negligent, as well as the facts which show a duty to take care (*Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371; *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K. B. 391, 400); and see p. 424, *ante*, and title NEGLIGENCE, Vol. XXI., p. 357.

Notice.—Where it is material to allege notice to a person of any matter or fact, this may be alleged without setting out the facts from which such notice is to be inferred, unless the precise facts are material (R. S. C. Ord. 19, r. 23); and see p. 427, *ante*.

Passing-off.—Where a plaintiff alleges that a defendant has induced persons to purchase the defendant's goods as and for those of the plaintiff, he must give the names and addresses of such persons (*Humphries & Co.* v. *Taylor Drug Co.* (1888), 39 Ch. D. 693); and see title TRADE MARKS, TRADE NAMES, AND DESIGNS.

Patents.—As to particulars in actions for revocation, and as to particulars of breaches and objections in actions for infringement, see title PATENTS AND INVENTIONS, pp. 206, 216 *et seq.*, *ante*.

Payment into Court.—Where the plaintiff claims in respect of several causes of action, and the defendant makes a payment into court, he must give particulars showing in respect of which cause of action the payment in is made (*James Tucker Steamship Co.* v. *Lamport and Holt* (1906), 23 T. L. R. 10, C. A.); and see title PRACTICE AND PROCEDURE. Similarly, where there are several heads of claim (*Orient Steam Navigation Co.* v. *Ocean Marine Insurance Co.* (1886), 34 W. R. 442; *Rowe* v. *Kelly* (1888), 59 L. T. 139; *Boulton* v. *Houlder Brothers & Co.* (1903), 19 T. L. R. 635

SECT. 3. Particulars.

Where the names of persons present are essential to a complete statement of the case to be met, it is no ground for refusing to order particulars of such names that the party against whom such order is made will be compelled to disclose the names of his witnesses (*g*).

SECT. 4.—*Reply and Subsequent Pleadings.*

When delivered.

929. No reply may be delivered unless by order or by leave (*h*). No pleading subsequent to reply other than a joinder of issue may be pleaded without the leave of the court or a judge, and then only upon such terms as the court or a judge thinks fit (*i*).

C. A.). Where there are several plaintiffs, a defendant who pays into court may be ordered to apportion the sum among them (*Benning* v. *Ilford Gas Co.*, [1907] 2 K. B. 290).

Privilege.—Particulars must be given showing how and why the occasion is privileged (*Elkington* v. *London Association for the Protection of Trade* (1911), 27 T. L. R. 329, C. A.; *Simmonds* v. *Dunne* (1871), 5 I. R. C. L. 358, 362); and see title LIBEL AND SLANDER, Vol. XVIII., pp. 677 *et seq.*

Recovery of Land.—The plaintiff, if he has not been in possession, must set out the facts which show his title (*Philipps* v. *Philipps* (1878), 4 Q. B. D. 127, C. A.; *Darbyshire* v. *Leigh*, [1896] 1 Q. B. 554, C. A.); and see title LANDLORD AND TENANT, Vol. XVIII., p. 558. If he claims as assignee of the reversion he must give particulars of the devolution of the estate to himself (*Davis* v. *James* (1884), 26 Ch. D. 778).

Right of Way.—As to a public right of way, see *Highway*, p. 456, *ante*. If a party alleges a private right of way he must set out the *terminus a quo* and the *terminus ad quem* of such way (*Rouse* v. *Bardin* (1790), 1 Hy. Bl. 351), and the title under which he claims the right (*Harris* v. *Jenkins* (1882), 22 Ch. D. 481; see also *Pledge & Sons* v. *Pomfret* (1905), 74 L. J. (CH.) 357); and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 257.

Seduction.—As a rule the court does not order the plaintiff to give particulars of immoral intercourse with the defendant, unless the latter states on oath that no such intercourse has taken place; see title MASTER AND SERVANT, Vol. XX., p. 274; but see *Kelly* v. *Briggs* (1888), 85 L. T. Jo. 78.

Special Damage.—No evidence can be given of special damage unless such damage has been alleged in the statement of claim; see title DAMAGES, Vol. X., p. 346. Where such damage is alleged the plaintiff will be ordered to give full particulars (*Bluck* v. *Lovering* (1885), 1 T. L. R. 497; *Dimsdale* v. *Goodlake* (1876), 40 J. P. 792; *Watson* v. *North Metropolitan Tramways Co.* (1886), 3 T. L. R. 273). If the loss of specific customers is alleged the names must be given, but if only a general diminution of business is alleged names need not be given (*Evans* v. *Harries* (1856), 1 H. & N. 251; *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A.); and see title LIBEL AND SLANDER, Vol. XVIII., p. 718.

Breach of Trust.—Full particulars of the actual breaches complained of must be given, and the plaintiff will not be allowed at the trial to complain of breaches outside the particulars given in the statement of claim (*Re Anstice, Anstice* v. *Hibbell* (1885), 33 W. R. 557; *Re Wrightson, Wrightson* v. *Cooke*, [1908] 1 Ch. 789, 799; and compare *Re Symons, Luke* v. *Tonkin* (1882), 21 Ch. D. 757; *Smith* v. *Armitage* (1883), 24 Ch. D. 727); and see title TRUSTS AND TRUSTEES.

Work and Labour done.—Full particulars must be given; see *Lump Sums*, p. 457, *ante*; and see title WORK AND LABOUR.

Wrongful Dismissal.—As to justifying a dismissal, see *Justification*, and *Misconduct*, p. 457, *ante*.

(*g*) *Zierenberg* v. *Labouchere*, [1893] 2 Q. B. 183, 187, C. A.; *Bishop* v. *Bishop*, [1901] P. 325.

(*h*) R. S. C., Ord. 23, r. 1.

(*i*) *Ibid.*, r. 3.

SECT 4. Reply and Subsequent Pleadings.

Time for delivery.

930. A plaintiff must deliver his reply, if any, within the time specified in the order giving leave to deliver a reply, or, if no time is specified, within ten days after the defence, or the last of the defences, has been delivered, unless the time is extended by the court or a judge (*k*).

Every pleading subsequent to reply must be delivered within the time specified in the order giving leave to deliver the same, or if no time is specified, then within four days after the delivery of the previous pleading, unless the time is extended by the court or a judge (*l*).

Effect of default.

931. If the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings are deemed to be closed, and all material statements of fact in the pleading last delivered are deemed to have been denied and put in issue (*m*).

Contents of reply.

932. A plaintiff by his reply must raise all matters on which he intends to rely in rebuttal of the allegations contained in the defence (*n*) and which under the rules hereinbefore set out should be specially pleaded (*o*), and also his defence to any counterclaim (*p*) raised by the defendant with his defence (*q*).

Defence to set-off or counterclaim arising after defence or after reply.

933. If, after a defence has been delivered, any ground of defence arises to any set-off or counterclaim alleged therein by the defendant, it may be raised by the plaintiff in his reply, either alone or together with any other ground of reply (*r*).

Where any defence to any set-off or counterclaim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of reply has arisen, or at any subsequent time by leave of the court or a judge, deliver a further reply (*s*).

(*k*) R. S. C., Ord. 23, r. 2.

(*l*) *Ibid.*, r. 3. The names of the pleadings subsequent to reply under the old system of pleading were rejoinder (by defendant), surrejoinder (by plaintiff), rebutter (by defendant), surrebutter (by plaintiff), and these names would still be used were such pleadings required (R. S. C., Ord. 72, r. 2). Leave to deliver a special rejoinder is not given unless such pleading is really required (*Harry* v. *Davey* (1876), 34 L. T. 842; *Norris* v. *Beazley* (1877), 35 L. T. 845).

(*m*) R. S. C., Ord. 27, r. 13.

(*n*) *Ibid.*, Ord. 19, r. 2.

(*o*) See pp. 425 *et seq.*, and 447 *et seq.*, *ante*.

(*p*) See title SET-OFF AND COUNTERCLAIM. The plaintiff may include in his reply any counterclaim by way of defence to the defendant's counterclaim, although the matter was not included in his statement of claim, provided he does not put it forward by way of an independent claim (*Renton, Gibbs & Co., Ltd.* v. *Neville & Co.*, [1900] 2 Q. B. 181, C. A.)

(*q*) R. S. C., Ord. 19, r. 2.

(*r*) *Ibid.*, Ord. 24, r. 1.

(*s*) *Ibid.*, r. 2.

PLEDGE.

See AGENCY; PAWNS AND PLEDGES.

PLENE ADMINISTRAVIT.

See EXECUTORS AND ADMINISTRATORS.

PLENIPOTENTIARIES.

See CONFLICT OF LAWS; CONSTITUTIONAL LAW.

POACHING.

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POLICE.

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Part I.—Origin of Police Forces.

SECT. 1.—*Introductory.*

Earliest forms of police organisation.

934. The modern system of police forces has been slowly evolved from the succession of peace officers, who at different times and under varying titles have safeguarded the internal peace of the kingdom.

Head-boroughs etc.

The earliest form of police organisation appears to have been local associations of persons who, as subjects of the king, became surety for one another's keeping of the peace (*a*). These associations elected principal men called headboroughs, borsholders or tithing-men, to whom they committed the responsibility for order in their association. Although these offices have never been formally abolished, they fell into abeyance with the introduction of a new system of safeguarding the peace through justices appointed for that purpose (*b*).

(*a*) Lambard, Duties of Constables, p. 6; 2 Hawk. P. C., c. 10, s. 33; 1 Bl. Com., p. 356.

(*b*) They are referred to as still existing in the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 10, and the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 3.

Constables of hundreds.

935. Officers called constables were created for each hundred or franchise with the duty of reporting to the justices default in the keeping of arms (*c*); and their duties were gradually increased as the appointment of justices became vested solely in the Crown and the jurisdiction of the justices was defined, until the guarding of the peace was practically left in their hands (*d*).

High and petty constables.

936. The term "constable" was given to several kinds of officers, whose duties, though similar in kind, varied very largely in importance.

Thus high constables were appointed for hundreds and petty constables for townships, boroughs, and parishes (*e*).

Duties.

The duties assigned to them included, besides the general maintenance of the peace, the making of reports of default in the upkeep of highways, the levying of distress for forfeiture under the Highway Acts, the making of returns of popish recusants, and the levying of rates for the relief of plague (*f*). In addition to these duties high constables had to attend at quarter sessions, to issue notices to justices relating to special sessions and to issue precepts for the collection and transmission of local rates (*g*). They were appointed originally by the court of the hundred (*h*), later, usually by quarter sessions, and finally by the justices at special sessions (*i*). Their duties were from time to time transferred or abolished, and finally they themselves ceased to exist (*k*).

SECT. 2.—*Parish Constables.*

Appointment

937. Petty constables date from the early years of King Edward III. (*l*), and, under the name of parish constables, may exist in non-urban parishes at the present day, but are not now appointed in any parish except after a resolution of the justices at quarter sessions (*m*). Where the appointment is authorised by

(*c*) Lambard, Duties of Constables, p. 5.

(*d*) Compare title MAGISTRATES, Vol. XIX., p. 535.

(*e*) See Lambard, Duties of Constables, pp. 5, 10.

(*f*) *Ibid.*, pp. 11, 32, 33, 36, 37, 39.

(*g*) See County Rates Act, 1844 (7 & 8 Vict. c. 33); High Constables Act, 1869 (32 & 33 Vict. c. 47).

(*h*) Statute of Winchester, 1285 (13 Edw. 1, c. 4) (now repealed).

(*i*) County Rates Act, 1844 (7 & 8 Vict. c. 33), s. 8; and see title MAGISTRATES, Vol. XIX., pp. 568, 569.

(*k*) County Rates Act, 1844 (7 & 8 Vict. c. 33), s. 8; High Constables Act, 1869 (32 & 33 Vict. c. 47). An exception was made in favour of the continuance of a high constable who was by law or custom a returning officer at an election, or charged with the supervision of the register of electors, or in whom real property was vested by virtue of his office (*ibid.*, s. 2).

(*l*) See Lambard, Duties of Constables, p. 6.

(*m*) Parish Constables Act, 1872 (35 & 36 Vict. c. 92), ss. 1, 2. The right of direct appointment is specially reserved to the justices of the respective petty sessional divisions where application is made by a parish council, or two or more such councils united, for the appointment of a paid constable (*ibid.*, ss. 4, 5); see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6; titles LOCAL GOVERNMENT, Vol. XIX., p. 247, note (*d*); MAGISTRATES, Vol. XIX., pp. 570, 571, 636. Parish constables are not appointed in the City of London or Metropolitan Police District (see p. 467, *post*), or in boroughs regulated by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50) (see title LOCAL GOVERNMENT, Vol. XIX., p. 293), or in parishes which have adopted the Lighting and Watching Act, 1833 (3 & 4 Will. 4,

SECT. 2. Parish Constables.

such a resolution, it is made by the justices of the petty sessional area in which the parish is situated, in special sessions (*n*), notice of the holding of which must be given to the justices by their clerk (*o*).

Qualifications and disqualifications.

938. The persons appointed are selected from a list of qualified persons prepared by the overseers of parishes (*p*) by the order of the justices (*q*). In order to be qualified a person must be an able-bodied man between twenty-five and fifty-five years of age, resident in the parish and rated for poor relief or to the county rate on a tenement of the annual value of £4 (*r*).

Certain classes of persons are disqualified (*s*) and others are exempt from serving (*t*). Persons selected to serve must do so or find a qualified substitute (*a*). In the case of a vacancy occurring,

c. 90) (see title GAS, Vol. XV., p. 308), or in the county of Chester (Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 21; Parish Constables Act, 1850 (13 & 14 Vict. c. 20), ss. 7, 8).

(*n*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 1. A list of the constables appointed is to be sent to the clerk of the peace and also to be published (*ibid.*, s. 14). The warrant of appointment is to be served personally upon the persons selected to serve (Parish Constables Act, 1872 (35 & 36 Vict. c. 92), s. 3); see, further, title MAGISTRATES, Vol. XIX., pp. 570, 571.

(*o*) Parish Constables Act, 1850 (13 & 14 Vict. c. 20), s. 4.

(*p*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 3. Small parishes and extra-parochial places may for this purpose be annexed to adjoining parishes (*ibid.*, s. 4). The list is to be fixed on church doors the first three Sundays in March and a list kept open for inspection for the first three weeks in March without payment of any fee (*ibid.*, s. 8).

(*q*) *Ibid.*, s. 2. The overseers, acting on a precept of the justices, call a meeting of the parish council, at which the list is prepared (*ibid.*, s. 3). The council has no discretion to do otherwise than obey the precept (*R.* v. *North Bierley Overseers* (1858), E. B. & E. 519); and the overseers may be compelled by mandamus to prepare the required list (*R.* v. *Thornton Overseers and West Riding of Yorkshire Justices* (1858), 6 W. R. 632).

(*r*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 5. Actual residence is a necessary condition of being compellable to serve. The carrying on of a trade or business is insufficient (*R.* v. *Adlard* (1825), 4 B. & C. 772). Persons who are not qualified but are willing to serve may be recommended by the council and appointed (Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 3).

(*s*) *Ibid.*, s. 7. The classes named are licensed victuallers and persons licensed to deal in any excisable liquors or to sell beer by retail, gamekeepers, and persons who have been attainted of treason or felony, or convicted of any infamous crime; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 430, note (*i*).

(*t*) The classes named include peers and members of Parliament, judges, justices of the peace, deputy lieutenants, clergy of any denomination, schoolmasters, members of the legal or medical professions, persons serving in any of the naval or military services, apothecaries, pilots, officers of the Royal Household, customs or excise officers, sheriffs and their officers, high constables or county police, registrars of births, churchwardens and other parish or poor law officials, employees of the Post Office (Parish Constables Act, 1842 (5 & 6 Vict. c. 109); Parish Constables Act, 1850 (13 & 14 Vict. c. 20), s. 5). Formerly a naturalised foreigner was exempt (*R.* v. *de Mierre* (1771), 5 Burr. 2787).

(*a*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 16; see *R.* v. *Clarke* (1787), 1 Term Rep. 679. The qualified substitute need not, however, be upon the overseers' list (*R.* v. *Booth* (1848), 12 Q. B. 884). If a man is selected as a constable in two different parishes the same year, acceptance of office in one parish frees him from liability to serve in the other (*R.* v. *Mosly* (1835), 5 Nev. & M. (K. B.) 261). But a person who

the person who last served, or the person finding a substitute when the vacancy is due to the death or disqualification of such substitute, must serve until a fresh appointment is made, after due notice, at the next court of petty sessions (*b*).

After having once served in person or by substitute, a person is not liable to be called on to serve the office again until every other person eligible has served in person or by substitute (*c*).

Powers.

939. Parish constables have power to act throughout the whole of the county in which their parish is situated, including detached parts of other counties and in every adjoining county, but they are not bound, except with the special warrant of a justice of the peace, to act outside their own parish (*d*). Their privileges and immunities have a like extent (*e*).

Fees.

940. They are entitled to the fees and allowances, settled by the justices at quarter sessions with the approval of the Home Secretary (*f*), for the service of summonses, execution of warrants or written orders of a justice, or such occasional duties as in the opinion of the justices they may be required to perform (*g*). These fees and allowances are to be applied in aid of the poor rate (*h*).

Control.

941. Parish constables are subject to the authority of the chief constable of the county in which their parish is situated (*i*), and may be punished for neglect of duty upon summary conviction before two justices (*k*).

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holds the office of constable in a manor and is exempt from holding other civic offices within the manor is not exempt from the duty to serve as parish constable (*R.* v. *Darbyshire* (1761), 2 Burr. 1182).

(*b*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 16.

(*c*) *Ibid.*, s. 11.

(*d*) *Ibid.*, s. 15; Parish Constables Act, 1872 (35 & 36 Vict. c. 92), s. 10.

(*e*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 15.

(*f*) The police powers of a Secretary of State are in fact exercised by the Home Secretary, and accordingly the term "Home Secretary" is used throughout the remainder of this title in place of that of "Secretary of State"; but it must be remembered that these powers could, in his absence, be exercised by any other Secretary of State; see title CONSTITUTIONAL LAW, Vol. VII., pp. 83, 85.

(*g*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 17; Parish Constables Act, 1850 (13 & 14 Vict. c. 20), s. 2; Parish Constables Act, 1872 (35 & 36 Vict. c. 92), s. 11. The payments are made out of the county rate or, where this is not applicable, out of the poor rate, under regulations made by the justices at quarter sessions subject to the approval of the Home Secretary (Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 17). Fees for services rendered to overseers, surveyors of highways, or other parish officers may be claimed without an order of justices, and if they are not paid may be recovered in a court of summary jurisdiction (Parish Constables Act, 1872 (35 & 36 Vict. c. 92), s. 12). Paid constables appointed on the application of a parish council cannot, however, claim fees for services rendered to the parish or parish officers (*ibid.*, s. 8).

(*h*) *Ibid.*, s. 7. Where costs are awarded by the justices in any proceedings instituted before them by a paid constable, these must be similarly applied (*ibid.*, s. 9).

(*i*) *Ibid.*, s. 7. As to chief constables, see p. 484, *post*.

(*k*) Parish Officers Act, 1793 (33 Geo. 3, c. 55), s. 1.

SECT. 3. Transition to Modern Police Forces.

SECT. 3.—*Transition to Modern Police Forces.*

Watchmen and beadles.

942. Parish constables had their counterpart in urban districts in the watchmen and beadles appointed by the borough corporations and their watch committees, but while the parish constable in rural districts is merely superseded in practice (*l*), the watchmen and beadles of the town have ceased to exist in law as well as in fact.

Special constables.

The inadequacy of the old order to meet the requirements of more modern times led to the practice of appointing special constables to cope with particular emergencies (*m*). This practice was regulated by statute, and the powers given for the creation of special constables survive at the present day, though the occasions which call for their employment are comparatively rare.

Modern police forces.

With the exception of such occasions the duties of police are now performed exclusively by the police forces, which were first established at the instance of Sir Robert Peel.

Transition as regards areas.

943. The local nature of the police organisation has been modified but not abolished. The county took the place of the parish as the unit (*n*), and arrangements were made for the elimination of the smaller borough police forces (*o*).

Metropolitan police.

944. The Capital itself, except the City of London, and the surrounding districts were committed to the care of a force known as the Metropolitan Police Force, the control of which is under the immediate supervision of the Government, and which is thus able to perform national as well as local services (*p*).

Part II.—Metropolitan Police.

SECT. 1.—*Area.*

The police force of the Capital.

945. The Metropolitan Police Force is the most important body of its kind, not only because it is the police force of the Capital and of the surrounding area, but because of its intimate connection with the government of the country (*a*).

The Force was formed in 1829 as a result of the recommendation of a committee of the House of Commons appointed on the motion of the Home Secretary (*b*).

(*l*) See p. 463, *ante*.

(*m*) See p. 491, *post*.

(*n*) County Police Act, 1839 (2 & 3 Vict. c. 93).

(*o*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69); Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 39.

(*p*) Metropolitan Police Acts, 1829 (10 Geo. 4, c. 44), and 1839 (2 & 3 Vict. c. 47); Police Act, 1909 (9 Edw. 7, c. 40); see p. 476, *post*.

(*a*) The area actually served by the Metropolitan Police Force is now about 700 square miles, with a total rateable value of nearly £60,000,000.

(*b*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 4. The then Home Secretary was Mr. (afterwards Sir Robert) Peel.

SECT. 1. Area.

946. The area for which the Force was to act was determined by statute and called the Metropolitan Police District (*c*).

Area.

The area included the city and liberties of Westminster and such of the parishes, townships, precincts, and places in the counties of Middlesex, Surrey, and Kent as were specified in a schedule (*d*), but provision was made for the subsequent inclusion in it by Order in Council of any parish or place within twelve miles of Charing Cross (*e*).

This limit was extended to any part of the Central Criminal Court district (*f*) or of a parish or place within fifteen miles of Charing Cross which might be specified by Order in Council (*g*) and to every part of the river Thames within or adjoining the counties of Middlesex, Surrey, Berkshire, Essex, and Kent (*h*).

Trafalgar Square, which is the freehold of the Crown, was included in the district in 1844 (*i*) and provision made for the guarding of Royal Palaces by selected members of the Metropolitan Police (*k*). Metropolitan police may be employed by the Commissioner at the discretion of the Home Secretary within the dockyards, victualling yards, and steam factory yards of the Crown and the central arsenal and principal stations of the War Department and within fifteen miles of any of them (*l*).

The City of London is not included in the Metropolitan Police District (*m*).

SECT. 2.—*Government.*

Control and officials.

947. The Metropolitan Police Force is under the control of the Home Secretary, who is the police authority for the district (*n*); the Force is governed by a Commissioner of Police and four Assistant Commissioners, all of whom are appointed by the Crown on the nomination of the Home Secretary (*o*). The treasurer of the Force

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(*c*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44). As to the establishment of Metropolitan Police Courts, see title MAGISTRATES, Vol. XIX., pp. 548, 549.

(*d*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), Sched.

(*e*) *Ibid.*, s. 34.

(*f*) See Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), ss. 2, 3; and title COURTS, Vol. IX., p. 88.

(*g*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 2.

(*h*) *Ibid.*, s. 5. Creeks, inlets, and water docks, quays and landing places adjacent thereto are included (*ibid.*).

(*i*) Trafalgar Square Act, 1844 (7 & 8 Vict. c. 60).

(*k*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 7.

(*l*) Metropolitan Police Act, 1860 (23 & 24 Vict. c. 135), ss. 1, 2, 6. When not actually in the precincts of a naval or military station, or on one of His Majesty's ships, their authority is confined to the property of the Crown or persons subject to naval or marine or military discipline (*ibid.*, s. 2; see *Turner* v. *Ford* (1877), 37 L. T. 352).

(*m*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 2; but as to co-operation with the City police, see p. 481, *post*.

(*n*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 33, Sched. III.; see note (*f*), p. 465, *ante*.

(*o*) The persons originally appointed Commissioners were the police magistrates (Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 4; see Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 1, and the Metropolitan Police Act, 1836 (6 & 7 Will. 4, c. 50), now repealed). By the Metropolitan Police Act, 1856 (19 & 20 Vict. c. 2), ss. 1, 2, one Commissioner and two

SECT. 2. Government.

is the Receiver of Metropolitan Police, who is appointed in the same manner as the Commissioner (*p*). These officials all hold office during the pleasure of the Crown (*q*).

They are disqualified from election to the House of Commons (*r*), and may not canvass at any parliamentary or municipal elections in any place policed by the Metropolitan Police Force (*s*), but they are not disentitled to vote at any parliamentary or municipal election (*t*).

SECT. 3.—*The Receiver.*

Duties as to payments.

948. The Receiver receives all moneys applicable to the Metropolitan Police Fund (*a*), and out of them pays, subject to the discretion of the Home Secretary, the salaries, wages, and allowances due to members of the Metropolitan Police Force (*b*), and the expenses of the metropolitan police courts (*c*) and of the court of the stipendiary magistrate for Chatham and Sheerness (*d*), and such extraordinary expenses incurred by the members of the Metropolitan Police Force in the execution of their duty as are approved by the Commissioner of Police, and such other charges as the Home Secretary may direct (*e*).

Accounts.

949. The accounts of the Receiver are drawn up and submitted to the Home Secretary half-yearly, or oftener if required. They are audited by the Commissioners for auditing the public accounts or

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Assistant Commissioners were provided for. A third Assistant Commissioner was provided for by the Metropolitan Police Act, 1884 (47 & 48 Vict. c. 17), s. 2, and a fourth by the Metropolitan Police Act, 1909 (9 Edw. 7, c. 40), s. 3. As to their powers and duties, see p. 469, *post*. The salaries of the Commissioner and Assistant Commissioners are regulated by the Home Secretary with the approval of the Treasury. That of the Commissioner is paid out of parliamentary funds, those of the Assistant Commissioners out of parliamentary funds or the Metropolitan Police Fund, as the Home Secretary, with the approval of the Treasury, may appoint; but the amount which may be paid out of parliamentary funds is limited to £1,200 a year (Metropolitan Police Act, 1899 (62 & 63 Vict. c. 26), ss. 1, 2).

(*p*) The post of Receiver was created, and the conditions of his appointment regulated, by the Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 10. He is paid a salary appointed by the Home Secretary, with the approval of the Treasury, out of parliamentary funds (Metropolitan Police Act, 1899 (62 & 63 Vict. c. 76), s. 1); and has a staff of clerks under him in an office which is under the departmental control of the Home Secretary. As to his duties, see the text, *infra*.

(*q*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), ss. 1, 10.

(*r*) *Ibid.*, s. 18; Metropolitan Police Act, 1856 (19 & 20 Vict. c. 2), s. 9.

(*s*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 18; Metropolitan Police Act, 1860 (23 & 24 Vict. c. 135), s. 5; see title ELECTIONS, Vol. XII., p. 539; p. 474, *post*.

(*t*) Police Disabilities Removal Acts, 1887 (50 & 51 Vict. c. 9), and 1893 (56 & 57 Vict. c. 6).

(*a*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 10; Police Act, 1890 (53 & 54 Vict. c. 41), ss. 33, 34.

(*b*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 12.

(*c*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 7. Except the salaries of the metropolitan police magistrates, which are payable out of the Consolidated Fund (Metropolitan Police Magistrates Act, 1875 (38 & 39 Vict. c. 3), s. 1).

(*d*) Metropolitan Police Courts Act, 1897 (60 & 61 Vict. c. 26), s. 6.

(*e*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 12.

such other person as the Home Secretary may direct (*f*), and are laid annually before Parliament (*g*). The account of the Receiver is kept by the Bank of England, which pays the drafts and orders drawn by the Receiver and countersigned by the Commissioner of Police (*h*).

Powers of Receiver with regard to property.

950. Provision is made for vesting all the police property in the Receiver (*i*), and for securing the transfer of it to his successor upon his removal (*k*). He is empowered to take or lease property of any tenure required for the use of the Metropolitan Police Force, and to transfer, demise, enfranchise, mortgage, or dispose of any property vested in him with the approval of the Home Secretary (*l*). He may provide, by building or otherwise, the accommodation required for the police and police courts, and may borrow money for these purposes (*m*). He is the police authority to whom claims for damage under the Riot (Damages) Act (*n*) must be made.

Temporary Receiver.

951. During the temporary absence of the Receiver a person appointed by warrant under the hand of the Home Secretary may act temporarily in his place (*o*).

SECT. 4.—*The Commissioners.*

Power as justice *ex officio*.

952. The Commissioner and Assistant Commissioners of Police are *ex officio* justices of the counties of Middlesex, Surrey, Hertford, Kent, Essex, Berkshire, and Buckinghamshire (*p*), and for the

(*f*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 11.

(*g*) This must be done within thirty days after the 31st March in each year (*ibid.*, s. 29; Metropolitan Police (Receiver) Act, 1867 (30 & 31 Vict. c. 39), s. 1).

(*h*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 10; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 4. The account is kept in the name of the Receiver, who is a corporation sole, and not in the personal name of the holder of the office (Metropolitan Police (Receiver) Act, 1861 (24 & 25 Vict. c. 124), ss. 1, 4).

(*i*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 16. The metropolitan police courts were vested in the Commissioner of Works by the Metropolitan Police Court (Buildings) Act, 1871 (34 & 35 Vict. c. 35), s. 3, but were retransferred to the Receiver by the Metropolitan Police Courts Act, 1897 (60 & 61 Vict. c. 26), s. 3.

(*k*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), ss. 14, 15; Metropolitan Police (Receiver) Act, 1861 (24 & 25 Vict. c. 124), ss. 2, 3.

(*l*) *Ibid.*, s. 5.

(*m*) Metropolitan Police Acts, 1886 (49 & 50 Vict. c. 22), and 1887 (50 & 51 Vict. c. 45). Under these Acts the amount to be borrowed was limited to £200,000. It was extended for the purposes of the police courts to £700,000 by the Metropolitan Police Courts Act, 1897 (60 & 61 Vict. c. 26), s. 4. The buildings vested in the Receiver are exempt from the provisions of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), relating to buildings and structures (*ibid.*, s. 3 (2); and see title METROPOLIS, Vol. XX., p. 474). The money required for loans may be obtained from the London County Council (Metropolitan Police Act, 1886 (49 & 50 Vict. c. 22), s. 3 (4)). The raising of a loan is subject to the approval both of the Home Secretary and of the Treasury (*ibid.*, s. 6); see also title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 174.

(*n*) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), Sched.; Home Office Regulations, 30th June, 1894; and see p. 507, *post*.

(*o*) Metropolitan Police (Receiver) Act, 1895 (58 & 59 Vict. c. 12).

(*p*) Metropolitan Police Acts, 1829 (10 Geo. 4, c. 44), s. 1; 1839 (2 & 3 Vict. c. 47), s. 4; and 1856 (19 & 20 Vict. c. 2), s. 2.

SECT. 4. The Commissioners.

county of London (*q*); but they may not act as such at any court of general or quarter sessions or in any matter out of sessions, except for the preservation of the peace, the prevention of crimes, the detection and committal of offenders, and in carrying into execution the Metropolitan Police Acts (*r*). The Commissioner must take a special oath (*s*), besides the ordinary oaths required to be taken by justices (*t*).

Powers as to the efficiency of the Force.

953. The Commissioner is empowered, with the sanction of the Home Secretary, to make regulations relative to the good government of the members of the Metropolitan Police Force, the places of their residence, the classification, rank and particular service of the several members, their distribution and inspection, the description of arms, accoutrements, and other necessaries to be furnished to them, the provision of horses and the members of the Force to be provided with them, and all such other orders and regulations which he may deem expedient for preventing neglect or abuse and for rendering the Force efficient in the discharge of all its duties (*a*). He may swear in particular members of the Force for duty at the naval and military stations of the Crown (*b*).

Powers as to street traffic.

954. The Commissioner (*c*) is the authority charged with the framing of the regulations regarding traffic in the streets (*d*), and

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 95.

(*r*) For these Acts, see note (*p*), p. 466, *ante*.

(*s*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 2. The oath is in the following form :—" I, A. B., do swear that I will faithfully and honestly according to the best of my skill and knowledge execute all the powers and duties of a justice of the peace under and by virtue of an Act " etc. (Metropolitan Police Act, 1829 (10 Geo. 4, c. 44). As to the taking of the oath, see Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), and title MAGISTRATES, Vol. XIX., p. 543.

(*t*) As to these, see title MAGISTRATES, Vol. XIX., pp. 539, 543.

(*a*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 5.

(*b*) Metropolitan Police Act, 1860 (23 & 24 Vict. c. 135), s. 2.

(*c*) Or an Assistant Commissioner at the direction of the Commissioner and with the approval of the Home Secretary; see p. 473, *post*.

(*d*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 51, 52. Under these provisions he may regulate the route to be taken by traffic during church hours on Sunday, Christmas Day and Good Friday on the application of a minister or churchwarden of any place of worship, or at all times of public processions or rejoicings or illuminations, and may give directions to prevent obstructions in the immediate neighbourhood of the Royal Palaces, public offices, Houses of Parliament, law courts or other places. The drivers of public vehicles are not liable to any penalty for deviation from their usual route in pursuance of his regulations (*ibid.*, s. 53). Under the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), ss. 4, 10, he has power to declare special limits for the ordering of traffic within which he may, with the approval of the Home Secretary, make regulations, but he may not limit the number of metropolitan stage carriages passing down any street in pursuance of their ordinary trade (*ibid.*, s. 11). The regulations so made by him are to be publicly exhibited in such places as he thinks fit, but failure in this duty does not excuse non-compliance with the regulations (*ibid.*, s. 13). He has the power to permit the passing of bulky traffic within special limits between the hours of 10 a.m. and 7 p.m. which is otherwise prohibited (*ibid.*, s. 16). The special limits include such streets etc. as are named by the Commissioner in an order made by him with the Home Secretary's approval and advertised in the *London Gazette* (*ibid.*, s. 10). The general limits of the Metropolitan Police Act, 1829 (2 & 3

the control of public vehicles, of which he is the registrar and licensor (*e*).

He may make regulations for traffic on the Thames within the Metropolitan Police District (*f*), and may make an agreement with the Thames Conservators for the policing of piers etc. by the Metropolitan Police Force (*g*).

Traffic on the Thames.

Within certain limits he may make regulations regarding the driving of cattle through the streets (*h*).

Driving of cattle.

He may grant licences to shoeblacks, commissionaires, and messengers and make regulations respecting the exercise by them of their calling (*i*), and may grant certificates to pedlars (*k*) and chimney-sweepers (*l*).

Licences to shoeblacks, and messengers.

Vict. c. 47), are an area within a six-mile radius of Charing Cross (*ibid.*, s. 4; Metropolitan Streets Act, 1885 (48 & 49 Vict. c. 18), s. 2). He may cause notices to be affixed to any lamp post (Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 22; Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), s. 14), or to posts of the electric tramways of the London County Council by the London County Council (Tramways and Improvements) Act, 1909 (9 Edw. 7, c. lxxv.), s. 60. His powers in regard to street traffic and street offences are not altered by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 245; see, generally, title STREET AND AERIAL TRAFFIC.

(*e*) London Hackney Carriages Act, 1850 (13 & 14 Vict. c. 7), ss. 1, 2; see London Hackney Carriage Act, 1831 (1 & 2 Will. 4, c. 22); London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86); London Hackney Carriage Act, 1853 (16 & 17 Vict. c. 33); Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134); Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115). The licences for drivers of such carriages are granted by the Commissioner (London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 8), and, for the carriages themselves, by the Commissioner or such other person as the Home Secretary may direct (Metropolitan Carriage Act, 1869 (32 & 33 Vict. c. 115), ss. 6, 11). It is the Commissioner's duty to inspect hackney and stage carriages and to give notice to the proprietor if he regards any carriage as unfit, and thereafter suspend the licence in regard to it (London Hackney Carriage Act, 1853 (16 & 17 Vict. c. 33), s. 2). Proprietors withdrawing a licensed carriage from hire for more than two consecutive days or for more than two days in the week must give him ten days' notice of their intention to do so (London Hackney Carriage (No. 2) Act, 1853 (16 & 17 Vict. c. 127), s. 16. He may make regulations with regard to standing for them (London Hackney Carriages Act, 1850 (13 & 14 Vict. c. 7), s. 4); and the regulations must be advertised in the *London Gazette*, and copies exhibited at the Central Police Office, and at each of the metropolitan police courts. It is also the Commissioner's duty to keep order at cab-stands, and he may pay wages with the consent of the Treasury to persons employed at cab-stands for that purpose, and he must direct the payment of water rate for such places (London Hackney Carriage Act, 1853 (16 & 17 Vict. c. 33), ss. 12, 13). A table of distances within the Metropolitan Police District signed by the Commissioner is conclusive evidence in disputes in regard to fares calculated by distance (*ibid.*, s. 6); see also title STREET AND AERIAL TRAFFIC.

(*f*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.) 209.

(*g*) *Ibid.*, s. 208; the terms may include payment of the constables employed; and see title WATERS AND WATERCOURSES.

(*h*) Metropolitan Market Act, 1857 (20 & 21 Vict. c. cxxxv.), s. 18.

(*i*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), ss. 19, 20; and see title STREET AND AERIAL TRAFFIC.

(*k*) Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 5; and see title MARKETS AND FAIRS, Vol. XX., p. 598.

(*l*) Chimney Sweepers Act, 1875 (38 & 39 Vict. c. 70), ss. 5, 6, 14; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

SECT. 4. **The Commissioners.**

He is the local authority empowered to grant orders exempting licensed victuallers from the duty of closing (*m*) and to grant occasional licences to the keepers of refreshment houses (*n*).

Licensing authority.

Regulations as to costers, scavenging, and dogs.

He may also make regulations with the approval of the Home Secretary for the exercise of their calling by costermongers, street hawkers, and itinerant traders (*o*); he may prohibit scavenging in any streets he may deem proper except between certain hours (*p*); and he may make regulations with regard to the muzzling of dogs (*q*).

Advertisements.

Advertisements may not be carried in the streets either by a person or a vehicle without his consent (*r*).

Unlawful fairs, and gaming

He may intervene to summon the owner or occupier of ground on which an unlawful fair is held (*s*), and he may authorise a superintendent to enter unlicensed theatres (*t*), or places used for bear baiting or other unlawful sports (*a*), or gaming houses (*b*), and to take into custody the persons found there.

Arrest of persons under police supervision.

He is the authority empowered to order the arrest of persons under police supervision, to prescribe the place at which such persons are to report themselves, and to order the search of premises occupied or recently occupied by convicted persons (*c*).

Lord's Day observance.

His authority is required for the institution of proceedings under the Lord's Day Observance Act (*d*).

Explosives.

He or an Assistant Commissioner or a district superintendent has power to search for and inspect explosives and to seize and detain such as are liable to forfeiture (*e*).

(*m*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 4, c 24), s. 55; and see title INTOXICATING LIQUORS, Vol. XVIII., p. 95.

(*n*) Public House Closing Act, 1864 (27 & 28 Vict. c. 64), s. 7; and see title INTOXICATING LIQUORS, Vol. XVIII., p. 97.

(*o*) Metropolitan Streets Act Amendment Act, 1867 (31 & 32 Vict. c. 5), s. 1; see *Summers* v. *Holborn District Board of Works*, [1893] 1 Q. B. 612; *Keep* v. *St. Mary's, Newington, Vestry, Austin* v. *St. Mary's, Newington, Vestry*, [1894] 2 Q. B. 524, C. A.; and see title STREET AND AERIAL TRAFFIC.

(*p*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 5.

(*q*) *Ibid.*, s. 18; and see title ANIMALS, Vol. I., p. 400.

(*r*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 9; see London Hackney Carriage Act, 1853 (16 & 17 Vict. c. 33), s. 16; *Fulton* v. *Kelly* (1889), 5 T. L. R. 325; and see title STREET AND AERIAL TRAFFIC.

(*s*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s 39; see title MARKETS AND FAIRS, Vol. X., pp. 16, 51.

(*t*) Metropolitan Police Act, 1839 (2 & 3 Vict. c 47), s. 46; and see title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*a*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 47.

(*b*) *Ibid.*, s. 48; see the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 6; Gaming Houses Act, 1854 (17 & 18 Vict. c. 38); and see title GAMING AND WAGERING, Vol. XV., p. 291.

(*c*) Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), ss. 3, 8, 16, 20; see Prevention of Crime Act, 1879 (42 & 43 Vict. c. 55), s. 2; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 303, 414, 415.

(*d*) Sunday Observation Prosecution Act, 1871 (34 & 35 Vict. c. 87); and see title TIME.

(*e*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 35; Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 73—75, 107; and see title EXPLOSIVES, Vol. XIV., pp. 391, 392.

SECT. 4. The Commissioners.

Duties of Assistant Commissioners.

955. The duties to be performed by the Assistant Commissioners are such as may from time to time be directed by the orders and regulations of the Commissioner, made with the approval of the Home Secretary, and they are performed under the Commissioner's superintendence and control (*f*). In the event of a vacancy in the office of Commissioner, or of the Commissioner's illness or absence, one of the Assistant Commissioners may be authorised by writing under the hand and seal of the Home Secretary to act in the place of the Commissioner (*g*).

Duties which Commissioner or Assistant Commissioner may perform.

956. The following duties may be performed either by the Commissioner or by an Assistant Commissioner, namely, the appointment and swearing in of constables (*h*); the appointment of additional police (at the cost of the applicant) (*i*); the swearing in of members of the Force for duty at the Royal Palaces (*k*); and the suspension or dismissal of any man whom he thinks remiss or negligent in the discharge of, or who is otherwise unfit for, his duty (*l*).

SECT. 5.—*Constables.*

Appointment.

957. It is the duty of the Commissioner to appoint and swear in a sufficient number of constables (*m*), who, when appointed, are subject to the regulations and to the Commissioner's power of suspension or dismissal (*n*). They have all the powers of constables at common law in addition to those given them by statute (*o*).

Area of exercise of powers.

958. These powers may be exercised by them throughout the Metropolitan Police District and also in the counties of Middlesex, Surrey, Hertford, Essex and Kent (*p*), in Berkshire and Buckinghamshire, and upon the river Thames at any place adjoining the counties of Middlesex, Surrey, Berkshire, Essex and Kent or the City of London (*q*).

(*f*) Metropolitan Police Act, 1856 (19 & 20 Vict. c. 2), s. 6.

(*g*) *Ibid.*, s. 8.

(*h*) *Ibid.*, s. 7; Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 4.

(*i*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 8. The written requisition of an applicant for the appointment of additional constables need not show urgent necessity therefor (*Allen* v. *Preece* (1854), 10 Exch. 443).

(*k*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 7. A constable so sworn may act within the Royal Palaces and in any place within a radius of ten miles from them (*ibid.*).

(*l*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 5; and see p. 501, *post*.

(*m*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 4. The number at present serving is approximately 20,000.

(*n*) See the text, *supra*. As to delivery of uniform and accoutrements on resignation or dismissal, see p. 501, *post*.

(*o*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 4; and see p. 497, *post*. As to exemption from service on juries and from tolls, see p. 500, *post*.

(*p*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 4. As to the employment of metropolitan police in dockyards and military stations outside the Metropolis, see p. 467, *ante*.

(*q*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 5; see note (*h*), p. 467, *ante*.

SECT. 5. Constables.

Attendance at courts.

959. A sufficient number are required to attend the police courts and other criminal courts (*r*), and also the courts of revising barristers, within the Metropolitan Police District (*s*).

Duties.

960. It is their exclusive duty to execute all summonses and warrants issued in any criminal proceeding or by any magistrate within the Metropolitan Police District (*a*). The constable to whom a summons or warrant is directed or delivered must, except in urgent cases, hand it to his superintendent (*b*), who by indorsement thereon appoints one or more constables to execute it (*b*).

Warrants to compel the appearance of any person charged with an offence before a metropolitan police magistrate may be executed outside the Metropolitan Police District without being locally indorsed (*c*).

Disqualification for canvassing.

961. Members of the Metropolitan Police Force are not allowed to canvass at any parliamentary or municipal election for any county or borough in any part of which they are authorised to act (*d*).

Special constables.

962. Parish constables cannot be appointed in the Metropolitan Police District (*e*), but special constables may be appointed and may act at any place within the District and in the City of London (*f*).

SECT. 6.—*Metropolitan Police Fund.*

Sources of revenue.

963. The Metropolitan Police Fund is recruited from three sources: (1) a police rate (*g*), (2) an Exchequer contribution (*h*), (3) fines and fees made payable to the police fund (*i*); but by far the greater part of the money is supplied by the first two (*k*).

Police rate.

964. The police rate is limited by statute to 11*d.* in the £ (*l*), and is levied on the full and fair annual value of all property in the

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(*r*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 11.

(*s*) County Voters Registration Act, 1865 (28 & 29 Vict. c. 36), s. 16; and see title ELECTIONS, Vol. XII., p. 222.

(*a*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 12. This does not apply exclusively in the case of a summons issued under the Customs Acts (see title REVENUE), which may be served by a customs officer (Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 227). As to the penalty for neglect of duty, see p. 501, *post*.

(*b*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 13.

(*c*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 17; and see title MAGISTRATES, Vol. XIX., pp. 575, 576.

(*d*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 18; Metropolitan Police Act, 1860 (23 & 24 Vict. c. 135), s. 5; see title ELECTIONS, Vol. XII., p. 539; and see p. 468, *ante*.

(*e*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 21.

(*f*) *Ibid.*; Police Act, 1890 (53 & 54 Vict. c. 45), s. 28.

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

(*h*) See p. 475, *post*.

(*i*) See p. 476, *post*.

(*k*) The amount actually raised by rate now amounts to about 58 per cent. of the total annual income of the fund.

(*l*) Under the Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 23, the limit was 8*d.* in the pound, but it was raised to 9*d.* by the Police Rate Act, 1868 (31 & 32 Vict. c. 67), s. 2, and to 11*d.* by the Metropolitan Police Act, 1912 (2 Geo. 5, c. 4). As to the procedure to be followed when the rate first exceeds 10*d.* in the £, see *ibid.*, s. 1 (b).

Metropolitan Police District (*m*). In the county of London, the assessment on which it is based is that provided under the Metropolis Valuation Act, 1869 (*n*). Elsewhere, it is that on which the county rate, if any, is based (*o*), and, where there is no county rate, the assessment is one determined by agreement between the Receiver and the overseers of the place, subject to arbitration by the Local Government Board (*p*). Assessment.

Property not subject to poor rate is not exempt (*q*), and the rates accruing therefrom are collected by persons appointed for the purpose on the nomination of the Commissioner of Police (*r*). Collection.

Where the property is subject to poor rate the police rate is collected by the overseers of the poor (*a*). The rates when collected are paid into the account of the Bank of England (*b*).

Although the amount of this rate is limited, a special extra rate may be imposed either to pay expenses consequent on a riot (*c*) or to make up a deficiency in the Pension Fund (*d*). Special extra rate.

965. The Exchequer contribution is paid annually through the medium of the county councils whose area is either wholly or partly within the Metropolitan Police District (*e*). Exchequer contribution

(*m*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 23.

(*n*) 32 & 33 Vict. c. 67; see title RATES AND RATING.

(*o*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 23. To the valuation is to be added the amount of the annual value, on which the poor rate has been computed, of all new buildings which have become rateable for the relief of the poor since the last valuation acted upon in assessing the county rate (Metropolitan Police Act, 1857 (20 & 21 Vict. c. 64), s. 11). This does not apply inside the Metropolis itself (Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 77, Sched. V.). The Commissioner or any person with an order from him is entitled to inspect the county rate of the county part of which is within the Metropolitan Police District (Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 28; Metropolitan Police Act, 1857 (20 & 21 Vict.c. 64), s. 13).

(*p*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 27.

(*q*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), ss. 30, 32; see Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 2. An assessment so made must be publicly exhibited (Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 31). An appeal against it may be made by an aggrieved party within twenty-one days to the next court of quarter sessions, and in such case ten days' notice to the Receiver is required. At quarter sessions the assessment may, if the court thinks fit, be altered so as to relieve the appellant without altering any other part of it (*ibid.*, s. 33); and see title RATES AND RATING.

(*r*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 32. The appointment is by warrant under the hand of the Commissioner.

(*a*) *Ibid.*, s. 25. The overseers within the Metropolis are the borough councils (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 11). As to these councils, see title METROPOLIS, Vol. XX., pp. 402 *et seq.* The overseers are obliged to permit the Receiver to inspect the rates and to make such return as he requires at two days' notice, and, in default, are liable to a penalty of £10 (Metropolitan Police Act, 1857 (20 & 21 Vict. c. 64), s. 14).

(*b*) Metropolitan Police (Receiver) Act, 1861 (24 & 25 Vict. c. 124), s. 7.

(*c*) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), s. 5; and see p. 507, *post*.

(*d*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 19.

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2); see also *ibid.*, s. 93, and as to the manner of payment, see p. 483, *post*. As to the area of the Metropolitan Police District, see p. 466, *ante*.

SECT. 6. Metropolitan Police Fund

in each case is a sum annually certified by the Home Secretary to bear the same proportion to the sum raised by rates as the amount of the Exchequer contribution bore to the sum raised by rate in the financial year 1887-1888 (*f*).

In addition, further sums, determined by the Home Secretary with the approval of the Treasury, may be paid into the Metropolitan Police Fund in respect of services rendered by the Metropolitan Police for imperial and national purposes (*g*).

Fees and fines.

966. All fees received and fines imposed in the metropolitan police courts (*h*) or those of Chatham and Sheerness (*i*) are payable to the Metropolitan Police Fund, except such as are payable to the Pension Fund (*j*) and those which are specifically appropriated to some other purpose by the Act under which they are received or imposed (*k*). Other sums payable to the Fund are fines for offences, other than those above excepted, against the Metropolitan Police Acts (*l*), imposed by any metropolitan police court (*m*); fines for

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (k). Originally the State paid out of the Consolidated Fund the cost of the Thames Police and of the mounted police in the Metropolitan Police District (Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 6); but in 1854 the charge was transferred to the sums annually voted by Parliament (Public Revenue and Consolidated Fund Charges Act, 1854 (17 & 18 Vict. c. 94), s. 1). In 1868 the contribution of the State was fixed at one quarter of the annual sum raised by rates (Police Rate Act, 1868 (31 & 32 Vict. c. 67), s. 2), but in 1875 the limit was abolished and the proportion left undetermined (Police (Expenses) Act, 1875 (38 & 39 Vict. c. 48), s. 2, now repealed). As to the calculation of the amount when the police rate exceeds 8*d.* in the £, see Metropolitan Police Act, 1912 (2 Geo. 5, c. 4), s. 1 (a).

(*g*) Police Act, 1909 (9 Edw. 7, c. 40), s. 1.

(*h*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), ss. 46, 47; Metropolitan Police Courts Act, 1897 (60 & 61 Vict. c. 26), s. 1. A return is to be made at the times required by the Home Secretary (*ibid.*, s. 7 (2)). The provisions of the Gaming Act, 1854 (17 & 18 Vict. c. 38), for the payment of penalties to other purposes, do not affect penalties recovered under the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71) (*Wray* v. *Ellis* (1858), 1 E. & E. 276); see title GAMING AND WAGERING, Vol. XV., p. 289, note (*f*).

(*i*) Metropolitan Police Courts Act, 1897 (60 & 61 Vict. c. 26), s. 7 (1), as amended by the Metropolitan Police Courts Act, 1898 (61 & 62 Vict. c. 31). After payment out of the Police Fund of the salary of the Clerk of the Police Court the surplus of the fines etc. is payable to the Exchequer. As to the Pension Fund, see p. 477, *post*.

(*j*) This includes the fines imposed upon drunken persons or upon constables for misconduct, or upon persons for assaults on constables (Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 47), s. 71), and fees for the execution of summonses and warrants (*ibid.*; Police Act, 1890 (53 & 54 Vict. c. 45), ss. 16, 23 (2)).

(*k*) The exception includes fines payable to a party aggrieved or to an informer (Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 47), fines recovered under any Act relating to the customs or trade or navigation and sued for by customs officers (*ibid.*, s. 47), and fines recovered in any proceedings under any Act relating to the customs, excise, stamps, taxes, or post office (*ibid.*, s. 56).

(*l*) For these Acts, see note (*p*), p. 469, *ante*.

(*m*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 47. This does not apply to penalties recovered before a court of summary jurisdiction other than a metropolitan police court (*Police (Receiver)* v. *Bell* (1872), L. R. 7 Q. B. 433; but see Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 37).

offences relating to dog licences, when the proceedings are instituted by a member of the Metropolitan Police Force (*n*); all such fees for the execution of summonses and warrants as are directed by the Home Secretary to be paid to the Fund instead of the Pension Fund (*o*); and all sums for licences issued in respect of hackney and stage carriages within the Metropolitan Police District or the City of London (*p*).

SECT. 6. Metropolitan Police Fund.

SECT. 7.—*Pension Fund.*

The Pension Fund.

967. The Pension Fund for the Metropolitan Police Force does not differ from that established for other police forces (*q*), except that the amount of the Exchequer contribution applicable to it is fixed at the annual sum of £150,000 (*r*) and certain fines and fees are made payable to it (*s*).

Appeal against refusal of pension.

An appeal against a refusal or withdrawal of a pension lies only to the quarter sessions for the county of London (*t*).

Relation of Commissioner and Assistant Commissioners to Pension Fund

968. The Commissioner and Assistant Commissioners of Police are subject to the general provisions in regard to approved service (*u*), and, except in so far as they are in receipt of salaries from a parliamentary source, to the general provisions in regard to pensions (*a*); but they are entitled to reckon for pension purposes any emoluments to which they may be entitled (*b*) under the Metropolitan Police Staff Superannuation Act, 1875 (*c*).

Superannuation allowance to persons other than constables.

969. The Home Secretary has power to make a superannuation allowance to persons other than constables employed under the Commissioner or Receiver, whose salary has been paid as part of the expenses of the Metropolitan Police (*d*) and to the staff of the metropolitan police courts (*e*). The allowance is to be made in accordance with the principles applicable to the Civil Service, and for this purpose the Home Secretary has power to make regulations and from time to time to vary or revoke them (*f*).

(*n*) Dog Licences Act, 1867 (30 & 31 Vict. c. 5); Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 23; see title ANIMALS, Vol. I., pp. 403, 404.

(*o*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 46; Police Act, 1890 (53 & 54 Vict. c. 45), ss. 16, 23 (2).

(*p*) Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), ss. 2, 6 (1); and see title STREET AND AERIAL TRAFFIC.

(*q*) See p. 509, *post*.

(*r*) Local Taxation (Customs and Excise), Act, 1890 (53 & 54 Vict. c. 60), s. 4.

(*s*) See note (*j*), p. 476, *ante*.

(*t*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 32 (3).

(*u*) *Ibid.*, s. 12. The certificate of approved service of an Assistant Commissioner may be given by the Commissioner (*ibid.*).

(*a*) *Ibid.* In the case of the Commissioner and such of the Assistant Commissioners whose salary is payable from a parliamentary source (see note (*o*), p. 467, *ante*), the rateable deductions from pay are payable to the Exchequer (Police Act, 1890 (53 & 54 Vict. c. 45) s. 32 (6)).

(*b*) *Ibid.*, s. 32 (5).

(*c*) Metropolitan Police Staff (Superannuation) Act, 1875 (38 & 39 Vict. c. 28).

(*d*) *Ibid.*, s. 1, Sched.

(*e*) Metropolitan Police Courts Act, 1897 (60 & 61 Vict. c. 26), s. 5.

(*f*) Police Act, 1909 (9 Edw. 7, c. 40), s. 4.

Part III.—City of London Police.

SECT. 1. Area.

SECT. 1.—*Area.*

Area.

970. The City of London has always been treated as a separate entity, and the right of maintaining civil order within its precincts is the exclusive privilege of the Lord Mayor, Aldermen, and Commons in Common Council assembled (*g*). It was expressly excluded from the area comprised in the Metropolitan Police District (*h*), and a separate police force was established for it in 1839 (*i*). Its distinct existence for police purposes has been secured by statute on repeated occasions in more recent times (*k*).

SECT. 2.—*Government.*

Control of Common Council.

971. The force is under the management and control of a Commissioner appointed by the Common Council, with the approval of the Home Secretary (*l*), and consists of such sufficient number of fit and able men as the Common Council may from time to time direct (*m*). It is maintained entirely by the City (*n*) and is not subject to inspection by the Home Office inspector (*o*). A police committee of the Common Council exists for the purpose of exercising such powers in connection with the police as may be delegated to to it by the Common Council (*p*).

The Commissioner.

972. The Commissioner may be appointed a justice of the peace on the petition of the Court of Aldermen and the Common Council (*q*), but his jurisdiction as such is subject to the same restrictions as that of the Commissioner of Metropolitan Police (*r*).

His position as justice.

He is sworn in before a judge of the High Court (*s*), and takes a special oath (*a*) in addition to those taken by a justice of the peace (*b*).

(*g*) See stats. (1736) 10 Geo. 2, c. 22, and (1768) 8 Geo. 3, c. 21. As to the Common Council, see title METROPOLIS, Vol. XX., pp. 426 *et seq.*

(*h*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 2.

(*i*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.).

(*k*) See City of London Traffic Regulation Act, 1863 (26 & 27 Vict. c. ccvi.); Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134); Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 93; Police Act, 1890 (53 & 54 Vict. c. 45), s. 39.

(*l*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 3.

(*m*) *Ibid.*, s. 9.

(*n*) *Ibid.*

(*o*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 32.

(*p*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 56.

(*q*) *Ibid.*, s. 6.

(*r*) As to these, see p. 470, *ante*.

(*s*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 5.

(*a*) *Ibid.* The special oath is in the following terms:—"I, A. B., do swear that I will faithfully and honestly according to the best of my skill and knowledge execute all the powers and duties of Commissioner of the City Police under and by virtue of" (the above Act).

(*b*) *Ibid.*, s. 6. As to these oaths, see Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), and title MAGISTRATES, Vol. XIX., pp. 539, 543.

Appointment of officers.

973. He appoints the number of men directed by the Common Council (*c*) and makes regulations for their management (*d*). He may suspend or dismiss any man whom he thinks remiss or negligent in the discharge of or otherwise unfit for his duty, but must report such action from time to time to the Lord Mayor (*d*).

Commissioner's powers.

974. He has power to make regulations for the ordering of street traffic during hours of public worship and on the occasion of processions, rejoicings, and illuminations (*e*), and generally to enforce the regulations in regard to traffic made by the Court of Aldermen (*f*). He has also similar powers to those possessed by the Commissioner of Metropolitan Police for authorising constables to enter unlicensed theatres and gaming houses (*g*).

Temporary Commissioner.

975. In the absence or illness of the Commissioner, the officer of the Force next in authority may act in his place for such time as may be appointed by the Lord Mayor and sanctioned by the Home Secretary (*h*).

SECT. 3.—*Special Powers.*

General power within the City.

976. The constables have all the powers of a constable at common law or by statute (*i*), and are sworn to act for all places within the City and Liberties of the City of London (*k*).

Special powers of arrest and search.

They may arrest idle persons who are disturbing the peace, or whom they suspect of having committed or intending to commit a breach of the peace, or whom they find between sunset and 8 A.M. lying or loitering in any highway, yard, or place and not giving a satisfactory account of themselves (*l*), also persons committing certain specified street offences (*m*) or throwing mud into the river Thames (*n*); and they have power to search and detain any vessel, boat, cart or carriage on which they suspect the presence of stolen property (*o*), and to kill dogs that are mad or have been bitten by mad dogs (*p*).

(*c*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 9.
(*d*) *Ibid.*, s. 14.
(*e*) *Ibid.*, ss. 20—22; and see title STREET AND AERIAL TRAFFIC.
(*f*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 3; and see p. 470, *ante*; see, however, the City of London (Street Traffic) Act, 1909 (9 Edw. 7, c. lxvii.), which gives to the Court of Aldermen the right to make regulations under the above Act, alters the hours during which cattle may not be driven through the streets (8 a.m. to 8 p.m.), and supersedes the regulations in regard to itinerant traders; and see title STREET AND AERIAL TRAFFIC.
(*g*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), ss. 20—22; see p. 472, *ante*; and see titles GAMING AND WAGERING, Vol. XV., p. 291; THEATRES AND OTHER PLACES OF ENTERTAINMENT.
(*h*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 25.
(*i*) As to these, see p. 497, *post*. As to penalties for neglect of duty and unauthorised possession of uniform and accoutrements, see p. 501, *post*.
(*k*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 9.
(*l*) *Ibid.*, s. 18.
(*m*) *Ibid.*, s. 35.
(*n*) *Ibid.*, s. 45.
(*o*) *Ibid.*, s. 49
(*p*) *Ibid.*, s. 42.

SECT. 3. Special Powers.

Special constables.

977. There is no power to appoint parish constables in the City of London (*q*); but special constables appointed either in the City or the Metropolitan Police District have authority to act as such throughout either area (*r*).

Electoral rights.

978. The Commissioner and all the members of the Force are forbidden to canvass at any parliamentary or municipal election (*s*), but they are not disentitled to vote (*a*).

SECT. 4.—*Finance.*

Treasurer.

979. The treasurer of the City of London Police is the City Chamberlain (*b*), whose accounts in relation to the police are laid annually before Parliament (*c*) and before the Common Council (*d*).

Police Fund.

980. The Police Fund is supplied, as to a quarter of the sum required, by payment out of the revenues of the City of London (*e*), and as to the remaining three-quarters by a police rate not exceeding 8*d*. in the £ and assessed in the several wards by the alderman, or his deputy, and the majority of the common councilmen of each ward (*f*). The police committee of the Common Council may rectify or amend the rate (*g*), but must report the fact to the ward authorities, who may appeal against the alteration to the Court of Aldermen (*h*). The decision of the latter is conclusive (*i*).

Pension Fund.

981. The Pension Fund of the City of London Police is not governed by the statutes relating to the pension funds of other police forces (*k*). It is maintained out of regular deductions from the pay of the constables, rateable deductions from their pay during sickness, fines imposed on constables, or for assaults on constables, or on drunken persons in a court of summary jurisdiction in the City, and from the proceeds of the sale of police clothing (*l*). The City Chamberlain is the treasurer (*l*).

(*q*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 21.
(*r*) Police Act, 1890 (53 & 54 Vict. c. 45), s 28; and see p. 474, *ante*.
(*s*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 8.
(*a*) Police Disabilities Removal Acts, 1887 (50 & 51 Vict. c. 9) and 1893 (56 & 57 Vict. c. 6); see title ELECTIONS, Vol. XII., p. 311; and see pp. 468, 474, *ante*.
(*b*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 91.
(*c*) *Ibid.*, s. 92.
(*d*) *Ibid.*, s. 93.
(*e*) *Ibid.*, s. 57.
(*f*) *Ibid.*, s. 58. The manner in which the rate is to be made and recovered is set out in *ibid*, ss. 58—84; see title RATES AND RATING. The expenses of the ward officials are payable out of the police rate (City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), ss. 82, 85). The Common Council and police committee have power to inspect the rate (*ibid.*, s. 81).
(*g*) *Ibid.*, s. 68. The police committee or the Common Council may remit rates on the ground of poverty or for any other sufficient cause (*ibid.*, s. 77).
(*h*) *Ibid.*, s. 69.
(*i*) *Ibid.*
(*k*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 39; see p. 509, *post*.
(*l*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 11.

Super-annuation.

982. The Common Council or the police committee may order the superannuation of any constable on the recommendation of the Commissioner, and may fix within prescribed limits the amount of his superannuation allowance (*m*).

If a constable is retired from the force owing to disablement consequent on the execution of his duties, the Common Council or police committee may award him a superannuation allowance not exceeding the amount of his pay (*n*).

Special allowances.

983. Constables who have received wounds or injuries, or shown extraordinary diligence, or incurred unusual expenses in executing the orders of the Commissioner in the arrest of offenders and in the preservation of the peace, may be awarded a special allowance by the Court of Aldermen, but it must not exceed the amount recommended by the Commissioner (*o*).

Authority in case of damage by riot.

984. The police authority in the case of damage by riot is the Common Council (*p*), and application for compensation is to be made to the town clerk of London (*q*). Payments made as compensation are made from the police rate (*r*).

Co-operation with Metropolitan Police.

985. Apart from the general provisions for mutual assistance between police forces (*s*), special provision is made for co-operation between the City of London and the Metropolitan Police in case of emergency (*t*).

Part IV.—County Police.

Development of county police force.

986. A police organisation for the counties came into being in 1839, when the powers of county justices to appoint special constables were transformed and extended (*a*).

The new organisation, which was originally permissive, was made

(*m*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 12. The amount awarded is graduated according to the length of service, but if the constable is under sixty years of age it is unlawful to make any allowance except upon the certificate of the Commissioner that he is incapacitated from further performance of his duty. In no case is a constable entitled as of right to any superannuation allowance (*ibid.*).

(*n*) *Ibid.*

(*o*) *Ibid.*, s. 13.

(*p*) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), Sched. I.; and see pp. 507, 508, *post.*

(*q*) Home Office Regulation, 30th June, 1894.

(*r*) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), Sched. I.

(*s*) See p. 491, *post.*

(*t*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 24. The Home Secretary, at the request of the Lord Mayor, may authorise the employment of Metropolitan Police in the City, and the Lord Mayor, at the request of the Home Secretary, may authorise the employment of City police in the Metropolitan Police District. In either case the constables whose services are lent have the powers of the constables of the area in which they are called upon to serve.

(*a*) County Police Act, 1839 (2 & 3 Vict. c. 93), ss. 1, 2; and see p. 492, *post.*

PART IV. County Police.

compulsory in all the counties in 1856 (*b*); and there are now sixty county police forces in England and Wales (*c*).

Area.

987. The area for which the county police force acts is that which is under the authority of the county council (*d*); but outlying parts of counties, which are not conveniently situated for supervision by the police of their own county, may, by agreement between the respective standing joint committees, be supervised by the police of an adjoining county (*e*), and boroughs which have no police force of their own may, by agreement between the county and borough councils, be placed under the supervision of the county police (*f*).

Control.

988. When formed, the organisation was put under the control of the county justices at quarter sessions (*g*) and remained so until 1889, when this part of the justices' jurisdiction was transferred to the standing joint committee of the county council and of the justices at quarter sessions (*h*).

Powers of standing joint committee.

The standing joint committee now appoints the chief constable (*i*) and, with the approval of the Home Secretary, fixes the strength of the police force, the number of subordinate officers with the gradations of rank, and the duties and pay attached to each rank (*k*).

The standing joint committee is the authority which provides police stations and lock-up houses (*l*), and the standing joint

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(*b*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 1. The provisions of the Police Act, 1890 (53 & 54 Vict. c. 45), supersede those of all local Acts where the latter are contradictory to it (*ibid.*, s. 31).

(*c*) Police forces have been established for all of the fifty-three counties of England and Wales except those of London and Middlesex, which are wholly within the Metropolitan Police District; see p. 467, *ante*. The counties of York and Lincoln have separate forces for each of their respective ridings or divisions; and the Isle of Ely (see the County Police Act, 1840 (3 & 4 Vict. c. 88), s. 34), the soke of Peterborough (see the County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 30), and the Isle of Wight each maintain a separate force.

(*d*) This does not apply to the counties of London and Middlesex, nor to such parts of the counties of Hertfordshire, Essex, Kent, and Surrey as are within the Metropolitan Police District; see p. 467, *ante*. Detached parts of counties were formerly placed under the supervision of the police of the county in which they were physically situated (County Police Act, 1839 (2 & 3 Vict. c. 93), s. 27; County Police Act, 1840 (3 & 4 Vict. c. 88), s. 2); but this provision has been rendered superfluous in practice owing to the rearrangement of county boundaries made in pursuance of the Local Government Act, 1888 (51 & 52 Vict. c. 41); see *ibid.*, ss. 50—54.

(*e*) County Police Act, 1840 (3 & 4 Vict. c. 88), s. 2.

(*f*) See p. 490, *post*.

(*g*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 2.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 9, 30; and see titles LOCAL GOVERNMENT, Vol. XIX., pp. 348 *et seq.*, 370; MAGISTRATES, Vol. XIX., p. 631.

(*i*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 4. More than one may be appointed, and one may be appointed to serve in more than one county (*ibid.*; County Police Act, 1857 (20 Vict. c. 2), s. 2). Thus, Cumberland and Westmoreland have the same chief constable, as also have the three parts of Lincolnshire, and the police of the soke of Peterborough are under the chief constable of Northamptonshire.

(*k*) County Police Act, 1840 (3 & 4 Vict. c. 88), s. 26.

(*l*) Petty Sessions and Lock-up House Act, 1868 (31 & 32 Vict. c. 22);

committees of adjoining counties, or the standing joint committee of a county and the council of an adjoining borough having a separate commission of the peace, may combine to provide such buildings on their borders for their mutual convenience (*m*).

Rules for government.

989. The rules for the government, pay, clothing, accoutrements, and necessaries of the county police forces are laid down by the Home Secretary with a view to uniformity, but they may be modified by him, on the application of the standing joint committee of any county, to meet the needs of that county (*n*).

Division of county into police districts.

990. At the discretion of the standing joint committee the county may be divided into police districts, with a greater or smaller number of constables in each as they think fit (*o*). Where this division is in force, the whole county is charged with the general expenses of the police, and the police themselves are available for general county work; but the particular districts must pay for the salaries and clothing of the police actually serving within them (*p*).

Cost of police force.

991. The cost of the county police force is defrayed out of the police account of the county fund (*q*). There is paid into that account annually by the county council a sum equal to half the cost of the pay and clothing of the police (*r*), and the sum is repayable to the county council out of Exchequer contributions to the local authorities (*s*), subject to the certificate of the Home Secretary as to the efficiency of the force (*t*). The remainder of the sum required is raised by a police rate, which is levied by the county council on the same basis as that for the county rate, and collected by the county treasurer from the guardians of the poor (*a*).

Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3; County Police Act, 1840 (3 & 4 Vict. c. 88), s. 12.

(*m*) Petty Sessions and Lock-up House Act, 1868 (31 & 32 Vict. c. 22); Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3; County Police Act, 1840 (3 & 4 Vict. c. 88), s. 12; Lock-up Houses Act, 1848 (11 & 12 Vict. c. 101); County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), ss. 22, 23; and see title LOCAL GOVERNMENT, Vol. XIX., p. 349.

(*n*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 3; but see the Police Act, 1890 (53 & 54 Vict. c. 45), s. 31.

(*o*) County Police Act, 1840 (3 & 4 Vict. c. 88), ss. 27, 28; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 9; *Re Local Government Act, 1888, Ex parte Leicestershire County Council and Standing Joint Committee of County of Leicester*, [1891] 1 Q. B. 53. Police districts may have their boundaries altered or united, as the standing joint committee may from time to time think fit (County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 4; County and Borough Police Act, 1859 (22 & 23 Vict. c. 32), s. 1). A single parish may be constituted a police district (*Ex parte Knowling* (1860), 6 B. & S. 195).

(*p*) County Police Act, 1840 (3 & 4 Vict. c. 88), s. 28.

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 24, 68; and see title LOCAL GOVERNMENT, Vol. XIX., p. 353. The county treasurer must maintain a separate police account (County Police Act, 1839 (2 & 3 Vict. c. 93), s. 83), and carry to it all fees and fines which are payable to the police. As to the fees and other sums payable to the pension fund, see p. 514, *post*.

(*r*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (i).

(*s*) *Ibid.*, s. 24 (2).

(*t*) *Ibid.*, s. 25. As to this certificate and the consequences if it is withheld, see p. 517, *post*.

(*a*) County Rates Act, 1844 (7 & 8 Vict. c. 33). The rate is a uniform

PART IV. County Police.

Chief constable.

Powers.

Duties.

992. The chief constable is in command of the force and is responsible for its general dispositions and government (*b*), subject to the rules made by the Home Secretary (*c*) and the approval of the standing joint committee (*d*).

He appoints the subordinate officers and the rank and file with the approval of justices at petty sessions (*e*), but he may dismiss all or any of them at his pleasure (*f*).

It is his duty to make a monthly return to the clerk of the peace, based upon similar returns made to him by his superintendents, of the number and disposition of the men in his command (*g*), and to make a quarterly report to the standing joint committee on such matters concerning the police as the standing joint committee may require (*h*).

He must attend every court of general or quarter sessions (*h*) and comply with the directions given him in regard to the police to be present at assizes (*i*), and must obey all lawful directions given to him, whether by the standing joint committee, or by the justices at quarter sessions, or the county council (*k*).

Disqualifications and privileges.

He may not have any other profession or employment (*l*) or canvass at parliamentary elections (*m*), and is exempt from serving on a coroner's or other jury (*n*). The statutory provisions relating to the superannuation and pension of constables apply to chief constables (*o*).

Deputy chief constable.

993. With the approval of the standing joint committee, the chief constable may appoint one of his superintendents to act as his deputy in the event of his incapacity, illness, or necessary absence from the county (*p*). A deputy so appointed may act in

rate subject to the existence of separate police districts; see County Police Act, 1840 (3 & 4 Vict. c. 88), s. 28, and p. 483, *ante*. But the rate is not levied in the Metropolitan Police District, or in detached parts of counties contributing to the police rate of another county, or in any municipal borough (*ibid.*, s. 3). As to the county rate generally, see titles LOCAL GOVERNMENT, Vol. XIX., p. 309; RATES AND RATING.

(*b*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 6.

(*c*) *Ibid.*; see p. 517, *post*.

(*d*) *Ibid.*; see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 30.

(*e*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 6.

(*f*) *Ibid.* He has also power to suspend a constable whom he thinks negligent or remiss, and to impose a fine up to the amount of a week's pay, or to degrade an offender to a lower rank (County and Borough Police Act, 1859 (22 & 23 Vict. c. 32), s. 26).

(*g*) County Police Act, 1840 (3 & 4 Vict. c. 88), ss. 31, 32.

(*h*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 17.

(*i*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 9.

(*k*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 17; County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 7; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 9 (2).

(*l*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 10.

(*m*) *Ibid.*, s. 9; and see title ELECTIONS, Vol. XII., p. 311. The penalty for disobedience to this provision is £20.

(*n*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 10.

(*o*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 12. As to these, see pp. 509 *et seq.*, *post*.

(*p*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 7.

the event of a vacancy in the office of chief constable owing to death or otherwise, but not for a longer period than three months (*q*).

Subordinate officials.

994. Subordinate members of a county police force are sworn in before a county justice (*r*), and are required to make a declaration as to previous public employment (*s*). While serving as constable they may not exercise any other profession or employment (*a*), and are exempt from service on a coroner's or other jury or in the military forces of the Crown (*b*).

Powers.

They have power to act throughout the area of the county in which they serve, and in any adjoining county (*c*). They have also power to act in boroughs situated wholly or partly within the county where they serve, and must obey the lawful commands of justices exercising jurisdiction within any such borough (*d*), but they must not be required to act in any borough having its own police force except in execution of the warrants of the county justices or by the order of their chief constable or superintendent (*e*).

Part V.—Borough Police.

Development of borough police force.

995. The system of police in boroughs was formerly dependent upon the common law right of the justices to appoint constables, and upon the terms of the charter of each borough. In 1835 the

(*q*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 7.

(*r*) *Ibid.*, s. 8. Instead of taking an oath they may now make a declaration (Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 12); and see title MAGISTRATES, Vol. XIX., p. 543.

(*s*) Police Act, 1890 (53 & 54 Vict. c. 45), s 26, Sched. II. As to penalties for neglect of duty and unlawful possession of arms and accoutrements, see p. 501, *post*.

(*a*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 10. This provision does not prevent their acting as inspectors of weights and measures, if appointed by the proper county authorities (*R.* v. *Jarvis* (1854), 3 E. & B. 640).

(*b*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 10.

(*c*) *Ibid*, s. 8. The police of any of the border counties—Northumberland, Cumberland, Berwick, Roxburgh, and Dumfries—have power in any of those counties to execute warrants of arrest for an offence committed in the county which they serve (Police (Scotland) Act, 1857 (20 & 21 Vict. c. 72), s. 11).

(*d*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 6.

(*e*) County and Borough Police Act, 1859 (22 & 23 Vict. c. 32), s. 2. The chief constable or superintendent is given power to order his constables to act in such a borough in cases of special emergency when required to do so by the watch committee (*ibid.*). The county police cannot, except in the case of fresh pursuit (see Indictable Offences Act, 1848 (11 & 12 Vict. c 42), s. 10), execute a warrant in a borough which maintains a separate police force, unless the warrant is indorsed by a borough justice (*R.* v. *Cumpton* (1880), 5 Q. B. D. 341, C. C. R.); and see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 308; MAGISTRATES, Vol. XIX., p. 564

PART V. Borough Police.

organisation of the system was placed in the hands of the watch committee of the borough council of every municipal borough (*f*).

This arrangement, which was specially preserved when the county police system was established (*g*), is still maintained in the case of those boroughs which have a separate police force. There are, however, many boroughs which do not maintain one. Thus, boroughs with a population of less than 10,000 in the year 1881 which formerly maintained a separate police force were, in 1889, transferred for police purposes to the county (*h*), and boroughs incorporated since 1882 have not the right to maintain a separate police force unless they contained a population of more than 20,000 at the date of the last census taken before incorporation (*i*). Power has also been given by statute for the consolidation of county and borough police forces (*k*), and this power has been taken advantage of in very many cases.

Boroughs with separate police force.

There remain, however, 128 cases of boroughs which maintain a separate police force (*l*).

(*f*) Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 76, now repealed and replaced by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 190.

(*g*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 24.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 39 (1).

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 215.

(*k*) County Police Act, 1840 (3 & 4 Vict. c. 88), s. 14; County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 5. But a separate police force in a borough with a population of more than 15,000 persons at the last census is not to be superseded without the authority of the Home Secretary (*ibid.*, s. 19); and see, further, p. 518, *post*.

(*l*) The following are the boroughs maintaining a separate police force:—

Ashton-under-Lyne.
Bacup.
Barnstaple.
*Barrow.
*Bath.
Bedford.
Berwick-upon-Tweed.
Beverley.
*Birkenhead.
*Birmingham.
*Blackburn.
*Blackpool.
*Bolton.
*Bootle.
Boston.
*Bournemouth.
*Bradford.
Bridgwater.
*Brighton.
*Bristol.
*Burnley.
*Burton-upon-Trent.
Cambridge.
*Canterbury.
*Cardiff.
Carlisle.
Carmarthen.
*Chester.
Chesterfield.
Chipping Wycombe.
Clitheroe.
Colchester.
Congleton.
*Coventry.
*Derby.
*Devonport.
Dewsbury.
Doncaster.
Dover.
Durham.
*Eastbourne.
*Exeter.
Folkestone.
*Gateshead.
Glossop.
Grantham.
Gravesend.
*Grimsby (Great).
Guildford.
*Halifax.
Hartlepool.
*Hastings.
Hereford.
Hove.
*Huddersfield.
*Ipswich.
Kendal.
Kidderminster.
King's Lynn.
*Kingston-upon-Hull.
Lancaster.
Leamington.
*Leeds.
*Leicester.
*Lincoln.
*Liverpool.
Louth.
Luton.
Macclesfield.
Maidstone.
*Manchester.
Margate.
*Merthyr Tydfil.
*Middlesbrough.
Neath.
Newark.
Newcastle-under-Lyme.
*Newcastle-upon-Tyne
*Newport (Mon.).
New Windsor.
*Northampton.
*Norwich.
*Nottingham.

996. The area for which a borough police force acts is that covered by the borough itself; but borough constables are entitled, and may be called upon, to act in any place in a county area within seven miles of the borough (*m*). Area.

997. The authority which controls the force is the watch committee of the borough council (*n*), which has the power of appointment (*o*) and dismissal (*p*) of borough constables. It may impose fines on, or reduce the rank of (*q*), or suspend (*r*) a constable for negligent performance of his duties, and may, on the recommendation of the borough superintendent of police and with the approval of the borough council, grant rewards for meritorious conduct (*s*). Controlling authority.

998. The force is maintained out of the borough fund (*t*) to which the borough rate (*a*) and watch rate, if any (*b*), are payable; Finance.

*Oldham.	Saint Albans.	Tiverton.
*Oxford.	*Saint Helens.	Truro.
Penzance.	*Salford.	Tunbridge Wells.
Peterborough.	Salisbury.	*Tynemouth.
*Plymouth.	Scarborough.	Wakefield.
Poole.	*Sheffield.	*Walsall.
*Portsmouth.	Shrewsbury.	*Warrington.
*Preston.	*Southampton.	*West Hartlepool.
Ramsgate.	*Southport.	Weymouth.
*Reading.	*South Shields.	*Wigan.
Reigate.	Stalybridge.	Winchester.
*Rochdale.	*Stockport.	*Wolverhampton.
Rochester.	*Stoke-upon-Trent.	*Worcester.
*Rotherham.	*Sunderland.	*Yarmouth (Great).
Ryde.	*Swansea.	*York.

The boroughs marked * are county boroughs. There are seventy five of such boroughs, but seven are not included in this list, namely, Croydon and West Ham, which are in the Metropolitan Police District (see p. 467, *ante*), and Bury, Dudley, Gloucester, Smethwick, and West Bromwich, the police forces of which are consolidated with county police forces. As to consolidation, see p. 490, *post*.

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 191 (2).

(*n*) *Ibid.*, ss. 190—192; County and Borough Police Acts, 1856 (19 & 20 Vict. c. 69), and 1859 (22 & 23 Vict. c. 32). The watch committee consists of the mayor and not more than one-third of the members of the borough council (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 190 (1)). It acts by a majority of those present, three constituting a quorum (*ibid.*, s. 190 (2); and see title LOCAL GOVERNMENT, Vol. XIX., pp. 311, 321).

(*o*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 191 (1).

(*p*) *Ibid.*, s. 191 (4).

(*q*) County and Borough Police Act, 1859 (22 & 23 Vict. c. 32), s. 26. The amount of the fine must not exceed one week's pay. The punishments are in addition to any others to which the offending constable may be liable (*ibid.*).

(*r*) *Ibid.* This power may be exercised by any two justices having jurisdiction in the borough (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 191 (4)).

(*s*) County and Borough Police Act, 1859 (22 & 23 Vict. c. 32), s. 24.

(*t*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 140, Sched. V., Part II.; and, as to the borough fund, see title LOCAL GOVERNMENT, Vol. XIX., p. 319.

(*a*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 144.

(*b*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 197—200;

PART V. Borough Police.

but a sum equal to half the cost of the pay and clothing of the force is repayable annually to the borough council out of the Exchequer contribution to the local authority, subject to the certificate of the Home Secretary of the efficiency of the force (*c*).

Treasurer.

The treasurer is the borough treasurer, by whom payments may be made on account of expenses of the police subject to an order of the borough council (*d*). The power to provide police stations and lock-up houses is vested in the council of any borough having a separate commission of the peace (*e*).

Powers by virtue of special Act and incorporation of Town Police Clauses Act, 1847.

999. The regulations affecting the control and discipline of borough police forces are commonly contained in special local Acts passed with that object; but an adoptive public Act (*f*) (hereafter referred to as "the adoptive Act"), passed for the purpose of securing uniformity in such regulations, has been adopted by many boroughs and incorporated in their special Acts.

Powers of local authority.

Under provisions of the adoptive Act the persons to whom authority is given by the special Act have power to appoint and dismiss constables and a superintendent constable (*g*), to pay the expenses of prosecutions, and to make such allowances and grant such wages or salaries to the constables as they may think fit (*h*). They may also, if they think it necessary, apply for the appointment of additional constables by the chief constable of the county in which the borough is situated, and pay for the cost of them (*i*).

Powers of constables.

The powers of constables appointed under the adoptive Act, or a special local Act incorporating it, may be exercised in the area limited by the special Act and in any place not more than five miles outside it (*k*).

The adoptive Act contains numerous provisions relating to street offences, fires, places of public resort, hackney carriages and public bathing which, irrespective of any local Act, are operative in every urban district (*l*).

General duties of constables.

1000. In addition to the duties placed upon the police by the adoptive Act or any special local Act, there is a general duty placed

and see title LOCAL GOVERNMENT, Vol. XIX., p. 319. The amount of it is limited to 8*d.* in the £1 per annum (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 197 (3); and see title RATES AND RATING).

(*c*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (i.); and see p. 517, *post*.

(*d*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 140, Sched. V.; and see title LOCAL GOVERNMENT, Vol. XIX., p. 313.

(*e*) Petty Sessions and Lock-up House Act, 1868 (31 & 32 Vict. c. 22), s. 3. As to joint lock-up houses, see pp. 482, 483, *ante*.

(*f*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89).

(*g*) *Ibid.*, s. 6.

(*h*) *Ibid.*, s. 9.

(*i*) *Ibid.*, s. 7; see County Police Act, 1840 (3 & 4 Vict. c. 88), s. 19; and see p. 491, *post*.

(*k*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 8.

(*l*) *Ibid.*, ss. 21—69; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171; and see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 166, 167; PUBLIC HEALTH AND LOCAL ADMINISTRATION; STREET AND AERIAL TRAFFIC; and see p. 502, *post*.

upon borough constables to perform all such duties connected with the police in their respective boroughs as the watch committee may from time to time prescribe (*m*).

In particular, the watch committee may employ constables who consent to perform such service wholly or partially as firemen (*n*).

Returns as to regulations.

1001. The watch committee or borough police authority are required to make quarterly returns to the Home Secretary of the police regulations made by them (*o*).

Swearing in of constables

1002. Borough constables are sworn in on appointment before a justice having jurisdiction in the borough (*p*), and may be required to make and sign a declaration as to their previous service in a police force or public employment (*q*).

Electoral rights.

1003. Borough constables are disqualified from canvassing (*a*), but not from voting, at a parliamentary or municipal election in the constituency or borough in which they serve (*b*).

(*m*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 7; compare *Andrews* v. *Nott Bower*, [1895] 1 Q. B. 888, C. A.; and see pp. 497 *et seq.*, *post*. As to penalty for neglect of duty, and for unlawful possession of uniform and accoutrements, see p. 501, *post*.

(*n*) Police Act, 1893 (56 & 57 Vict. c. 10), s. 2. As to the regulations in regard to the pensions of constables so employed, see p. 514, *post*. Fire police may be employed in places where the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), is in force, outside the area of the borough, and in such case the expenses incurred may be claimed and recovered from the owner of the premises in which the fire has happened. In the event of disagreement as to the amount due, or to the propriety of sending the fire police to the premises, the decision of the justices of the peace is final (Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 33).

(*o*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 192. The dates on which these are to be made are the 1st January, the 1st April, the 1st July, and the 1st October in each year.

(*p*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 191 (2); see Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 8. The swearing in now takes the form of a declaration to be made in accordance with the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 12; and see title MAGISTRATES, Vol. XIX., p. 543.

(*q*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 26, Sched. II.

(*a*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 9.

(*b*) Police Disabilities Removal Acts, 1887 (50 & 51 Vict. c. 9), and 1893 (56 & 57 Vict. c. 6). Under the first of these Acts provision is made for enabling constables on duty to vote; see title ELECTIONS, Vol. XII., p. 311.

Part VI.—Consolidation and Mutual Assistance of Police Forces.

SECT. 1. SECT. 1.—*Consolidation of County and Borough Forces.*

Consolidation of County and Borough Forces.

1004. The police forces of any incorporated borough may be consolidated with that of the county in which it is situated or which it adjoins, by mutual agreement (*c*) between the borough council on the one hand and the standing joint committee of the county council and county justices at quarter sessions on the other (*d*). The resolution for consolidation does not require more than a bare majority in either case, and is effective upon the exchange of a duly executed memorandum of agreement (*e*).

By agreement.

By Order in Council.

A borough council which has sought to obtain such a consolidation agreement without success may apply to the Home Secretary, who has power to inquire into the terms of the proposed agreement and report thereon to the Sovereign in Council (*f*). The Sovereign in Council may thereupon fix the terms and conditions under which consolidation shall take place and the date as from which it shall take effect (*f*).

Control of consolidated force.

1005. Where the police of a county and borough have been consolidated, the entire force is under the control of the chief constable of the county (*g*); and while the watch committee of the borough retains the right of appointing borough constables, in the absence of a provision in the agreement giving it to the chief constable, the chief constable has the sole right of dismissal (*g*). Whenever he dismisses a borough constable it is his duty to report the fact, with his reasons for it, to the mayor of the borough, and any constable so dismissed is disqualified from reappointment by the watch committee without the chief constable's assent (*g*).

Determination of agreement.

1006. A consolidationagreement which has been voluntarily concluded may be determined by six months' notice in writing on either side (*h*); but the notice of discontinuance must have been carried by a three-fourths majority of the side giving the notice (*i*),

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(*c*) County Police Act, 1840 (3 & 4 Vict c. 88), s. 14.
(*d*) *Ibid.*; see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 30.
(*e*) County Police Act, 1840 (3 & 4 Vict. c. 88), s. 14. The memorandum must be signed on behalf of the county by two or more members of the standing joint committee and countersigned by the clerk of the peace; and must be under the common seal of the borough (*ibid.*).
(*f*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 5.
(*g*) County Police Act, 1840 (3 & 4 Vict. c. 88), s. 15.
(*h*) *Ibid.*, s. 14. The notice, if given by the county, must be under the hand of one or more members of the standing joint committee and countersigned by the clerk of the peace; if given by the borough, it must be under the common seal of the borough (*ibid.*).
(*i*) *Ibid.*

and the determination of the agreement must receive the sanction of the Home Secretary (*k*).

1007. Where the consolidation is in consequence of an Order in Council, its terms may be varied from time to time, or it may be determined by a subsequent Order in Council (*l*).

Determination or variation of Order in Council.

SECT. 2.—*Assistance of One Police Force by Another.*

Assistance in emergencies.

1008. Power is given by statute to police authorities to enable them, by agreement, to give assistance to one another in emergencies (*m*).

Nature of agreement for additional constables.

Arrangements may be made for the addition, to the force requiring aid, of such number of constables as may be agreed on between the authorities (*n*). The agreement may be in view of a particular emergency or it may be a standing agreement, and it may be made with reference to recurring or unforeseen events or otherwise as may be thought expedient (*o*). It may contain such terms as are thought expedient in regard to the command, expenses and pensions of the additional constables (*p*).

Powers of additional constables.

During the time the agreement is in force, the additional constables have all the powers, duties and privileges of the constables of the force to which they are added (*q*).

Exchequer contribution.

The police authority receiving the assistance is entitled to receive an Exchequer contribution equal to half the cost of the pay and clothing of the men whose services it enjoys (*r*).

Part VII.—Special Constables: Additional Police.

SECT. 1.—*Special Constables.*

Grounds for exercise of appointment in emergency.

1009. The authorities charged with the preservation of the peace have always had the power of appointing special constables to supplement the regular peace officers in an emergency (*a*).

(*k*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 20.
(*l*) *Ibid.*, s. 5.
(*m*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 25 (1), (5). The agreement may be made by one police authority with several other police authorities at once (*ibid.*, s. 25 (5)). The power to conclude such an agreement may be delegated by a police authority to its chief officer of police by general or special order, and with or without any exception, restriction or conditions (*ibid.*, s. 25 (3)). For the mutual co-operation of the Metropolitan Police Force and the City of London Police, see p. 481, *ante*. As to agreements between county police authorities and borough police authorities, see p. 490, *ante*.
(*n*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 25 (1).
(*o*) *Ibid.*, s. 25 (2).
(*p*) *Ibid.*, s. 25 (4).
(*q*) *Ibid.*, s. 25 (1).
(*r*) *R. on the Prosecution of Rotherham Corporation* v. *West Riding of Yorkshire County Council*, [1895] 1 Q. B. 805, C. A.; and see p. 483, *ante*.
(*a*) Compare Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 22;

SECT. 1. Special Constables.

At the present day the power may be exercised by any two or more borough or county justices, upon the oath of any credible witness that any tumult, riot, or felony has occurred or may reasonably be apprehended in any place within their jurisdiction, if they are of opinion that the regular peace officers are insufficient for the preservation of the peace and the protection of life and property (*b*).

Mode of appointment.

1010. The appointment is made by precept in writing under the hands of the justices, who may appoint as many special constables as they think fit (*c*). Notice of the appointment and the reasons for it must be sent to the Home Secretary and the lord lieutenant of the county (*c*).

Number appointed.

1011. All persons resident in the place or neighbourhood of the place, who are liable to be nominated as parish constables, are eligible (*d*) and compelled to serve (*e*), and persons who are non-resident but willing to serve may be appointed (*f*).

Qualification.

Where appointment has already been made of the resident persons who are eligible, those who are by law exempt may be appointed on the authority of the Home Secretary (*g*).

Annual appointment of special constables in boroughs.

1012. In boroughs, two of the borough justices in October of every year are to appoint as many as they think fit of the inhabitants who are not legally exempt to act as special constables (*h*), but such persons are only to act upon a warrant of one of the

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Special Constables Act, 1820 (1 Geo. 4, c. 37) (repealed); Constables Expenses Act, 1801 (41 Geo. 3, c. 78).

(*b*) Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 1; and see title MAGISTRATES, Vol. XIX., p. 571.

(*c*) Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 1.

(*d*) *Ibid.*; see p. 464, *ante*.

(*e*) Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 8; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 487, note (*t*). On conviction before two justices they are liable to a fine of £5 for refusing to serve (Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 8), but the proceedings must be begun within two months (*ibid.*, s. 15). The opinion was expressed in *R.* v. *Vincent* (1839), 9 C. & P. 91, *per* ALDERSON, B., that the justices ought to cause them to be indicted. Voters at a parliamentary election in any place are exempt from all liability to serve as special constables for that place during the period of the election unless they consent so to serve (Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), s. 8).

(*f*) Special Constables Act, 1835 (5 & 6 Will. 4, c. 43).

(*g*) Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), ss. 2, 3. The Home Secretary may act on the representation of two justices and order the appointment of persons ordinarily exempted in the places named by the justices. Such persons are liable to serve for two months only. The Home Secretary has the further power of directing the lord lieutenant to have special constables sworn throughout a whole county or any part of it, irrespective of whether any persons are ordinarily exempt or not. In such case the persons appointed are liable to serve for three months.

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 196 (1); and see title MAGISTRATES, Vol. XIX., p. 571. This does not supersede the power of borough justices to create special constables in an emergency under the Special Constables Act, 1831 (1 & 2 Will. 4, c. 41) (*R.* v. *Hulton* (1849), 13 Q. B. 592); see p. 491, *ante*.

borough justices, in which such justice must recite that in his opinion the strength of the borough police force is at the time insufficient (*i*).

1013. A declaration is required to be made by special constables on their appointment (*k*), default in making which renders the offender liable to a penalty not exceeding £5 (*l*). Declaration on appointment.

1014. Except in the case of special constables appointed under the authority of the Home Secretary (*m*), the appointment subsists until it is discontinued or suspended at a special sessions of justices held for that purpose (*n*). Notice of the discontinuance or suspension must be sent to the Home Secretary and the lord lieutenant of the county (*o*). Duration of appointment.

1015. Special constables have all the powers which, at common law or by statute, an ordinary constable has in a county (*p*), and may act with the like powers in an adjoining county by the order of the justices of the adjoining county (*q*). Area as regards powers

When appointed by a justice or justices exercising jurisdiction within the Metropolitan Police District or the City of London they may act for the whole of that district and the City of London as if it were a single county (*r*).

1016. The justices having jurisdiction in the place for which special constables have been appointed may at a special sessions to be held for the purpose (*s*) order payment to be made to the special constables from time to time of such reasonable allowances for their trouble, loss of time, and expenses as they may think fit (*t*). The Allowances.

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 196 (3), (4).

(*k*) Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 1; Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 8; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 196 (2). The declaration of a special constable is as follows:—"I A. B. do swear, that I will well and truly serve our Sovereign lord the King in the office of special constable for the parish [or township] of —— without favour or affection, malice or ill will; and that I will to the best of my power cause the peace to be kept and preserved, and prevent all offences against the persons and properties of his Majesty's subjects; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law" (Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 1).

(*l*) *Ibid.*, s. 7. But proceedings to enforce this penalty must be begun within two months (*ibid.*, s. 15).

(*m*) See p. 492, *ante*.

(*n*) Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 9. On such discontinuance or other termination of their appointment special constables must deliver up every staff, weapon, and other article provided for their use to the person and at the time which any justice, having jurisdiction in the place for which they were appointed to act, may direct (*ibid.*, s. 10).

(*o*) *Ibid.*, s. 9.

(*p*) *Ibid.*, s. 5; see *R.* v. *Porter* (1841), 9 C. & P. 778.

(*q*) Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 6; see London County Council (General Powers) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxix.), s. 44.

(*r*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 28.

(*s*) Or at an adjourned meeting of special sessions (Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 14).

(*t*) *Ibid.*, s. 13; see *R.* v. *Hamilton* (1868), L. R. 3 Q. B. 718.

SECT. 1. Special Constables.

cost of this payment is chargeable to the county rate fund, or, in boroughs not contributing to the county rate, to the borough fund (a).

Assault on special constables.

Provision is made for the punishment of assaults on special constables in the execution of the duties of their office (b).

SECT. 2.—*Constables of Railway and Other Companies.*

Special constables at public undertakings.

1017. Special constables may be appointed in order to keep the peace at or near railroads, canals, and other public works (c).

Payment of expenses.

1018. Where it appears on the evidence of three or more credible witnesses that the appointment of special constables is occasioned by the behaviour, whether actual or apprehended, of the persons employed on such works, the justices having jurisdiction in the area where such persons are employed may make an order on the treasurer of the railway, canal, or other company for the payment of the special constables' expenses (d); but the order must be made within one month of the appointment (d), and, after notice to and hearing the person on whom it is made (e), a copy of it must be sent to the Home Secretary for confirmation before it is binding on the company (f).

The payment to be allowed must not exceed 5*s.* a day for each constable employed (f). When such an order is made and confirmed, payment must be made within three weeks, or in default the property of the company may be distrained on (g).

Purpose and regulation of appointment and dismissal of railway police.

1019. Special constables are commonly appointed for and at the request of the railway companies for the purposes of restraining the commission of crimes upon their premises, whether by their own employees or by other persons (h). It is a necessary part of railway companies' business to protect the property entrusted to them as common carriers or otherwise, and as such the employment

(a) Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 13. In boroughs the authorised payment is 3*s.* 6*d.* a day and such other allowances as are made by order of the borough council (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 196 (6), Scheds. IV., V. (ii.)). As to the expenses of special constables whose appointment is occasioned by the conduct of people employed upon railway or other public works, see the text, *infra*.

(b) Conviction of such an assault before two justices of the peace renders the offender liable to a fine not exceeding £20, or the offender may be prosecuted in the same manner as one who commits an assault upon any other constable in the execution of the duties of his office (Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 11). Summary proceedings for such an offence must be begun within two months (*ibid.*, s. 15); and see p. 499, *post*.

(c) Special Constables Act, 1838 (1 & 2 Vict. c. 80), s. 1.

(d) *Ibid.*

(e) *R.* v. *Cheshire Lines Committee* (1873), L. R. 8 Q. B. 344.

(f) Special Constables Act, 1838 (1 & 2 Vict. c. 80), s. 1. The Home Secretary has power to disallow or reduce the amount of the payment allowed, and the order thereupon only has force as modified (*ibid.*, s. 2).

(g) *Ibid.*, s. 3.

(h) *Lambert* v. *Great Eastern Railway*, [1909] 2 K. B. 776, C. A., *per* COZENS-HARDY, M.R., at p. 781.

of special constables is within the scope of their incorporation (*i*). In practice, however, the appointment and dismissal of special constables is commonly regulated by the special Acts passed for the several companies (*k*).

Position of constables.

The special constables are, during the time of their service, the companies' servants, and the companies are responsible for the acts done by them within the scope of their authority (*l*).

Apart from the provisions of any special Act, they may be clothed in uniform or not at the companies' discretion (*m*).

Canals and river police.

1020. Special constables are also appointed for keeping the peace on canals and navigable rivers (*n*).

Appointment and dismissal

The appointment is made by two justices of the peace in the county, and by the watch committee in boroughs, from the persons recommended to them for that purpose by or on behalf of the proprietor of the canal or river (*o*). The same authorities have the power of dismissal (*p*).

Powers of constables.

1021. The special constables so appointed for canals and rivers have all the ordinary powers of a constable (*q*). They may not act within the Metropolitan Police District (*r*) or, except within the actual limits of their employer's premises, in any borough; but elsewhere they have power to act up to a distance of a quarter of a mile from their employer's premises (*s*). They have power to arrest offenders against the Canals (Offences) Act, 1840 (*t*), without

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(*i*) *Edwards* v. *Midland Rail. Co.* (1880), 6 Q. B. D. 287, *per* FRY, J., at p. 289; and see title RAILWAYS AND CANALS.

(*k*) Thus, for instance, the employment of special constables on the Great Eastern Railway is regulated by the Great Eastern Railway (General Powers) Act, 1900 (63 & 64 Vict. c. cx.), s. 50.

(*l*) *Lambert* v. *Great Eastern Railway*, [1909] 2 K. B. 776, C. A.; see *Goff* v. *Great Northern Rail. Co.* (1861), 3 E. & E. 672; *Edwards* v. *Midland Rail. Co.* (1880), 6 Q. B. D. 287; compare *Eastern Counties Rail. Co.* v. *Broom* (1851), 6 Exch. 314; *Walker* v. *South Eastern Rail. Co.*, *Smith* v. *Same* (1870), L. R. 5 C. P. 640; *Mahoney* v. *Besley* (1865), 4 F. & F. 544. But companies are not liable for the acts of such servants outside the scope of their authority; compare *Stevens* v. *Midland Rail. Co.* (1864), 10 Exch. 352; and see, generally, title MASTER AND SERVANT, Vol. XX., pp. 248 *et seq.*, 261.

(*m*) *Lambert* v. *Great Eastern Railway*, *supra*, *per* COZENS-HARDY, M.R., at p. 782; compare Great Eastern Railway (General Powers) Act, 1900 (63 & 64 Vict. c. cx.), s. 50 (5).

(*n*) Canals (Offences) Act, 1840 (3 & 4 Vict. c. 50), s. 1. They are required to render a declaration, in the form set out in *ibid.*, s. 1, similar to that made by other special constables; see p. 493, *ante*. For neglect of duty they are liable on summary conviction before a magistrate to a fine of not more than £10, which may be deducted from their wages, or to one month's imprisonment with or without hard labour (Canals (Offences) Act, 1840 (3 & 4 Vict. c. 50), s. 4). As to summary convictions, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*o*) Canals (Offences) Act, 1840 (3 & 4 Vict. c. 50), s. 1. As to canal proprietors, see, generally, title RAILWAYS AND CANALS.

(*p*) Canals (Offences) Act, 1840 (3 & 4 Vict c. 50), s. 2; on dismissal such constables are required to deliver up their accoutrements (*ibid.*, s. 5); and see p. 501, *post*.

(*q*) Canals (Offences) Act, 1840 (3 & 4 Vict. c. 50), ss. 1, 10.

(*r*) See p. 467, *ante*.

(*s*) Canals (Offences) Act, 1840 (3 & 4 Vict. c. 50), s. 1.

(*t*) 3 & 4 Vict. c. 50.

SECT. 2. Constables of Railway and Other Companies.

a warrant and to detain carriers of stolen goods (*a*), and are protected against assaults and resistance to their authority (*b*). They are paid such amount and at such time as their employers may think fit (*c*).

Harbour, dock, or pier police.

1022. Special constables may also be appointed by two justices on the nomination of the authority (*d*) controlling a harbour, dock, or pier, and may be dismissed by them (*e*). The persons appointed have all the authority of constables within the limits of the harbour, dock, or pier, and for a distance of one mile from it (*f*).

Water bailiffs.

1023. Water bailiffs having the authority of constables may be appointed by boards of conservators of fishery districts (*g*).

Special constables for Oxford and Cambridge Universities.

1024. The Chancellor or Vice-Chancellor of the Universities of Oxford and Cambridge have power to appoint special constables for their respective universities (*h*).

Additional police.

1025. Additional constables may be appointed by the chief constable of any county, with the approval of the standing joint committee of the county council and of the justices of the county at quarter sessions, on the application and at the expense of any person or persons who can show the necessity for them (*i*). These additional constables, though appointed to serve in a particular area, have all the powers of other county constables, and are under the authority of the chief constable, who, upon the application for that purpose of the persons who asked for their appointment, must discontinue their employment (*k*).

(*a*) Canals (Offences) Act, 1840 (3 & 4 Vict. c. 50), s. 11.

(*b*) *Ibid.*, s. 6. The penalty, on summary conviction before a magistrate, is a fine not exceeding £10, or imprisonment for two months with or without hard labour. As to summary convictions, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* The special constables are also protected by the provisions of the Public Authorities Protection Act, 1893 (56 & 57 c. 61); see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*c*) Canals (Offences) Act, 1840 (3 & 4 Vict. c. 50), s. 3.

(*d*) See, generally, title WATERS AND WATERCOURSES.

(*e*) Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), ss. 79, 80.

(*f*) *Ibid.*, s. 79.

(*g*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 27. This is without prejudice to the appointment of additional constables (*ibid.*); and see the text, *infra*. See also title FISHERIES, Vol. XIV., pp. 607, 609.

(*h*) Universities Act, 1825 (6 Geo. 4, c. 97). The Chancellors or Vice-Chancellors may appoint as many men as they think fit. The men so appointed are sworn in and receive a certificate of authority entitling them to act for a specified time or while they retain their certificate. Their authority is confined to the university and an area with a radius of four miles from it. As to the Universities of Oxford and Cambridge, see title EDUCATION, Vol. XI., pp. 94, 95.

(*i*) County Police Act, 1840 (3 & 4 Vict. c. 88), s. 19. As to chief constables, see p. 484, *ante*; and the powers of county constables, p. 485, *ante*. As to the appointment of additional constables in the Metropolitan Police District, see p. 473, *ante*.

(*k*) County Police Act, 1840 (3 & 4 Vict. c. 88). Such additional constables are now appointed in lieu of watchmen in parishes which adopted and have continued to avail themselves of the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90) (County Police Act, 1840 (3 & 4 Vict. c. 88), s. 20).

Part VIII.—General Powers and Duties of Constables.

General powers and duties.

1026. The Police Acts give to the members of every police force all the powers, privileges, and duties which any constable duly appointed has within his constablewick at common law or by statute (*l*).

The general duties of constables are to preserve the King's peace, and with that object to keep watch and ward in their several districts, and to bring criminals to justice (*m*).

Power of arrest.

1027. For the efficient execution of these purposes they are given powers of arresting offenders under the warrant of a justice of the peace (*n*), and in some cases without warrant (*o*). They may not, however, execute the warrant of a justice outside the limit of the area for which they act, except in the case of fresh pursuit, when

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(*l*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 4; County Police Act, 1839 (2 & 3 Vict. c. 93), s. 8; City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 9; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 191 (2). A constablewick is the area for which a constable is empowered to act.

(*m*) 1 Bl. Com., p. 356; Statute of Winchester, 1285 (13 Edw. 1, c. 6); Com. Dig., tit. Justices of Peace (B. 79.).

(*n*) For the provisions regulating the issue of such warrants, see Indictable Offences Act, 1848 (11 & 12 Vict. c. 42); Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43); titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 307 *et seq.*; MAGISTRATES, Vol. XIX., pp. 564, 596. As to warrants of arrest in various matters, see also titles CORONERS, Vol. VIII., pp. 266, 267 (arrest of coroner's witnesses); EXTRADITION AND FUGITIVE OFFENDERS, Vol. XIV., p. 422 (fugitive offenders); GAMING AND WAGERING, Vol. XV., p. 291 (common gaming house). As to the powers of customs officers, see title REVENUE.

(*o*) As to the right to arrest without warrant at common law, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 296—300; and, under a variety of statutes, *ibid.*, pp. 300, 301. Members of the Metropolitan, City, and borough police forces have power so to arrest idle and disorderly persons (Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 64; City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 18; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 193). The same applies in the case of street offences in the Metropolitan Police District or the City of London, and in boroughs where the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), has been adopted (Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54; City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 35; Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28). As to constables' power to arrest in certain circumstances without a warrant, see also titles COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 171 (pirated music); ECCLESIASTICAL LAW, Vol. XI., p. 664 (brawling in church); INFANTS AND CHILDREN, Vol. XVII., p. 168 (offences under the Children Act, 1908 (8 Edw. 7, c. 67); METROPOLIS, Vol. XX., p. 465 (offences against Metropolis Management Acts); OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., p. 596 (throwing rubbish into public garden; and compare *ibid.*, p. 583). As to a constable's power of recapture of an escaped prisoner, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 509.

they may execute it at any place within seven miles of the boundary (*p*).

General Powers and Duties of Constables.

Upon arrest constables may, if necessary, handcuff a person whose demeanour is violent or raises an apprehension of violence (*a*), and may search him and take away from him articles that are dangerous or available as evidence of the offence with which he is charged (*b*).

Execution of search warrants.

1028. It is their duty to execute search warrants issued by a justice of the peace and directed to them (*c*); and in some cases they have a right of search without warrant (*d*).

(*p*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 10; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 308. As to fresh pursuit, see also *ibid.*, p. 300. As to the powers of police in border counties, see note (*c*), p. 485, *ante*.

(*a*) *Wright* v. *Court* (1825), 4 B. & C. 596; see *Leigh* v. *Cole* (1853), 6 Cox, C. C. 329. A prisoner who is handcuffed without a reasonable necessity for such a course has a right of action for damages (*R.* v. *Taylor* (1895), 59 J. P. 393).

(*b*) *Leigh* v. *Cole*, *supra*; *Bessell* v. *Wilson* (1853), 20 L T. (o. s.) 233, *per* Lord CAMPBELL, C.J.; see *Dillon* v. *O'Brien and Davis* (1887), 20 L. R. Ir. 300; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 607, note (*u*); *Bice* v. *Jarvis* (1885) 49 J. P. 264. As to information given to the police by persons whom they have arrested, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 394 *et seq.*; *R.* v. *Winkel* (1911), 76 J. P. 191. As to restitution of property in the hands of the police, see titles MAGISTRATES, Vol. XIX., pp. 577, 606; PAWNS AND PLEDGES, pp. 247, 254, 255, *ante*.

(*c*) The common law right to issue a search warrant is confined to cases of stolen property, but the right is extended to a variety of other matters by statute. A list of these is set out in title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 310, to which reference generally should be made for the conditions under which search warrants are to be issued and executed. As to search warrants in various matters, see also titles ANIMALS, Vol. I., p. 418 (unlawful vivisection); CLUBS, Vol. IV., 434, 436, 437 (offences in clubs); COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 171 (pirated music); EXPLOSIVES, Vol. XIV., p. 391 (offences with regard to explosives); EXTRADITION AND FUGITIVE OFFENDERS, Vol. XIV., p. 422 (fugitive offenders); FISHERIES, Vol. XIV., p. 639 (offences with regard to salmon); GAMING AND WAGERING, Vol. XV., p. 291 (common gaming house); INFANTS AND CHILDREN, Vol. XVII., p. 168 (offences under the Children Act, 1908 (8 Edw. 7, c. 67); INTOXICATING LIQUORS, Vol. XVII., p. 120 (offences with regard to licensed premises); as to protection of a constable in executing search warrant, see title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., p. 688, note (*d*).

(*d*) Constables have power to search without a warrant persons coming from land and suspected of having been unlawfully in search of game (Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114; see title GAME, Vol. XV., pp. 237, 238). A written order from a chief officer of police is sufficient authority to a constable to search for stolen property on premises occupied by persons convicted of fraud or dishonesty punishable by penal servitude or imprisonment, or occupied actually or within the previous twelve months by persons convicted of receiving stolen property or harbouring thieves (Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 16). In cases of emergency they have power to search for explosives with only a written order from a superintendent of police (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 73; see title EXPLOSIVES, Vol. XIV., pp. 391 *et seq.*). The Metropolitan and City of London police have power to stop and search boats or carriages for stolen goods (Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 66; City of London Police Act, 1839 (2 & 3 Vict. c. xciv.),

1029. When money is paid to a constable in discharge of a penalty imposed by a court of summary jurisdiction, it is his duty to pay the money over to the clerk of the court of summary jurisdiction (*e*); and, when it is paid to a constable in discharge of a sum in respect of which a distress warrant has been issued, the constable is dispensed from the duty of further execution of the warrant (*f*).

Duty of constable with regard to sums paid to him.

1030. A warrant must be strictly executed, otherwise the constable to whom it is directed is liable to an action (*g*). A constable acting in pursuance of a justice's warrant is protected against action brought without a precedent demand to produce the warrant for perusal and copy, and a refusal on his part to produce it, or brought without due notice, or brought in consequence of any want of jurisdiction in the justice who signed the warrant (*h*).

Action against constable.

Any action brought against a constable acting in execution of his duty must be brought within six calendar months of the act complained of (*i*).

1031. A constable in the execution of his duty is entitled to receive aid from private persons on occasions where there is reasonable necessity for it (*k*). Persons refusing or neglecting to give aid are liable to indictment at common law (*l*).

Right to aid from private persons.

1032. To assault, resist, or obstruct a constable in the execution

Assault on, or obstruction of, constable.

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s. 49), when actually in transit (*Hadley* v. *Perks* (1866), L. R. 1 Q. B. 444); and they have power, with a written order from the Commissioner, to enter, unlicensed theatres gambling houses etc. (Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 46—48; City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), ss. 30—32); see pp. 472, 479, *ante*.

(*e*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 31.

(*f*) *Ibid.*, ss. 28, 31; and see title DISTRESS, Vol. XI., p. 226.

(*g*) *Parton* v. *Williams* (1830), 3 B. & Ald. 330; *Crosier* v. *Cundey* (1827), 6 B. & C. 232; *Hoye* v. *Bush* (1840), 1 Man. & G. 775; and see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*h*) Constables Protection Act, 1750 (24 Geo. 2, c. 44), s. 6. The action must not be brought for a space of six days after the demand and compliance with the demand for production of the warrant. This provision, though originally applicable to parish constables only, is applicable now to every member of a police force. It applies when a constable executes a distress warrant which has been duly issued but the execution of which is suspended without authority by the justices (*Barrons* v. *Luscombe* (1835), 5 Nev. & M. (K. B.) 330); see also title ACTION, Vol. I., p. 26. As to the effect of acting under a warrant upon an otherwise criminal act, *e.g.*, murder, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 574.

(*i*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2; see titles LIMITATION OF ACTIONS, Vol. XIX., p. 176; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*k*) *R.* v. *Brown* (1841), Car. & M. 314. It is no defence that the single aid of the person called upon would have been of no avail (*ibid.*); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 506, 507.

(*l*) *R.* v. *Brown*, *supra*; *R.* v. *Sherlock* (1866), L. R. 1 C. C. R. 20; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 506, 507. Persons going to the aid of the police when called upon are protected *eundo, morando, et redeundo* (*R.* v. *Phelps* (1841), Car. & M. 180, *per* COLTMAN, J.).

PART VIII. General Powers and Duties of Constables.

of his duty is an offence for which the offender may either be indicted (*m*) or tried summarily (*n*).

Privileges and exemptions.

1033. Metropolitan and county constables are exempt from service in the militia or on juries (*o*), and from payment of tolls (*p*).

The publication by a chief officer of police of any matter issued by him for the information of the public is, in the absence of express malice, privileged (*q*).

The duty of a constable to bring criminals to justice does not prevent him from receiving rewards offered by private persons for their apprehension (*r*).

Provision has been made by statute for a weekly rest day for members of every police force (*s*).

(*m*) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 38, conviction under which renders the offender liable to imprisonment with or without hard labour for a period not exceeding two years. Under the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 12, the court may in its discretion impose in the alternative a fine not exceeding £20, and, in default of payment, imprisonment, with or without hard labour, for a period not exceeding six months, for an assault on a constable; and by the Prevention of Crimes Amendment Act, 1885 (48 & 49 Vict. c. 75), s. 2, a fine not exceeding £5, and, in default of payment, two months' imprisonment, for resisting or obstructing a constable in the execution of his duty; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 506, 507.

(*n*) Under the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 18, persons assaulting or resisting or inciting others to assault or resist a constable are liable on conviction before a magistrate to a fine not exceeding £5, or imprisonment for not more than one month. The City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 18, provides for a similar punishment on conviction before a justice of the City. A similar offence in relation to a borough constable renders the offender liable to a fine not exceeding £5 (Municipal Corporations Act, 1883 (45 & 46 Vict. c. 50), s. 195), or, where the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), is in force, to a fine not exceeding £5, or imprisonment with or without hard labour for not more than one month. In the latter case the conviction may be before one justice (*ibid.*, s. 20). A similar offence, in regard to a county constable or a special constable either in a county or borough, renders the offender liable on conviction before the justice to a fine not exceeding £20 (Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 11; County Police Act, 1839 (2 & 3 Vict. c. 93), s. 8). As to the scale of punishment then applicable, see the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20; title MAGISTRATES, Vol. XIX., pp. 568 *et seq.*, 572—574.

(*o*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 10; Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9, Sched.; and see title JURIES, Vol. XVIII., pp. 230, 231.

(*p*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 10; County Police Act, 1840 (3 & 4 Vict. c. 88), s. 1; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 65.

(*q*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 4; see title LIBEL AND SLANDER, Vol. XVIII., pp. 697, 699.

(*r*) *England* v. *Davidson* (1840), 11 Ad. & El. 856; *Smith* v. *Moore* (1845), 1 C. B. 438; *Neville* v. *Kelly* (1862), 12 C. B. (N. S.) 740; but it has been said that such rewards are contrary to public policy (*Burt* v. *Wakefield Bank* (1878), 4 C. P. D. 1, *per* GROVE, J., at p. 6). As to whether the police themselves or the person giving them information are entitled to the reward, see *Lancaster* v. *Walsh* (1838), 4 M. & W. 16; *Thatcher* v. *England* (1846), 3 C. B. 254; *Burt* v. *Wakefield Bank*, *supra*.

(*s*) Police (Weekly Rest-Day) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 13).

Neglect of duty or unlawful absence from duty.

1034. It is an offence for a constable in any police force in violation of his duty to do or fail to do any act (*t*), or to resign or absent himself from duty without either the written consent of the chief officer of the police force or of the superintendent under whom he is placed, or without having given to such superior officer one calendar month's notice of his intention to resign (*u*).

Omission to deliver up police property.

1035. It is the duty of every constable on resignation or dismissal to deliver up his clothing, accoutrements, and the other appointments supplied to him as constable, to the person and at the time and place directed by the chief officer or superintendent (*v*). Omission to do so is an offence.

Unauthorised possession of police property.

1036. The unauthorised possession of police clothing and accoutrements by any person not able to account satisfactorily for it, or the false pretence of being a constable, or the unauthorised use of police clothing or accoutrements for the purpose of obtaining admission to a house or other place, or for any other unlawful purpose, is an offence (*w*).

This Act requires adoption by each police authority, but if not adopted within four years from 26th July, 1910, comes automatically into operation at the expiration of that period (*ibid.*).

(*t*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 12; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 14; City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 15. Under these statutes the penalty is a fine not exceeding £10, which may be deducted from the constable's pay, or, in the discretion of the court, imprisonment for a period of not more than one month, with or without hard labour. In the case of borough constables the penalty is a fine not exceeding 40*s.*, or, in the discretion of the court, imprisonment for not more than ten days or dismissal from the force (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 194). The offence is in all cases punishable summarily, and is irrespective of the penalty of suspension or dismissal. As to larceny or embezzlement by police officers, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 641, 654.

(*u*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 13; County and Borough Police Act, 1859 (22 & 23 Vict. c. 32), s. 4; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 15; City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 17. The offender is liable on conviction to forfeit all arrears of pay due to him or to a penalty not exceeding £5. In the case of county or borough police both forfeiture and penalty may be imposed (County and Borough Police Act, 1859 (22 & 23 Vict. c. 32), s. 4); but see Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 10, whereby in places where that Act applies the offender is liable to forfeit all arrears of pay, or to a penalty not exceeding £5, or, in the discretion of the justices, to imprisonment for not more than fourteen days (*ibid.*, s. 10).

(*v*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 14 (a search warrant for the discovery of such accoutrements as are not delivered up may be issued by a justice (*ibid.*)); Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 11; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 16. This provision does not apply in the City of London, or in the case of boroughs where the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), has not been adopted or where there is no similar provision in the local Act. The penalty in all cases where the provision applies is imprisonment with or without hard labour for a period not exceeding one month; and a search warrant may be issued (*ibid.*, s. 11). As to pawning police clothing, see title PAWNS AND PLEDGES, p. 237, *ante*.

(*w*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 15; Metropolitan

PART VIII. General Powers and Duties of Constables.

Bribing or harbouring constable.

1037. It is an offence for a licensed victualler to bribe or attempt to bribe a constable, or to supply him with liquor or refreshment when on duty, except by an order of a superior officer, or knowingly to harbour or entertain any constable or to permit him to remain on his premises except in the execution of his duty during any part of the time during which the constable is on duty (*x*).

Special powers of police.

1038. Special powers and duties are given to the police under a variety of statutes, such as those relating to aliens (*y*), animals (*z*), the army (*a*), bail (*b*), betting and gaming (*c*), billiard licences (*d*), brawling (*e*), bread (*f*), brothels (*g*), canals (*h*), cattle (*i*), children (*j*),

Police Act, 1839 (2 & 3 Vict. c. 47), s. 17; City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 16; Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89). The provision does not apply in boroughs where the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), has not been adopted or where there is no similar provision in the local Act. The offender is liable in every case where it does apply to a penalty not exceeding £10, in addition to any other punishment to which he may be liable (*ibid.*, s. 12).

(*x*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 78. Under this statute the penalty for a first offence is a sum not exceeding £10, for a subsequent offence a sum not exceeding £20. See also Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 6; County Police Act, 1839 (2 & 3 Vict. c. 93), s. 16. Under these statutes, which include the holder of an "off licence," the offender is liable to a penalty not exceeding £5. Under the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 34, the penalty is a sum not exceeding 20*s.*; and see title INTOXICATING LIQUORS, Vol. XVIII., pp. 134, 135. As to bribery of and extortion by the police generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 481, 483, 484.

(*y*) Aliens Act, 1905 (5 Edw. 7, c. 13); see title ALIENS, Vol. I., p. 325.

(*z*) See title ANIMALS, Vol. I., pp. 398, 399, 400 *et seq.*, 414, 415, 418, 419, 422, 431.

(*a*) Army Act (44 & 45 Vict. c. 58); see title ROYAL FORCES.

(*b*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 42; see title MAGISTRATES, Vol. XIX., p. 608; see also p. 505, *post*.

(*c*) Stat. (1541-2) 33 Hen. 8, c. 9; Gaming Act, 1802 (42 Geo. 3, c. 119); Gaming Act, 1845 (8 & 9 Vict. c. 109); Betting Act, 1853 (16 & 17 Vict. c. 119); Gaming Houses Act, 1854 (17 & 18 Vict. c. 38); Street Betting Act, 1906 (6 Edw. 7, c. 43); see title GAMING AND WAGERING, Vol. XV., pp. 284, 285, 291, 294 *et seq.*, 303.

(*d*) Gaming Act, 1845 (8 & 9 Vict. c. 109); see title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*e*) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32); see titles BURIAL AND CREMATION, Vol. III., p. 422; ECCLESIASTICAL LAW, Vol. XI., p. 664.

(*f*) Bread (London) Act, 1822 (3 Geo. 4, c. cvi.); Bread Act, 1836 (6 & 7 Will. 4, c. 37); see title FOOD AND DRUGS, Vol. XV., p. 48.

(*g*) Disorderly Houses Act, 1751 (25 Geo. 2, c. 36); Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 542, 543.

(*h*) Special Constables Act, 1838 (1 & 2 Vict. c. 80); see p. 494, *ante*, and title RAILWAYS AND CANALS.

(*i*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89); Metropolitan Market Act, 1857 (20 & 21 Vict. c. cxxxv.); Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134); see title STREET AND AERIAL TRAFFIC.

(*j*) Children Act, 1908 (8 Edw. 7, c. 67); see title INFANTS AND CHILDREN, Vol. XVII., pp. 161 *et seq.*, 168 *et seq.*, 173 *et seq.*

chimney sweepers (*k*), clubs (*l*), coal (*m*), criminals (*n*), customs and excise (*o*), disorderly persons (*p*), distress (*q*), dogs (*r*), drunkards (*s*), elections (*t*), explosives (*u*), factories and shops (*a*), fire (*b*), food and drugs (*c*), game (*d*), hawkers (*e*), highways (*f*), house duty (*g*), illegal sports (*h*), innkeepers (*i*), intoxicating liquors (*j*),

(*k*) Chimney Sweepers Act, 1875 (38 & 39 Vict. c. 70); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*l*) Licensing (Consolidation) Act, 1910 (10 Edw. 7, & 1 Geo. 5, c. 24); see title CLUBS, Vol. IV., pp. 434, 436.

(*m*) Coal Duties (London) Act, 1831 (1 & 2 Will. 4, c. lxxvi.); see titles TRADE AND TRADE UNIONS; WEIGHTS AND MEASURES.

(*n*) Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 2; Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), ss. 3, 5, 6, 7, 8, 16; Prevention of Crime Act, 1879 (42 & 43 Vict. c. 55), s. 2; Summary Jurisdiction Act, 1979 (42 & 43 Vict. c. 49), s. 10; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 303, note (*f*) (power of arrest), 307 (breaking open doors to arrest), 414 (police supervision), 415 (reporting by convict); *R.* v. *Mitchell* (1912), 28 T. L. R. 484; title MAGISTRATES, Vol. XIX., p. 510.

(*o*) Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38); see title REVENUE.

(*p*) See title STREET AND AERIAL TRAFFIC.

(*q*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 6; see title DISTRESS, Vol. XI., p. 192.

(*r*) Dog Licences Act, 1867 (30 & 31 Vict. c. 5); Customs and Inland Revenue Acts, 1878 (41 & 42 Vict. c. 15), and 1879 (42 & 43 Vict. c. 21); Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134); Dogs Act, 1906 (6 Edw. 7, c. 32); Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 61; see titles ANIMALS, Vol. I., pp. 398 *et seq.*; GAME, Vol. XV., pp. 253, 254.

(*s*) Licensing Act, 1872 (35 & 36 Vict. c. 94); Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24); see title INTOXICATING LIQUORS, Vol. XVIII., pp. 142, 143, 167.

(*t*) See title ELECTIONS, Vol. XII., pp. 311, 489, 526, 527, 535, 537 note (*d*).

(*u*) Explosives Act, 1875 (38 & 39 Vict. c. 17); see title EXPLOSIVES, Vol. XIV., pp. 374, 379 *et seq.*, 391, 392, notes (*c*), (*e*), 393, note (*f*).

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 119; Shops Act, 1911 (1 & 2 Geo. 5, c. 54), s. 7; see title FACTORIES AND SHOPS, Vol. XIV., p. 529.

(*b*) Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), ss. 12, 22; Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), ss. 87, 88; see titles METROPOLIS, Vol. XX., p. 418; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*c*) Sale of Food and Drugs Acts, 1875 (38 & 39 Vict. c. 63), 1879 (42 & 43 Vict. c. 30), and 1899 (62 & 63 Vict. c. 51); see title FOOD AND DRUGS, Vol. XV., pp. 12, 13, 33, 34, 58.

(*d*) See title GAME, Vol. XV., pp. 236, 237, 238, 256, 260.

(*e*) Hawkers Act, 1888 (51 & 52 Vict. c. 33), ss. 4, 6; see title MARKETS AND FAIRS, Vol. XX., pp. 56, 57.

(*f*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), ss. 24, 28; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54; Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 79; see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 65, 123; PUBLIC HEALTH AND LOCAL ADMINISTRATION; STREET AND AERIAL TRAFFIC.

(*g*) House Tax Act, 1803 (43 Geo. 3, c. 161), s. 60; see title INHABITED HOUSE DUTY, Vol. XVII., p. 187.

(*h*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 36; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54.

(*i*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 18; see titles INNS AND INNKEEPERS, Vol. XVII., p. 312; INTOXICATING LIQUORS, Vol. XVIII., p. 133.

(*j*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 153; Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), ss. 10, 15, 22, 25, 27, 53,

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licences (*k*), lunatics (*l*), markets and fairs (*m*), merchandise marks (*n*), motor cars (*o*), pawnbrokers (*p*), pedlars (*q*), petroleum (*r*), poaching (*s*), post office (*t*), prostitutes (*u*), public health (*v*), railways (*w*), refreshment houses (*x*), ships (*y*), small tenements (*z*), street offences (*a*), street traffic (*b*), Sunday observance (*c*), tenants absconding (*d*), theatres and music halls (*e*).

62, 64, 80, 81, 82; Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), s. 5; see title INTOXICATING LIQUORS, Vol. XVIII., pp. 22, 39, 42, 98, 99, 104, 120, 132, 142, 143, 146, 156.

(*k*) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 9; Game Licences Act, 1860 (23 & 24 Vict. c. 90). Under the Finance Act, 1908 (8 Edw. 7, c. 16), and Order in Council of 19th October, 1908, the county council may employ the police to exercise such powers and duties as were formerly exercised under the Game Licences Act, 1860 (23 & 24 Vict. c. 90), by officers of the Inland Revenue; see title GAME, Vol. XV., pp. 247, 253.

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 13, 20; Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 2; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 505, 505, 506.

(*m*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 38, 39; see title MARKETS AND FAIRS, Vol. XX., pp. 16, 19, note (*g*).

(*n*) Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 12; see title TRADE MARKS, TRADE NAMES, AND DESIGNS.

(*o*) Motor Car Act, 1903 (3 Edw. 7, c. 36), ss. 1, 3; see title STREET AND AERIAL TRAFFIC.

(*p*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), ss. 34, 36, 42; see title PAWNS AND PLEDGES, pp. 247, 248, 256, *ante*.

(*q*) Pedlars Act, 1871 (34 & 35 Vict. c. 96), ss. 5, 8, 9, 15, 17, 19; see title MARKETS AND FAIRS, Vol. XX., pp. 58, 59

(*r*) Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67), s. 4; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*s*) Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 1; Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2; see title GAME, Vol. XV., pp. 236, 237, 238.

(*t*) Post Office Act, 1908 (8 Edw. 7, c. 48) s. 67 (2); see title POST OFFICE, p. 667, *post*.

(*u*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54; see titles POOR LAW; STREET AND AERIAL TRAFFIC.

(*v*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 106; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*w*) Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 6; Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 17; see title RAILWAYS AND CANALS.

(*x*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), ss. 18, 41; see title INTOXICATING LIQUORS, Vol. XVIII., pp. 133, 142.

(*y*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 33—35; see titles SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

(*z*) Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74); see title LANDLORD AND TENANT, Vol. XVIII., p. 560.

(*a*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 54, 62; see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 65, 123; PUBLIC HEALTH AND LOCAL ADMINISTRATION; STREET AND AERIAL TRAFFIC.

(*b*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 62; see title STREET AND AERIAL TRAFFIC.

(*c*) Sunday Observance Prosecution Act, 1871 (34 & 35 Vict. c. 87), s. 1; see titles THEATRES AND OTHER PLACES OF ENTERTAINMENT; TIME.

(*d*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 67; see titles DISTRESS, Vol. XI., p. 192; LANDLORD AND TENANT, Vol. XVIII., pp. 560, 561.

(*e*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 46; see title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

Police prosecutions.

1039. Much of the work of the prosecution of crime is performed by the police at the expense of the local authority (*f*).

This is done, in some instances, in pursuance of a statutory obligation (*g*); but it is principally done in the exercise by them, on behalf of the public, of the right of any private person to prosecute (*h*); and there are therefore certain classes of offences in which it is not open to them to proceed (*i*).

Gradations of rank.

1040. No uniform hierarchy of rank is established by statute for the police forces of the country; but superintendents, inspectors, and sergeants of police are commonly appointed.

The gradations of rank and the number in each rank is fixed, in the case of boroughs by the watch committee (*k*), in the case of counties by the standing joint committee with the approval of the Home Secretary (*l*), in the case of the Metropolitan Police by the Commissioners with the approval of the Home Secretary (*m*), in the case of the City Police by the Commissioner of City Police with the approval of the Home Secretary and the Lord Mayor and Aldermen (*n*).

Powers of superior officers. Bail.

1041. Superintendents and inspectors of police may admit to bail persons arrested without warrant who cannot be brought before a court of summary jurisdiction within twenty-four hours of the arrest (*o*). In places where the adoptive Act (*p*) is in force,

(*f*) In undertaking this responsibility the action of each police force is controlled by its police authority, and the extent to which the responsibility is assumed consequently varies in different police areas with the view of its duties taken by the particular authority. The practice is the result of the balance of public convenience which is felt increasingly to require the application of consistent principles in the prosecution of offenders. In the Metropolis and some of the larger boroughs (*e.g.*, Birmingham), the police authority employs a solicitor for the exclusive purpose of advising the police and conducting prosecutions. As to the authority for incurring such expenses, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 140, Sched. V.; County Police Act, 1839 (2 & 3 Vict. c. 93), s. 18.

(*g*) See, for instance, Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), ss. 9, 15; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 69.

(*h*) Where, however, proceedings have already been taken by a private prosecutor, the court will grant audience to him in preference to the police (*R.* v. *Bushell* (1888), 16 Cox, C. C. 367). As to the powers of private persons to prosecute, see title CRIMINAL LAW AND PROCEDURE, Vol IX., p. 293.

(*i*) Thus, in a few cases, the power of instituting proceedings is limited to certain persons or to persons who have obtained the consent of the Attorney-General or others; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 293; EDUCATION, Vol. XII., pp. 65 *et seq.*; REVENUE.

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 191. In some cases the chief officer of police in a borough has the title of superintendent; see p. 487, *ante*.

(*l*) County Police Act, 1840 (3 & 4 Vict. c. 88), s. 26; see p. 482, *ante*.

(*m*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 5; see p. 470, *ante*.

(*n*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 14; see p. 479, *ante*.

(*o*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 38; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 306, 307.

(*p*) *I.e.*, Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89); see p. 488, *ante*.

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superintendents or other superior officers may admit to bail persons, arrested without warrant, who are charged with an offence, other than a felony, which may be tried summarily under that Act or a local Act, if they cannot conveniently be brought before a justice (*q*).

Similarly, such officers in any police area may, and except in certain circumstances must, admit to bail persons apparently under sixteen, and charged with any offence, if they cannot be brought before a court of summary jurisdiction forthwith, upon sufficient recognisances being entered into by the parent or guardian (*r*).

Constables in the Metropolitan Police District in charge of a station at night, or, in the City of London or any municipal borough, at any time when a justice is not sitting, have similar powers in the case of persons arrested without warrant and charged with offences which may be tried summarily (*r*).

Powers of entry and search.

Superintendents of police have certain special powers of entry and search in the Metropolitan Police District and City of London (*t*), and also in the country generally, under a few public statutes (*u*) and local Acts. But apart from these, and from the fact that constables must give notice of their intention to resign to the superintendents, if any, under whom they are placed (*x*), the distinctive powers given to the superior ranks of a police force are the creation not of statute but of the regulations made for the particular force.

Disposition and management.

1042. Arrangements for the disposition and management of the rank and file of each police force are made by its chief officer with the approval of the local police authority (*y*). The requisite number of men is in this way determined and assigned to the several branches of police work. The distribution of such work to organised departments varies in different police forces, but a

(*q*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 17.

(*r*) Children Act, 1908 (8 Edw. 7, c. 67), s. 94. As to the excepted cases, and generally, see title INFANTS AND CHILDREN, Vol. XVII., p. 176.

(*s*) Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 9; City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 51; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 227; see Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 9.

(*t*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 34, 35, 39, 46–48; City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), ss. 30—32; see pp. 472, 479, *ante*. They are justified in detaining a prisoner brought in by a constable even though in fact the original arrest was illegal (*Bowditch* v. *Fosbery* (1850), 19 L. J. (EX.) 339); and see *Bowditch* v. *Balchin* (1850), 5 Exch. 378 (an action against the constable who made the arrest in the same case).

(*u*) See Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 73.

(*x*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 15; City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 17; County Police Act, 1839 (2 & 3 Vict. c. 93), s. 13; County and Borough Police Act, 1859 (22 & 23 Vict. c. 32), s. 4.

(*y*) The police authorities are, in the case of the Metropolitan Police, the Home Secretary; of the City of London Police, the Common Council; of county police, the standing joint committee; of borough police, the watch committee (Police Act, 1890 (53 & 54 Vict. c. 45), s. 33, Sched. III.; The watch committee of boroughs is directly responsible for the regulations for the management of its police force (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 191 (3)).

separate department is maintained by most forces for the special purposes of detection of crime and supervision of convicted persons.

Detective departments.

1043. Owing to the greater variety and complexity of the services required from the Metropolitan Police Force, the separate organisation of its departments is more elaborately carried out under the control of the Commissioner and Assistant Commissioners at the central police office at New Scotland Yard. The officers and constables trained in the work of special departments of that office may be, and frequently are, placed at the disposal of the local police authorities under the statutory powers for the mutual assistance of one police force by another (*z*).

Criminal Investigation Department.

Part IX.—Damage by Riot.

General compensatory principle.

1044. It follows from the ancient theory of the responsibility of each recognised area for the preservation of the peace within its borders (*a*) that, in the event of damage to property ensuing from the riotous assemblage of persons within the area, such damage shall be made good at the expense of the inhabitants of the area (*b*).

An aggrieved party may recover compensation for a house, shop, or building which has been injured or destroyed, or for property injured, stolen, or destroyed by riot (*c*).

For this purpose it is immaterial whether the riot has occurred in a public place or within private grounds (*d*), or whether it is accompanied by a felonious act (*e*); but it is essential that the disturbance should have amounted to a riot (*f*).

(*z*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 25; see p. 491, *ante*.

(*a*) See p. 462, *ante*.

(*b*) Preamble to the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38). The claim for compensation used formerly to be against the hundred; see stats. (1827) 7 & 8 Geo. 4, c. 31, and (1832) 2 & 3 Will. 4, c. 72, both of which are now repealed, and *Drake* v. *Footitt, Drake* v. *Hankin* (1881), 7 Q. B. D. 201.

(*c*) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), s. 2. Damage done to a wreck, or to machinery or engines used in agriculture, manufacture, mining or quarrying, is included (*ibid.*, s. 6). In the case of a church or chapel, the claim may be made by the churchwardens or persons having the management of, or the legal estate in, it; and, in the case of a school, hospital, public institution or building, by the person having the management of, or the legal estate in, it (*ibid.*, s. 7). As to riot generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 471 *et seq.*

(*d*) *Gunter* v. *Metropolitan Police District* (*Receiver*) (1888), 53 J. P. 249.

(*e*) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38). Formerly this was an essential condition; see *Reid* v. *Clarke* (1798), 7 Term Rep. 496; *Drake* v. *Footitt, Drake* v. *Hankin, supra*.

(*f*) *Field* v. *Metropolitan Police* (*Receiver*), [1907] 2 K. B. 853. A riot

PART IX. Damage by Riot.

Conduct of claimant.

1045. The conduct of the party alleging injury is to be taken into account in fixing the amount of compensation; and, in particular, the precautions taken by him in view of the riot and his attitude in regard to it, whether as accessory to it or as having given provocation to the riotous persons, are material (*g*).

Insurance money received by claimant.

Any amount received by him by way of insurance or otherwise to recoup him in whole or in part for the loss sustained must be deducted from the amount payable to him under this provision, and such deduction, if any, becomes payable to the person who has paid such insurance (*h*).

The claim.

1046. The claim for compensation must be made to the police authority for the area in which the damage was sustained (*i*), and must be made in accordance with the Home Office Regulations (*k*). No costs are allowed to the claimant on making the claim (*l*).

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is itself a misdemeanour at common law, and the persons taking part in it are liable to punishment; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 471. For the purpose of supporting a civil claim to compensation there are five essential conditions of a riot:—(1) it must consist of at least three persons; (2) they must have a common purpose; (3) there must be execution or inception of the common purpose; (4) there must be an intent to help one another by force if necessary against any person who may oppose such execution; (5) there must be force or violence, not merely used in demolishing property, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage; see *Field* v. *Metropolitan Police (Receiver)*, [1907] 2 K. B. 853; and compare *R.* v. *Fursey* (1833), 6 C. & P. 81 (a riot may exist whether the Riot Act is read or not); *R.* v. *Hughes* (1830), 4 C. & P. 373; *R.* v. *Cunninghame Graham and Burns* (1888), 16 Cox, C. C. 420 (there must be evidence of combined intention to use force); *R.* v. *Langford* (1842), Car. & M. 602 (at least one person must be terrified). Although it takes three persons to constitute a riot, two persons may be convicted of riot with persons unknown (*R.* v. *Beach and Morris* (1909), 2 Cr. App. Rep. 189).

(*g*) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), s. 2 (1). Where the claimant had advertised a race meeting which did not after all take place, and the crowd had paid gate money, it was held that provocation had been offered (*Gunter* v. *Metropolitan Police District (Receiver)* (1888), 53 J. P. 249).

(*h*) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), s. 2 (2); and see title INSURANCE, Vol. XVII., p. 518.

(*i*) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), s. 3 (1). In the case of county areas the police authority is the standing joint committee; of boroughs, the borough council; of the Metropolitan Police District, the Receiver; of the City of London, the Common Council. The Tyne Improvement Commissioners are the authority for the area prescribed in their special Acts (*ibid.*, Sched.).

(*k*) *Ibid.*, s. 3 (2). The existing Home Office Regulations, which there is power to vary from time to time, were made on the 30th June, 1894. They include provisions for the claim to be made within a period of fourteen days of the damage being sustained, which claim, however, may be made in a prescribed form showing specified heads of damage; for a full description of the damage and the evidence which the claimant proposes to offer, together with a statutory declaration by such witnesses as the police authority may specify; for separation of property owned by the claimant from that of other persons in his possession; for the separate payment to the owners of property not belonging to the claimant; and for an undertaking by the claimant, if required, to return the money paid in respect of stolen property if it is recovered.

(*l*) Home Office Regulations, 30th June, 1894, No. 11.

1047. If the claim is duly made and the claimant is aggrieved by a refusal on the part of the police authority to admit the claim in whole or in part, he may appeal to the Home Secretary (*m*). If the claim is disallowed by the Home Secretary, the claimant has a right of action against the police authority for the subject-matter of his original claim and the amount named in it; but, if he fails to recover at all or recovers an amount less than that admitted by the police authority, he must pay the costs of the action as between solicitor and client (*n*). Appeal to Home Secretary from refusal to admit claim.

1048. Actions in respect of a claim for no more than £100 must be brought in the county court (*o*). Tribunal.

1049. Claims admitted or recovered by action are payable out of the police fund of the district (*p*). Source of payment.

Part X.—Superannuation and Other Allowances.

1050. Statutory provision exists for establishing upon a more or less uniform basis the regulations affecting the superannuation and pensions of police officers (*q*). General provision.

Under this provision police officers are permitted to retire in certain prescribed circumstances and under certain prescribed conditions (*a*); but the length of notice required (*b*) and the rate of

(*m*) Home Office Regulations, 30th June, 1894, No. 2.

(*n*) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), s. 4 (1).

(*o*) *Ibid.*, s. 4 (2). A county court in any part of the police area may be selected (*ibid.*).

(*p*) *Ibid.*, s. 5 (1). Where a county and borough police force are consolidated (see p. 490, *ante*), the expense is apportioned by the Home Secretary in the absence of a provision in the agreement between the county and borough authorities dealing with the matter (Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), s. 5 (3)).

(*q*) Police Act, 1890 (53 & 54 Vict. c. 45); Police (Superannuation) Act, 1906 (6 Edw. 7, c. 7). These provisions apply to every member of a police force other than the City of London Police Force, as to which see p. 480, *ante* (Police Act, 1890 (53 & 54 Vict. c. 45), ss. 1, 39). Before the passing of the former of these Acts superannuation funds existed, the amount of which was raised by deductions from pay, and out of which the police authority was empowered, but not obliged, to grant pensions; see Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 22, 23; County Police Act, 1840 (3 & 4 Vict. c. 88), ss. 10, 11; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. V., Part II.; compare *R.* v. *Metropolitan Police District (Receiver)* (1863), 4 B. & S. 593. Members of any police force, including that of the City of London, are excluded from the provisions of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58) (*ibid.*, s. 13); see title MASTER AND SERVANT, Vol. XX., p. 156.

(*a*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 1.

(*b*) This must not exceed four months, but the notice must be in writing (*ibid.*).

PART X. Superannuation and Other Allowances.

pension allowed (*c*) varies within certain limits in the case of different police forces (*d*).

Retirement on pension without medical certificate.

1051. A constable who has completed not less than twenty-five years' approved service, and has reached the age, if any, prescribed by the local police authority by which he is employed, is entitled, after giving the prescribed notice, to retire without a medical certificate and to receive a pension for life (*e*).

(*c*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 3. The maximum and minimum limits are laid down in *ibid.*, Sched. I., Part I. (as regards ordinary pensions), and Part II. (as regards special pensions etc.). The amount of the pension is based upon the rate of pay received by the constable before retirement (*ibid.*, s. 3, Sched. I.), but for this purpose free board and lodging are not to be reckoned as part of his pay (*Goodwin* v. *Sheffield Corporation*, [1902] 1 K. B. 629), nor is a separate allowance for special duties (*Upperton* v. *Ridley*, [1903] A. C. 281), and where he has been promoted in rank within three years of his death or retirement, the pension is calculated on the average of his pay for these three years (*ibid.*; Police Act, 1893 (56 & 57 Vict. c. 10), s. 6). The pension of a constable who has been reduced in rank is calculated on the basis of his reduced pay (*ibid.*; see *Ruff* v. *Home Secretary* (1896), 60 J. P. 343).

(*d*) The amounts and conditions may be fixed within the above limits by the local police authority according to its own fixed scale. Where a police authority did not fix a scale before the 1st January, 1891, the scale might be prescribed for it by the Home Secretary (Police Act, 1890 (53 & 54 Vict. c. 45), s. 3 (3)). The local police authority, in the case of the metropolitan police, is the Home Secretary; in the case of a county, the standing joint committee of the county council and justices at quarter sessions; in the case of a borough, the watch committee; and in the case of the Tyne police, the Tyne Improvement Commissioners (*ibid.*, Sched. III.).

(*e*) *Ibid.*, s. 1 (a). "Approved service" means service which, after possible deductions are made, is certified by the police authority to be diligent and faithful service (*ibid.*, s. 4 (1)); and see note (*u*), p. 477, *ante*. The possible deductions are on the ground of sickness, misconduct, or neglect of duty (Police Act, 1890 (53 & 54 Vict. c. 45), s. 4 (1)); but absence on the ground of military service is not a reason for deduction (*ibid.*, s. 4 (5)). If a deduction is to be made, notice of it must be given as soon as may be to the constable, who may appeal to the chief officer against any act of another officer giving rise to any ground for deduction, and the decision of the chief officer is final, except in the case of a borough, when it requires the approval of the watch committee (*ibid.*, s. 4 (3)). Approved service for not less than two years in another police force, from which a constable was removed with the sanction of the chief officer of that force, may be reckoned (*ibid.*, s. 4 (4); see Police Superannuation Act, 1908 (8 Edw. 7, c. 5), ss. 1, 2), but service in any force before the age of twenty-one is not reckoned unless permitted by the regulations of the force from which the constable claims his pension (Police Act, 1890 (53 & 54 Vict. c. 45), s. 4 (1)). Service of the State as a civil servant within the meaning of the Superannuation Act, 1887 (50 & 51 Vict. c. 67), or as a member of a police force with a salary paid out of money provided by Parliament, may be reckoned, three years of service in the police being regarded as equivalent to four years of service as a civil servant, and, where the pension is payable partly from the police pension fund and partly from funds provided by Parliament, the proportion to be allocated to each fund respectively is decided by the Treasury, having regard to the length of service and salary in each capacity (Police Act, 1890 (53 & 54 Vict. c. 45), s. 14 (3)). A mandamus will issue, if necessary, to the Treasury to compel them to determine the proportion (*R.* v. *H. M. Treasury* (*Lords Commissioners*), [1909] 2 K. B. 183). Actual service in the Army or Navy reserve forces may be reckoned for approved service (Police (Superannuation) Act, 1906 (6 Edw. 7, c. 7), s. 4). As to the effect upon the right to a pension of temporary rank conferred upon a member of a police force while performing

Retirement of incapacitated constable on pension or gratuity.

1052. A constable who has completed fifteen years' approved service, and is incapacitated for the performance of his duty by infirmity of mind or body, is entitled on a medical certificate to retire and receive a pension for life (*f*). If he is so incapacitated before completion of fifteen years' approved service, he is entitled on a medical certificate to retire and receive such gratuity, if any, as the local police authority may think him entitled to (*g*).

If his incapacity, whenever it occurs, is due to an injury received in the execution of his duty without his own default, he is entitled on a medical certificate to retire and receive a pension for life (*h*).

Pension or gratuities and allowances to widow and children of constable.

1053. The widow of a constable who dies while in a police force from the effect of an injury received in the execution of his duty without his own default is entitled to a pension, and his children to allowances (*i*). If he dies from the effects of such an injury within

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other services, see *Storey* v. *Nottinghamshire Standing Joint Committee* (1908), 72 J. P. 31. The certificate of approved service must be given by the police authority. The chief officer can certify as to the period of service, but not as to character (*Garbutt* v. *Durham Joint Committee*, [1906] A. C. 291). As to chief officers, see p. 516, *post*. Such a pension is an ordinary pension; see Police (Superannuation) Act, 1906 (6 Edw. 7, c. 7), s. 8; and see the text, *infra*.

(*f*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 1 (b). Such a pension is an ordinary pension, and the medical certificate required as evidence of incapacity is that of some one or more legally qualified medical practitioner or practitioners selected by the police authority (*ibid.*, s. 5 (1)). The police authority may yearly or otherwise, until he reaches the age at which he would obtain his pension for life as of right (see p. 510, *ante*), satisfy itself that the constable's incapacity for service continues, and if it does not, may require him to serve again (Police Act, 1890 (53 & 54 Vict. c. 45), s. 5 (4)), or, if the incapacity becomes only partial, may reduce his pension proportionately (*ibid.*, s. 5 (6)). A constable so required to serve again is entitled to do so in a rank as high and at a salary as large as he formerly enjoyed (*ibid.*, s. 5 (5)). A constable who refuses to be examined by the doctor selected by the police authority is disentitled from claiming the full or partial pension to which he might otherwise have been entitled (*ibid.*, s. 5 (7)). In the decision of matters relating to pensions for incapacity, there is no appeal from the decision of the police authority except in the case of a borough constable, who may appeal to the borough council (*ibid.*, s. 5 (8)). A police authority may not order a constable to be re-examined by a doctor for any purpose other than information as to his capacity (*Re Kinchant, R.* v. *Leigh (Lord)*, [1897] 1 Q. B. 132, C. A.).

(*g*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 1 (c); and see note (*d*), p. 510, *ante*.

(*h*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 1 (d). The police authority must satisfy itself by the evidence of its selected doctor (1) that the injury was received by the constable in the execution of his duty; (2) that it was not due to his default; (3) that the infirmity is attributable to the injury; also whether (1) the injury was accidental or not, and (2) whether the disablement is total or partial (*ibid.*, s. 5 (2); and see note (*f*), *supra*). If a pension has been granted on the ground of partial disablement, it may be increased at any time within three years if it appears from medical evidence that the disablement will be total (Police Act, 1893 (56 & 57 Vict. c. 10), s. 3).

(*i*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 2 (1). As to evidence of the injury, see note (*h*), *supra*; and as to the scale of the pension, see note (*d*), p. 510, *ante*; Police Act, 1890 (53 & 54 Vict. c. 45), Sched. I. The widow's pension depends on her not remarrying and on her being of good character. An allowance to a child ceases when the child attains the age of fifteen (*ibid.*, Sched. I., Part III.).

PART X. Superannuation and Other Allowances.

twelve months of being granted a pension because of the injury, the police authority may, if it thinks fit, grant a pension to the widow for a term of years or otherwise (*k*). If whilst serving in a police force he dies from any other cause (*l*), or within twelve months after the grant of a pension (*m*), the police authority may, if it thinks fit, grant gratuities to the widow and children or any of them.

Reduction of pension.

1054. A pension granted to a constable on the ground of infirmity of mind or body may be reduced by an amount not exceeding one-half of the sum to which he would be otherwise entitled, if the police authority is satisfied that the infirmity is due wholly or partially to the constable's own default or vicious habits (*n*).

Forfeiture of pension.

1055. A pension may be forfeited wholly or in part, and temporarily or otherwise, as the police authority may determine, on the following grounds (*o*) :—

(1) Conviction of any offence for which the constable is sentenced to penal servitude, or to imprisonment for more than three months with hard labour, or for more than twelve months with or without hard labour;

(2) Conscious association with thieves or reputed thieves;

(3) Refusal to assist the police with information or otherwise;

(4) Carrying on an illegal business or making discreditable or improper use (*p*) of his previous employment as a policeman;

(5) Making discreditable or improper use of confidential information obtained whilst serving in a police force (*q*);

(6) Soliciting or receiving, without the leave of the police authority, a pecuniary testimonial on retirement (*r*);

(7) Acting as a private detective after being forbidden to do so by the police authority on any reasonable grounds (*s*).

Payment and receipt of pensions.

1056. A police pension may not be assigned or charged for the benefit of anyone except the pensioner's family, and, in the case of the pensioner's bankruptcy, does not pass to the trustee or the creditors (*t*). The police authority has power, however, to pay the whole or part of the pension in certain cases to poor law (*a*) or

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(*k*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 2 (3).

(*l*) *Ibid.*, s. 2 (2).

(*m*) *Ibid.*, s. 2 (4).

(*n*) *Ibid.*, s. 6. Actions must be based on medical evidence as to this; see note (*h*), p. 511, *ante*.

(*o*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 8.

(*p*) *Ibid.*, s. 8 (d). The police authority is the judge of whether the use made is discreditable or improper.

(*q*) Police (Superannuation) Act, 1906 (6 Edw. 7, c. 7), s. 5 (1); and see note (*p*), *supra*. In this and the following cases the forfeiture requires the confirmation of the Home Secretary.

(*r*) Police (Superannuation) Act, 1906 (6 Edw. 7, c. 7), s. 5. Compare *Chisholm* v. *Holland* (1886), 50 J. P. 197.

(*s*) Police (Superannuation) Act, 1906 (6 Edw, 7, c. 7).

(*t*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 7 (1); but sums already accrued may be attached (*Booth* v. *Trail* (1883), 12 Q. B. D. 8; and see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 191; CHOSES IN ACTION, Vol. IV., pp. 400 *et seq.*).

(*a*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 7 (2), (3). The cases to which the provision is applicable are when the pensioner or someone whom he is liable to maintain is in receipt of poor relief, or where the pensioner neglects to maintain a person whom he is liable to maintain.

hospital or asylum authorities (*b*), or to a person whom the pensioner is liable, but neglects, to maintain (*c*), and, if a sum not exceeding £100 is due to a pensioner at his death, the police authority may direct that probate be dispensed with, and deliver the money to the person beneficially entitled to it (*d*).

Payments due to a minor may be made to the minor or to someone on his behalf at the discretion of the police authority (*e*).

Regulations may be made by the police authority, with the sanction of the Home Secretary, for declarations to be made by persons in receipt of grants (*f*); and the receipts of such persons are good discharges to the police authority for the amount paid (*g*).

Fraudulently obtaining a pension.

1057. Fraudulently obtaining or attempting to obtain a pension or other grant is an offence rendering the offender liable to forfeit the grant (*h*). If summarily convicted, he may be imprisoned with or without hard labour for four months, or be fined a sum not exceeding £25; if convicted by a jury, he may be imprisoned with or without hard labour for a term not exceeding two years (*i*).

Reduction in rank and refusal of pension.

1058. A constable who would otherwise be entitled to a pension may be dismissed or reduced in rank or be refused a pension for misconduct, or negligence in the discharge of his duties, or for any offence rendering a police pensioner liable to forfeit his pension (*k*).

Appeal from refusal or forfeiture.

1059. If a pension is refused or forfeited the constable claiming the pension has a right of appeal to quarter sessions (*l*); and, if the police authority exceeds its jurisdiction in cancelling or delaying payment of the pension, the constable is entitled to a mandamus to the police authority (*m*).

(*b*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 7 (4); and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p 440.

(*c*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 7 (3).

(*d*) *Ibid.*, s. 7 (5). If there is more than one person entitled, the police authority may distribute the money in accordance with law. If the deceased pensioner is illegitimate the police authority may distribute the money among such persons as it thinks fit.

(*e*) *Ibid.*, s. 7 (6).

(*f*) *Ibid.*, s. 7 (8).

(*g*) *Ibid.*, s. 7 (7).

(*h*) *Ibid.*, s. 9; and see title MAGISTRATES, Vol. XIX., p. 586. This includes the use of a false declaration, certificate, representation or evidence, personation, malingering, feigning illness, wilful injury or any other fraudulent conduct. The provision supersedes any provisions of a local Act or charter.

(*i*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 9.

(*k*) *Ibid.*, s. 10.

(*l*) *Ibid.*, s. 11. The appeal is to the next practicable court of quarter sessions. The decision of quarter sessions being final, there is an appeal by special case to the High Court (*Kydd* v. *Liverpool Watch Committee*, [1908] A. C. 327, overruling *Goodwin* v. *Sheffield Corporation*, [1902] 1 K. B. 629. In *Upperton* v. *Ridley*, [1903] A. C. 281, and *Garbutt* v. *Durham Joint Committee*, [1906] A. C. 291, the question of the jurisdiction of the High Court to hear an appeal under this provision was not raised).

(*m*) *Re Kinchant*, *R.* v. *Leigh* (*Lord*), [1897] 1 Q. B. 132, C. A. In this case the police authority had used its power of calling upon a constable to undergo a medical re-examination for the purpose of assisting the bankruptcy court; see note (*f*), p. 511, *ante*.

PART X. Superannuation and Other Allowances.

Suspension of pension during service.

1060. If a constable in receipt of a pension from the fund of one police force takes service in that or another police force, his pension may be suspended during the period of his service (*n*); and if he receives an appointment with a remuneration paid out of parliamentary or local (other than police) funds, his pension is reduced so that he receives altogether a sum equal to one and a half times the salary of the office in respect of which his pension was awarded (*o*).

Reduction *pro tanto*.

Sources of revenue of pension fund

1061. The police pension fund, to be maintained by every police authority (*p*), is supplied by the deductions made from the pay of the constables themselves, fines imposed on the police themselves, or for assaults on the police, or awarded to the police as informers in any court of summary jurisdiction, fines or fees directed by any Act to be payable to the fund, net proceeds of the sale of police clothing, payments or contributions made under any local Act, a proportion of the sum paid by another police authority for the loan of constables' services (*q*), and dividends on invested funds.

Other sources of supply are the net sums received as fees for pedlars' and chimney-sweepers' certificates, fees payable to constables for the execution of their duties, and fines summarily imposed for offences under the Licensing Acts committed in the police area (*r*), also sums in the hands of the police authority or of members of the force as such (*s*).

The fund also receives contributions from the Exchequer, subject to the Home Secretary's certificate of efficiency (*t*).

Treasurer of pension fund.

1062. The treasurer of the police funds is the treasurer of the

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(*n*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 13 (1).

(*o*) *Ibid.*, s. 13 (2); Police Act, 1893 (56 & 57 Vict. c. 10), s. 4; see *Nott-Bower* v. *Liverpool Corporation* (1904), 68 J. P. 243.

(*p*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 16 (1). As to the pension funds of the Metropolitan Police Force and City of London Police, see pp. 477, 480, *ante*. There is only one superannuation fund for the police of the three parts of Lincolnshire (County and Borough Police Act, 1889 (22 & 23 Vict. c. 32), s. 22; see also Lincolnshire Police Superannuation Act, 1883 (51 & 52 Vict. c. ix)).

(*q*) See p. 491, *ante*.

(*r*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 16 (2). These sums are payable to the police pension fund unless the local authority to whom they are immediately payable resolves otherwise.

(*s*) *Ibid.*, s. 16 (3). These sums are not to be carried to the pension fund if held upon any private trust, or without the express direction of the police authority (*ibid.*). Where police are appointed to carry out the provisions of the Weights and Measures Acts, fees paid to them for their services are not payable to the pension fund (*R.* v. *Kesteven Justices* (1889), 58 L. J. (M. C.) 157).

(*t*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 17. As to the certificate of efficiency, see p. 516, *post*. The sources of the contributions are certain customs and excise duties, which are not, however, payable to the pension fund of the Metropolitan Police Force. The distribution is made in two parts—first, an amount equal to that of the deductions made by each police authority is payable to each pension fund, and then the remainder is divided proportionately according to the amounts paid in pensions or grants out of each fund in the previous year; but the Home Secretary is entitled to modify the terms of distribution to avoid inequality of treatment (Police Act, 1890 (53 & 54 Vict. c. 45)).

pension fund, and the rules as to audit of the police funds are applicable (*u*).

1063. Surplus income is to be invested in accordance with the Trustee Acts (*a*), or in debentures or mortgages of a county council issued under the Local Loans Act (*b*) and in a manner to be selected by the police authority (*c*). Investment of income and application of capital.

The capital of the pension fund cannot be used for making payments out of the fund (*d*). Any deficiency is guaranteed by the police fund itself (*e*), which is reimbursed by means of a special police rate (*e*).

Where the pension fund exceeds the requirements of the force, the police authority may apply to the Home Secretary for a provisional order authorising payments out of it and suspension of investing (*f*).

1064. A constable who retires from a police force without a pension or gratuity, but who is not dismissed, and who does not remove to another police force on the terms of his previous approved service being reckoned for approved service with that other force (*g*), may have returned to him, at the discretion of the police authority, the deductions which have been made from his pay (*h*). Return of deductions from pay.

1065. A constable who retires from and rejoins the same police force is entitled to reckon the years of approved service of his first term, but he must repay to the police fund any pension or gratuity received by him on retiring and any deductions of pay which have been returned to him (*i*). Effect of rejoining force.

1066. A constable who has completed twenty-five years' approved service and has reached the prescribed age for a pension may continue to serve unless superannuated, and, in such case, the police authority may in its discretion fix his prospective pension on the basis of his previous service, if they have a medical certificate that he is physically fit for service (*j*). Such medical certificate must be renewed each year (*k*), and any extra pay given for the constable's Effect of service after prescribed period.

(*u*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 18.

(*a*) See title TRUSTS AND TRUSTEES.

(*b*) See title MONEY AND MONEY-LENDING, Vol. XXI., pp. 61 *et seq.*

(*c*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 18 (3); Police Act, 1893 (56 & 57 Vict. c. 10), s. 5; see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 69.

(*d*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 18 (4).

(*e*) *Ibid.*, s. 19.

(*f*) *Ibid.*, s. 22. As to confirmation of such a provisional order, see note (*t*), p. 518, *post*.

(*g*) See note (*e*), p. 510, *ante*.

(*h*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 21.

(*i*) Police (Superannuation) Act, 1906 (6 Edw. 7, c. 7), s. 2. The repayment may be effected by deductions from pay or otherwise as the police authority may determine. The sum repaid is payable to the police pension fund (*ibid.*).

(*j*) *Ibid.*, s. 1. The police authority may direct that he shall be entitled on retiring at any time thereafter to receive a pension not less in amount than he would be entitled to had he retired at once. This right to a named pension will only be forfeited for the reasons for which a pension actually received may be forfeited; see p. 512, *ante*. As to medical certificates, see note (*f*), p. 511, *ante*.

(*k*) Police (Superannuation) Act, 1906 (6 Edw. 7, c. 7), s. 1 (2).

PART X. Superannuation and Other Allowances.

continued service is not reckoned for the purpose of his pension, and rateable deductions are not made from it (*l*).

Application of provisions to superior officers.

1067. The provisions for the pensions and allowances to constables also apply to superior officers (*m*); but certificates of approved service and sanction of removal to another force may in the case of the chief constable be given by resolution of the police authority (*n*).

Compulsory retirement of officers above inspectors.

1068. An officer above the rank of inspector must retire at the age of sixty-five except in a special case (*o*), but, even if not entitled to receive a pension under the usual rules, he is given one on the same terms as if he had then retired with a medical certificate (*p*).

Part XI.—Powers of Secretary of State.

The central authority.

1069. The Home Secretary (*q*) is the central police authority (*r*).

Appointment of inspectors.

1070. Inspectors are appointed by the Crown acting through the Home Secretary (*s*) to visit and inquire into the state and efficiency of every county and borough police force, the observance or otherwise of the statutory provisions under which such police forces are appointed, and the state of police stations, charge rooms, cells and lock-ups or other premises occupied for the use of such police force (*a*).

Reports of inspectors.

The reports of the inspectors are made to the Home Secretary and laid by him before Parliament (*a*).

Certificates of efficiency.

1071. Certificates of efficiency based on the reports of the inspectors are issued annually by the Home Secretary to all such county and borough police forces as have been maintained in a state of efficiency in point of numbers and discipline during the

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(*l*) Police (Superannuation) Act, 1906 (6 Edw. 7, c. 7), s. 1 (3).

(*m*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 12. But pensions payable by Parliament are not to be payable out of the Police Pension Fund (*ibid.*).

(*n*) *Ibid.*

(*o*) Police (Superannuation) Act, 1906 (6 Edw. 7, c. 7), s. 6 (1). A special case can only arise where the police authority is of opinion that the officer's retirement would be detrimental to the interests of the force, and in any case retirement can only be deferred for five years (*ibid.*).

(*p*) *Ibid.*, s. 6 (2).

(*q*) The powers are in fact always exercised by the Home Secretary, but, in his absence, could be exercised alternatively by any other Secretary of State; see note (*f*), p. 465, *ante*; title CONSTITUTIONAL LAW. Vol. VII., pp. 83—85.

(*r*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 15; see title CONSTITUTIONAL LAW, Vol. VII., p. 85.

(*s*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 15. The number of inspectors to be appointed is three, and their salaries are determined by the Treasury Commissioners and paid out of money provided by Parliament for that purpose (*ibid.*).

(*a*) *Ibid.*

preceding year (*b*). Receipt of this certificate is a condition precedent to the payment to the local authorities maintaining such police forces of the Treasury grant of one half the cost of maintenance (*c*), as well as of the sums contributed annually by the Treasury to the local police superannuation grants (*d*). The certificate is not to be withheld finally until the inspector's report has been communicated to the local police authority and that authority has had an opportunity of making a statement in respect of it to the Home Secretary (*e*). In the event of its being finally withheld, this statement, if any, together with the reasons of the Home Secretary for withholding it, are to be laid before Parliament (*e*), and a sum to be certified by the Home Secretary as equal to one half the cost of the pay and clothing of such police during the year is forfeited by the local authority (*f*).

Powers as to appointments and regulation of forces.

1072. Appointments to the office of chief constable in counties are subject to the approval of the Home Secretary (*g*). He makes the rules for the government, pay, clothing, accoutrements and necessaries of every county police force (*h*), and receives quarterly reports of the rules made from time to time by watch committees or borough councils for the regulation and guidance of borough police forces (*i*). The table of fees payable to the constables of any police force for acts done in execution of their duty is subject to his approval (*k*).

Annual police returns.

1073. The Home Secretary receives an annual return in a form prescribed by him of the number of offences reported to the police within each county or borough, the number of persons apprehended by the police, the nature of the charges against them, the result of the proceedings taken thereon and any other particulars relating to the state of crime in the district which the local police authority may think it material to furnish (*l*).

(*b*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 16.

(*c*) *Ibid.*; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (i). The payment is made through the county councils. In the case of county police forces, it is made to the borough council. As to places within the Metropolitan Police District, see p. 475, *ante*.

(*d*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 17; see p. 514, *ante*.

(*e*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 16.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 25. In the case of a county police force being inefficient, the sum which would normally be appropriated to the police fund from the local taxation account of the county fund becomes payable to the Exchequer account. In the case of a borough police force being inefficient the forfeited sum is not paid over by the county council to the borough council, and remains available for general county purposes.

(*g*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 3.

(*h*) *Ibid.* A copy of such rules is to be laid before both Houses of Parliament (*ibid.*; and see p. 483, *ante*).

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 192.

(*k*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 23; County and Borough Police Act, 1859 (22 & 23 Vict. c. 32), s. 24. In a borough such fees are paid over to the superannuation fund (*ibid.*, s. 11).

(*l*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 14.

PART XI. **Powers of Secretary of State.**

The return is made for each calendar year, and must be forwarded to the Home Secretary as soon as may be after the termination of the year (*m*). A classified abstract of the returns is prepared annually and laid before Parliament (*n*).

Consolidation orders and agreements.

1074. The making of orders consolidating the police forces of a borough and county is subject to an inquiry and report by the Home Secretary when the parties fail to agree to them (*o*); and, in any event, such a consolidation agreement cannot be terminated without his consent (*p*), nor can the separate police force maintained by a borough having more than 15,000 inhabitants be superseded without his authority (*q*).

Formation of separate districts etc.

The formation of separate police districts in counties (*r*) and places for the provision of lock-ups are subject to his approval (*s*).

Adjustments as regards pension fund.

He may make provisional orders for dealing with any surplus belonging to the pension fund of any police force, or for the adjustment of relations between the pension fund of a police force and any other special force maintained by the same local authority (*t*).

Powers in relation to the Metropolitan Police Force.

1075. In relation to the Metropolitan Police Force, the Home Secretary is the police authority and has control of the organisation and disposition of the force (*a*). The Chief Commissioner and Assistant Commissioners of Police are appointed by the Crown on nomination by him (*b*), and the police office at New Scotland Yard is subordinate to his department (*c*).

Forces not under Home Secretary's control.

1076. The City of London police (*d*) and the police force maintained by the Tyne Improvement Commissioners (*e*) are not controlled by the Home Secretary, and are not in receipt of any contribution from the Exchequer.

(*m*) Police Returns Act, 1892 (55 & 56 Vict. c. 38), s. 1.

(*n*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 14.

(*o*) *Ibid.*, s. 5; see p. 490, *ante*.

(*p*) County and Borough Police Act, 1856 (19 & 20 Vict c. 69), ss. 5, 20; see p. 491, *ante*.

(*q*) County and Borough Police Act, 1856 (19 & 20 Vict. c 69), s. 19; see p. 486, *ante*.

(*r*) County Police Act, 1840 (3 & 4 Vict. c. 88), s. 27; County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), s. 1; see p. 483, *ante*.

(*s*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 22; Lock-up Houses Act, 1848 (11 & 12 Vict. c. 101), s. 1; Petty Sessions and Lock-up Houses Act, 1868 (31 & 32 Vict. c. 22), s. 10; see pp. 482, 488, *ante*.

(*t*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 22. Such provisional orders require confirmation with or without modification by Parliament (*ibid*). The other special forces alluded to are a fire brigade, fire police or other like force (*ibid.*).

(*a*) *Ibid.*, s. 32; see p. 467, *ante*.

(*b*) Metropolitan Police Act, 1856 (19 & 20 Vict. c. 2), s. 2; see p. 467, *ante*.

(*c*) See p. 467, *ante*.

(*d*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.); see, however, as to the Commissioner, p. 478, *ante*.

(*e*) Tyne Improvement Act, 1852 (15 & 16 Vict. c. cx.), ss. 27—29; and see note (*t*), p. 508, note (*d*), p. 510, *ante*.

Special constables.

1077. The Home Secretary receives notice of the nomination and appointment of special constables, with a statement of the circumstances rendering such appointment expedient (*f*); and also of the suspension or determination of the service of any or all of the special constables appointed (*g*).

He has power on the representation of the justices of the peace to order the appointment of persons as special constables who would otherwise be exempt (*h*), and to reduce the amount of orders, made by local authorities, for the payment of special constables by persons undertaking public works, when such orders appear to him excessive (*i*).

Parish constables.

1078. The regulations for the payment of fees and allowances to parish constables require his approval (*k*).

(*f*) Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 1; see p. 492, *ante*.

(*g*) Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), s. 9.

(*h*) *Ibid.*, ss. 2, 3. Under *ibid.*, s. 3, he may direct the lord lieutenant of a county to cause special constables to be sworn in throughout a whole district without regard to exemptions; see p. 492, *ante*.

(*i*) Special Constables Act, 1838 (1 & 2 Vict c. 80), s. 2; see p. 494, *ante*.

(*k*) Parish Constables Act, 1842 (5 & 6 Vict. c. 109), s. 17; Parish Constables Act, 1872 (35 & 36 Vict. c. 92), s. 11; see p. 465, *ante*.

POLICY.

See INSURANCE.

POLL.

See ELECTIONS.

POLLUTION.

See CRIMINAL LAW AND PROCEDURE; NUISANCE; WATERS AND WATERCOURSES.

POOR LAW.

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Part I.—Introductory.

Complexity of the poor laws.

1079. The law as to the relief of the poor is entirely the creation of statute. It originated in 1601 with the enactment which is still the key-note of the system (*a*), but the comparatively simple origin is almost lost in a maze of statutes, departmental orders and directions, which have in practice the force of statutory enactments, and judicial decisions and *obiter dicta*, many of them absolutely irreconcilable the one with the other; while, to add to the confusion, innumerable duties and powers have been imposed or conferred upon poor law authorities, and their cost directed to be discharged out of the moneys raised for the relief of the poor, which have little or no connection with the primary object of relieving the urgent necessities of the destitute (*b*).

No branch of the laws of England stands in greater need of codification or would more amply repay the labour of the codifier than does the law relating to the relief of the poor.

The parochial system.

1080. Originally the relief of the poor within its bounds was the charge of each parish, and parish officers, named "overseers of the poor," were appointed, whose duty it was to set to work all paupers and their families, and to tax all occupiers in order to raise a parochial fund for the necessary relief of the parish poor (*c*). This identification with the parish led to the complicated law of settlement and removal (*d*), the object of which was to compel all persons likely to resort to the parish fund for relief to return to the parish to which they originally belonged, and so relieve parishes from the burden of maintaining strangers.

The union.

1081. Very early in the history of poor relief we find that parishes were combining or uniting for the purposes of better and

(*a*) Poor Relief Act, 1601 (43 Eliz. c. 2). From an early period the law endeavoured to repress mendicancy, and to provide for the restriction of beggars to their place of origin and to some small exent for their maintenance. The earliest statute on the subject (1388), 12 Rich. 2, c. 7, provided that impotent beggars and poor people were to go back to the parish of birth, and the various Vagabonds Acts, *e.g.* (1495) 11 Hen. 7, c. 2; (1503-4) 19 Hen. 7, c. 12; (1535-6) 27 Hen. 8, c. 25; (1597) 39 Eliz. c. 4; (1603) 1 Jac. 1, c. 7 (all now repealed), carried the system still further.

(*b*) This title deals only with the primary object of the poor law, and is restricted to an attempt to outline the means by which that object, "the necessary relief of the poor," is sought to be attained. For the extraneous duties of boards of guardians, reference should be made to the titles noted in the table of cross-references given on p. 522, *ante*. One matter, however, that has no legal relation to poor relief is included in this title, namely, the quite modern subject of old age pensions, partly because the subject stands by itself, and, though no part of the poor law system, is yet perhaps more nearly akin to poor relief than to any other title, and partly because it may be contended that the relief so given to the aged is truly poor relief, though artificially kept distinct therefrom. The provisions of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), will be dealt with in the title WORK AND LABOUR.

(*c*) See title RATES AND RATING.

(*d*) See pp. 574 *et seq.*, 580 *et seq.*, *post*.

PART. I. Introductory.

more economical administration of poor relief (*e*), and this combination was carried out all over the country by successive Acts of Parliament (*f*), which proceeded to take the administration out of the hands of the overseers, to systematically group parishes into unions, and to place each union under the control, a very limited control, of elected boards of guardians, whose freedom of action is limited in nearly every direction by the supervising and directing powers of a Government department, formerly the Poor Law Commissioners and the Poor Law Board, and now the Local Government Board (*g*).

Part II.—Poor Law Authorities.

SECT. 1.—*The Local Government Board.*

SUB-SECT. 1.—*In General.*

Supremacy of the Local Government Board.

1082. The administration of relief to the poor is subject to the management, direction, and control of the Local Government Board (*h*), in which body is now vested the powers of the former Poor Law Commissioners and the Poor Law Board. The Local Government Board cannot interfere with the law of settlement and removal, and cannot dictate to the guardians as to the relief to be granted in any individual case (*i*), but in practically every other matter connected with the administration of the poor laws and the relief of the poor the Board is supreme, subject only to the control of Parliament, and, in some cases, to the power reserved to the Crown to disallow by Order in Council certain proceedings of the Board (*k*).

Proof of sanction etc.

1083. In any case where the Poor Law Commissioners, or the Poor Law Board, or the Local Government Board, have given or refused their consent, sanction, or approval, in any matter where their order under seal is not expressly required, the production of any written document signed, or purporting to be signed, by a secretary or assistant secretary of the Commissioners or of the particular Board is *primâ facie* evidence of the decision of the Commissioners or Board upon such matter (*l*).

(*e*) See the Poor Relief Act, 1662 (14 Car. 2, c. 12).

(*f*) See, for example, Gilbert's Act, stat. (1782) 22 Geo. 3, c. 83, now repealed; Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76).

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

(*h*) For the constitution of the Local Government Board, see title CONSTITUTIONAL LAW, Vol. VII., pp. 103, 104.

(*i*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 15.

(*k*) See, generally, the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76); the Poor Law Board Act, 1847 (10 & 11 Vict. c. 109); and the Local Government Board Act, 1871 (34 & 35 Vict. c. 70).

(*l*) Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), s. 4.

SECT. 1. The Local Government Board.

1084. The Local Government Board is empowered to hold inquiries and to require returns upon any matter connected with the execution of any of its powers; such inquiries are generally held by the Board's inspectors (*m*), or by specially appointed persons (*n*).

Inquiries.

1085. Any question affecting the settlement, removal, or chargeability of a poor person may, by agreement between the guardians concerned made under seal, be submitted to the Local Government Board, whose decision will be final and conclusive between the submitting parties (*o*).

Settlement of differences.

1086. Any adjustment of property and liabilities required in connection with matters arising under the Local Government Act, 1894 (*p*), must, so far as it relates to the joint use of property in which a board of guardians is interested, be approved by the Local Government Board (*q*).

Adjustments.

SUB-SECT. 2. *Poor Law Orders.*

1087. The Local Government Board may from time to time make and issue rules, orders, and regulations (for the sake of brevity hereinafter referred to as "orders") for the management of the poor, the government of workhouses and the education of the children therein, for apprenticing the children of poor persons, for the guidance and control of all guardians, vestries, and parish officers, so far as relates to the management and relief of the poor, and the keeping, examining, auditing, and allowing of accounts, and making and entering into contracts in all matters relating to such management or relief, or to any expenditure for the relief of the poor, and generally for the due execution of the poor laws. The Board may from time to time suspend, alter, or rescind any order (*r*).

Power to make orders.

1088. A King's Printer's copy of any order of the Local Government Board is *primâ facie* evidence, after the lapse of fourteen days from the date thereof, that such order was duly made and is in force (*s*).

Proof of orders.

1089. Orders are either general or particular. Any order of the Local Government Board, which when issued is directed to and affects more than one union, other than an order by which a district

General orders.

(*m*) See p. 527, *post*.

(*n*) See Poor Law Board Act, 1847 (10 & 11 Vict. c. 109), ss. 11, 22, 26.

(*o*) Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 12.

(*p*) 56 & 57 Vict. c. 73.

(*q*) *Ibid.*, s. 68 (2); see title LOCAL GOVERNMENT, Vol. XIX., p. 289.

(*r*) See Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 15. Numerous and voluminous orders have been issued under this authorisation, which deal in detail with almost every phase of poor law relief. The principal orders are referred to in connection with particular subjects, but for the text readers are referred to such a collection as Macmorran and Lushington's Poor Law General Orders, 2nd ed., or to the annual volumes of Statutory Rules and Orders.

(*s*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 71. As to the proof of any order etc., see the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2; Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 5; Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 2; and title EVIDENCE, Vol. XIII., pp. 525, 526.

SECT. 1. The Local Government Board.

of unions or parishes and unions is formed (*t*), is deemed to be a general order, as is also every order made to vary or rescind a general order, whether it be directed to or affects one or more than one union (*a*). Any general order, or any part thereof, may be disallowed by Order in Council, and thereupon, so far as it has been disallowed, it ceases to be of any force or validity, except as to anything lawfully done thereunder before the disallowance (*b*).

Particular orders.

A particular order is one that is applicable to individual cases in some one parish or union.

Publication.

1090. A written or printed copy of every order must, before it comes into operation in any parish or union, be sent by the Local Government Board to the overseers of the parish, and to the guardians of the union or their clerk. The overseers and guardians must give publicity to the order in such manner as the Board directs, and must allow it to be inspected, and copies thereof to be taken on payment of the prescribed charge, by any owner of property in the place or his agent, or any ratepayer. These requirements also apply to the disallowance or revocation of an order (*c*). Copies of an order do not require to be sealed (*d*).

Every general order must be published in the *London Gazette*, and when so published takes effect without further publication (*e*).

A copy of any general order must be laid before both Houses of Parliament as soon as possible after its publication (*f*), and if it relates to the relief of the poor, the government and management of workhouses and their inmates, or the guidance and regulation of guardians and their officers, copies must be sent to the clerks to the justices of the petty sessional divisions within the union (*g*).

Testing validity of orders.

1091. An order may be removed into the High Court of Justice by *certiorari*, but unless and until it is declared illegal by that court it remains effective and must be obeyed (*h*). This is, practically, the only way in which the validity of an order can be raised and tested (*i*). The writ must be moved for within twelve months of the publication in the *London Gazette* of a general order (*k*), and within twelve months of the sending of a copy, as required by statute, of any other order (*l*).

(*t*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 1.
(*a*) Poor Law Board Act, 1847 (10 & 11 Vict. c. 109), s. 15.
(*b*) *Ibid.*, s. 17.
(*c*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 18.
(*d*) Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58), s. 14.
(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. V., Part. III.
(*f*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 1.
(*g*) *Ibid.*, s. 2. Copies are not required to be sealed (Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58), s. 14).
(*h*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 105. As to the procedure, see *ibid.*, ss. 106—108; and title CROWN PRACTICE, Vol. X., pp. 174, 192, note (*l*). A divisible order may be quashed as to part only (*R.* v. *Robinson* (1851), 17 Q. B. 466).
(*i*) See *R.* v. *Bristol* (*Governors of the Poor*) (1849), 13 Q. B. 405; *R.* v. *Oldham Union Overseers* (1847), 10 Q. B. 700; *R.* v. *Bangor Overseers* (1847), 13 Q. B. 91.
(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. V., Part III.
(*l*) Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 13.

Disobedience to orders.

1092. If any person wilfully neglects or disobeys an order of the Local Government Board, or of its predecessors, he may, on summary conviction before two justices, be fined for the first offence any sum not exceeding £5; for the second offence, any sum not exceeding £20 nor less than £5. A third or subsequent offence is deemed to be a misdemeanour, and is punishable on conviction on indictment by a fine of not less than £20 and such imprisonment, with or without hard labour, as the court may award (*m*).

Provisional orders.

1093. The Local Government Board may, on the application of the guardians concerned, by provisional order (*n*) repeal or alter any local Act controlling or regulating the relief of the poor, or the making and levying of the poor rate, in any union or parish (*o*).

Alteration of areas.

1094. The Local Government Board has also extensive powers as to the division of parishes and the alteration of parish boundaries for the purposes of the better administration of relief to the poor (*p*).

SUB-SECT. 3.—*Inspectors.*

Appointment.

1095. The Local Government Board must from time to time appoint so many fit persons as may be allowed by the Treasury, to be inspectors, to assist in the execution of the law relating to the relief of the poor, and may from time to time assign duties to the inspectors or to any of them, and may remove an inspector. The salaries of the inspectors are regulated by the Treasury (*q*).

Powers and duties.

1096. The inspectors are entitled to visit and inspect every workhouse or place wherein any poor person in receipt of relief is lodged, and to attend every board of guardians and every parochial and other local meeting held for the relief of the poor, and to take part in the proceedings, but not to vote at such board or meeting (*r*). The power to inspect a workhouse extends to the doing of anything necessary to procure such information as may be required by the Local Government Board as to the condition and government of the

(*m*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 98.

(*n*) As to provisional orders and their confirmation generally, see title PARLIAMENT, Vol. XXI., p. 740.

(*o*) See Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 2; Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 3; Poor Law Act, 1879 (42 & 43 Vict. c. 54), s. 9.

(*p*) See, generally, the Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106); the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61); the Poor Law Act, 1879 (42 & 43 Vict. c. 54); the Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58); the Local Government Act, 1894 (56 & 57 Vict. c. 73); and, as to metropolitan parishes, the Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63). See also title LOCAL GOVERNMENT, Vol. XIX., p. 238. As to the powers of the Local Government Board in relation to the formation, alteration, and dissolution of unions, see pp. 553 *et seq.*, *post*.

(*q*) Poor Law Board Act, 1847 (10 & 11 Vict. c. 109), s. 19. See also Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 3, for a general power of appointing inspectors and other officers.

(*r*) Poor Law Board Act, 1847 (10 & 11 Vict. c. 109), s. 20. The right to attend and take part in meetings may be enforced by mandamus; see *R.* v. *St. Pancras* (*Directors of the Poor*) (1858), 22 J. P. 384; *R.* v. *St. Marylebone Guardians* (1856), 6 Jur. (N. S.) 1094, n.

SECT. 1. The Local Government Board.

workhouse and the inmates. An inspector may be authorised to hold inquiries upon any matter concerning the administration of the poor law, and may summon and examine witnesses (*s*).

SECT. 2.—*County Councils.*

Position of county councils.

1097. Strictly speaking, a county council is not a poor law authority, for, save as regards the provision of asylums for pauper lunatics (*t*), it has practically no administrative duties in connection with the relief of the poor. Councils, however, have certain powers to alter poor law areas (*a*) and to regulate the election of guardians (*b*), and they must make certain payments to guardians.

Grants to guardians.

1098. The county council, including the council of a county borough, must pay to the guardians out of the county fund, and charge to the Exchequer Contribution Account (*c*), (1) such sums as the Local Government Board certify to be due from the council in respect of the remuneration of teachers in poor law schools (*d*), and for payments to public vaccinators (*e*); (2) the school fees paid for pauper children sent from a workhouse to a public elementary school outside the workhouse (*f*); (3) certain sums towards the remuneration of the registrars of births and deaths (*g*); and (4) a sum equal to 4*s*. a week for each pauper lunatic chargeable to the union, and maintained in an asylum, registered hospital, or licensed house, for whom the net charge upon the guardians, after deducting amounts received otherwise than from local rates, is equal to or exceeds 4*s*. a week (*h*). If the union is in more than one county the amount to be paid will be apportioned (*i*).

The guardians are also entitled to receive from the county council, other than the London County Council, or the council of the county borough, as the case may be, an annual sum for the costs of the officers of the union and of district schools to which the union contributes (*k*).

(*s*) See Poor Law Board Act, 1847 (10 & 11 Vict. c. 109), ss. 21, 22, 26.

(*t*) For its powers and duties in this respect, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 479.

(*a*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 36; and title LOCAL GOVERNMENT, Vol. XIX., p. 377.

(*b*) See pp. 531 *et seq.*, *post*.

(*c*) See title LOCAL GOVERNMENT, Vol. XIX., p. 351.

(*d*) See title EDUCATION, Vol. XII., p. 88.

(*e*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) See title EDUCATION, Vol. XII., pp. 82, 88.

(*g*) See title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 24, 34. The guardians must claim payment in the prescribed manner; see *ibid.*, s. 24 (6), (7). As to the method of calculating the amount of contributions, see *Calne Union* v. *Wilts County Council*, [1911] 1 K. B. 717, and Circular of the Local Government Board, dated 7th July, 1911.

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (5).

(*k*) *Ibid.*, s. 26. As to the basis of calculation and apportionment, see *ibid.*

Grants in London.

1099. In the administrative county of London (*l*) the county council must (1) pay to the guardians for every poor law union wholly in the county such sums as the Local Government Board from time to time certifies to be due from the said council in substitution for the local grants towards the remuneration of poor law medical officers, and towards the cost of drugs and medical appliances, (2) grant to the guardians of every poor law union wholly in the county an amount equal to 4*d.* a day per head for every indoor pauper maintained in that union, such grant to be reckoned in a prescribed manner (*m*), unless Parliament otherwise determines, and (3) pay to the guardians of every poor law union, a portion of which only is situate in its county, such proportion of the annual sum which is, under the provisions of the Local Government Act, 1888 (*n*), payable by the county council of a county to the guardians of that union, as the rateable value of the portion within the administrative county of London bears to the rest of the union (*o*).

SECT. 3.—*Justices of the Peace.*

Poor law powers of justices.

1100. Justices of the peace may order overseers to give relief in cases of sudden and urgent necessity, and may order medical relief in a case where sudden and dangerous illness may require it (*p*), and in any union formed under the Poor Law Amendment Act, 1834 (*q*), any two justices usually acting for the district in which such union is situated may at their discretion direct, by order under their hands and seals, that relief be given to any adult person, who from old age or infirmity of body is wholly unable to work, without requiring such person to reside in the workhouse. Such person, however, must be entitled to relief in such union, and be desirous of receiving it out of the workhouse, and one of the justices must certify in the order, of his own knowledge, that the person is wholly unable to work as aforesaid (*r*).

SECT. 4.—*Overseers.*

To relieve in urgent cases.

1101. Apart from their duties with respect to the making and levying of the poor rate (*s*), practically the only matter in which overseers have powers in connection with the relief of the poor is

(*l*) See title METROPOLIS, Vol. XX., p. 393.

(*m*) The expression "indoor pauper" is defined by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 43 (2), which also enacts (*ibid.*, s. 43 (3)), that the average number of paupers shall be estimated in such manner as the Local Government Board directs. The grant made by the London County Council in respect of indoor paupers is in addition to any payment made out of the Metropolitan Common Poor Fund (*ibid.*, s. 94), as to which see p. 550, *post*.

(*n*) 51 & 52 Vict. c. 41.

(*o*) *Ibid.*, s. 43 (1).

(*p*) See p. 530, *post*.

(*q*) 4 & 5 Will. 4, c. 76.

(*r*) *Ibid.*, s. 27. As to the authority of justices to visit workhouses, see p. 559, *post*; for their powers in connection with removal orders, see pp. 590 *et seq.*, *post*, where those orders are dealt with; and for their duties as regards the poor rate, see title RATES AND RATING.

(*s*) As to which, see title RATES AND RATING.

SECT. 4. Overseers.

that in cases of sudden and urgent necessity the overseer of a parish is required to give such temporary relief as each case may require, in articles of absolute necessity, but not in money, and whether the applicant for relief is settled in the parish or not. If an overseer refuses or neglects to give relief in any such case of a non-settled or non-resident applicant, he may be ordered in writing to do so by a justice of the peace, and, if he disobeys such an order, he may, on summary conviction, be fined a sum not exceeding £5. A justice may also order medical relief to any parishioner or out-parishioner, when required by sudden and dangerous illness, and the overseer must obey such an order on pain of a similar penalty for default (*t*).

An overseer may also, in a case of sudden and urgent necessity, give a written order for admission to the workhouse (*a*). The overseer must enter in a register the name of every poor person in receipt of out-relief in the parish, with such particulars respecting the family and settlement of every such poor person, and his and their relief and employment, as the Local Government Board requires (*b*).

Parish debts.

1102. If overseers lawfully contract any debt on account of the parish within three months of the termination of their year of office, their immediate successors must pay it (*c*).

Appointment by guardians.

1103. When the power of appointing overseers is vested in the parish council or parish meeting of a rural parish, if the guardians of the union do not receive from the council or meeting the prescribed notice of appointment within the prescribed time, the guardians must make the appointment, and the person appointed by them will supersede any overseer whose appointment has not been duly notified (*d*).

SECT. 5.—*Boards of Guardians.*

SUB-SECT. 1.—*Constitution and Proceedings.*

Constitution.

1104. The local administration of poor relief is entrusted to boards of guardians, which expression means a board of guardians elected under the Poor Law Amendment Act, 1834 (*e*), and the Acts amending the same, and includes a board of guardians or other body of persons performing under any local Act the functions of a board of guardians under the said Act of 1834 (*f*). This Act

(*t*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 54. See also General Order of the Poor Law Commissioners, 22nd April, 1842, arts. 1—3 (Stat. R. & O. Rev., Vol. X., Poor, England, pp. 180 *et seq.*).

(*a*) General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 88—90 (Stat. R. & O. Rev., Vol. X, Poor, England, pp. 74 *et seq.*).

(*b*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 55. For the duties of overseers with respect to burials, see title BURIAL AND CREMATION, Vol. III., pp. 475, 547; for their duties as to registration of voters and elections, see title ELECTIONS, Vol. XII., pp. 194, 196, 201, 210, 217, 221, 231, 239, 382, 481.

(*c*) Poor Law Audit Act, 1848 (11 & 12 Vict. c. 91), s. 1.

(*d*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 50.

(*e*) 4 & 5 Will. 4, c. 76.

(*f*) See Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 16 (1). In Birmingham, Brighton, Bristol, Bury St. Edmunds, Chichester, East and West

provided that when parishes were united for the administration of the laws for the relief of the poor, a board of guardians for such union should be constituted and chosen, and that the workhouse or workhouses of such union should be governed, and the relief of the poor in such union should be administered, by the board of guardians (*g*), also that where the administration of the laws for the relief of the poor of any single parish had been or is directed to be governed and administered by a board of guardians, such board should be elected and constituted, and authorised and entitled to act for such single parish, in like manner in all respects as a board of guardians for united parishes (*h*).

Elections.

1105. Guardians are elected parochially, the number to be elected for each parish being fixed by the constituting order. Such number may be altered by either the Local Government Board (*i*) or the county council (*k*), or, if the union is in more than one county, by a joint committee of the councils of the respective counties (*l*).

The Local Government Board may by order unite small parishes for the purpose of the election of guardians (*m*), and may divide a parish into wards for such elections of guardians, and determine the number of guardians to be elected for each ward (*n*), and may alter any wards and the number of guardians to be elected for such wards (*o*). The county council have somewhat similar powers (*p*), and, in addition, have power to remove, by order, difficulties which may arise in connection with an election, or with the first meeting after any ordinary election, of guardians, and if from an election not being held, or being defective, or otherwise, the board has not been properly constituted, may do what appears necessary to put matters right (*q*).

In a rural district the district councillors are the guardians for the particular parish or area for which they have been elected, and no special election of guardians can be held (*r*).

Flegg, Exeter, Forehoe, Kingston-upon-Hull, Liverpool, Mutford and Lothingland, Oswestry, Oxford, Plymouth, Southampton, and Stoke Damerel, the guardians, and in Liverpool, the select vestry, have powers and duties under local Acts. Such guardians must have the qualifications and be elected in the way required by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 60, but in other respects they continue to exercise the powers and duties conferred by the local Acts.

(*g*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 38.

(*h*) *Ibid.*, s. 39.

(*i*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 18.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 60 (1).

(*l*) *Ibid.*, s. 60 (3); and see title LOCAL GOVERNMENT, Vol. XIX., pp. 331, 349.

(*m*) See Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 6.

(*n*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 12.

(*o*) Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58), s. 8.

(*p*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 60, and title LOCAL GOVERNMENT, Vol. XIX., p. 378.

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48 (5); Local Government (Elections) Act, 1896 (59 & 60 Vict. c. 1).

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 24 (3).

SECT. 5. Boards of Guardians.

The property and personal qualifications of electors are the same as in other local government franchises (*s*), with the single distinction that the receipt of medical relief disqualifies (*t*). The elections are held and conducted according to the rules framed by the Local Government Board (*a*), under the Local Government Act, 1894 (*b*).

Qualifications.

1106. The qualification for a guardian is either being a parochial elector (*c*) of some parish in the union, or having resided in the union during the whole of the twelve months preceding the election (*d*), or, in the case of a guardian for a parish wholly or partly situate within the area of a borough, whether a county borough or not, being qualified to be elected a councillor for that borough (*e*). No person is disqualified by sex or marriage (*f*).

Disqualifications

1107. The disqualifications are the same as those for a district councillor (*g*), with the additions that no assistant overseer and no paid officer of a board can be a guardian, and no person receiving any fixed salary or emolument from the poor rates in any parish or union is capable of serving as a guardian in such parish or union (*h*).

A guardian who is an officer or soldier of the auxiliary or reserve forces does not become disqualified by reason only of his absence on active service, or on service beyond the seas (*i*).

(*s*) See title ELECTIONS, Vol. XII., pp. 182 *et seq.*

(*t*) See Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 14; Medical Relief Disqualification Removal Act, 1885 (48 & 49 Vict. c. 46), s. 2. But not so in respect of vaccination; see Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 26. See also title ELECTIONS, Vol. XII., p. 192.

(*a*) *Ibid.*, ss. 20 (5), 48 (4). For the procedure, see title ELECTIONS, Vol. XII., pp. 389 *et seq.* The orders at present in force are the Guardians (Outside London) Election Order, 1898, and the Guardians (London) Election Order, 1898 (Stat. R. & O. Rev., Vol. X., Poor, England, pp. 2, 41). By virtue of the Municipal Elections (Corrupt and Illegal Practices) Act, 1911 (1 & 2 Geo. 5, c. 7), it is an illegal practice to make a false statement in relation to the personal character or conduct of a candidate at a municipal election, which includes the election of guardians (see Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70)), such elections being thus put in this respect on much the same footing as parliamentary elections, as to which see title ELECTIONS, Vol. XII., pp. 298 *et seq.*

(*b*) 56 & 57 Vict. c. 73.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 20 (1), (3); and see title ELECTIONS, Vol. XII., pp. 191, 192, 202, note (*s*), 245, for parochial electors.

(*d*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 20 (2)

(*e*) *Ibid.*; see title LOCAL GOVERNMENT, Vol. XIX., p. 303.

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 20 (2).

(*g*) See title LOCAL GOVERNMENT, Vol. XIX., p. 263. As to the disqualification imposed by a conviction for treason or felony, see Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 2, and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 428.

(*h*) Poor Law Amendment Act, 1842 (5 & 6 Vict. c. 57), s. 14. Payment to a medical practitioner for notification of disease does not disqualify for being a guardian (Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 11; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76, s. 57).

(*i*) Members of Local Authorities Relief Act, 1900 (63 & 64 Vict. c. 46), s. 2.

Failure to elect.

1108. If no person is elected in any parish at the annual election, the existing guardians may continue in office (*k*), and in case of any vacancy the remaining guardians are competent to act (*l*). No defect in the qualification or election of any person acting as a guardian at a board of guardians will vitiate the proceedings of the board (*m*).

Resignation.

1109. A person duly elected can only resign with the consent of the Local Government Board (*n*).

Term of office.

1110. The term of office is three years, one-third, as nearly as may be, of the board going out of office on the 15th April in each year; but the county council, or a joint committee, may on the application of the board give directions for the simultaneous retirement of the whole board on the said date in every third year, and may on a like application rescind such direction (*o*). The county council directs in which year or years of each triennial period the guardians for each parish, or ward, or district, shall retire (*p*).

Additional guardians.

1111. There are no *ex-officio* or nominated guardians (*q*), but the board may elect a chairman or vice-chairman, or both, and not more than two other persons, from outside their own body, but from persons qualified to be guardians of the union, and any person so elected will be an additional guardian and member of the board (*r*).

A vice-chairman holds office during the term of office of the chairman; in the absence or during the inability of the chairman he has the powers and authority of the chairman (*s*).

Meetings.

1112. The meetings and proceedings of boards of guardians, save that the chairman may be elected from outside (*t*), are regulated by the same rules as are applicable to urban district councils (*a*). The

(*k*) Poor Law Amendment Act, 1842 (5 & 6 Vict. c. 57), s. 10.
(*l*) *Ibid.*, s. 12.
(*m*) *Ibid.*, s. 13.
(*n*) *Ibid.*, s. 11.
(*o*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 20 (6); District Councillors and Guardians (Term of Office) Act, 1900 (63 & 64 Vict. c. 16), s. 1; and title ELECTIONS, Vol. XII., p. 390.
(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 60 (2), (4). The first appointed day for retirement in rotation was 15th April, 1896 (*ibid.*, s. 79 (3)), and for simultaneous retirement, 15th April, 1898 (*ibid.*, s. 79 (5)).
(*q*) *Ibid.*, s. 20 (1). An exception exists in the case of Oxford, which is under a local Act; see *ibid.*, s. 60 (6).
(*r*) *Ibid.*, s. 20 (8). See also title ELECTIONS, Vol. XII., pp. 375, 393. It would seem that where the chairman is elected from among the guardians he ceases to be chairman on the 15th April in any year when he goes out of office as a guardian, but that, subject to this, he is entitled to act as chairman until his successor is appointed at the annual meeting; see opinion of the Local Government Board, 20th March, 1912 (76 J. P. 165), and *R.* v. *Rowlands, Ex parte Beesley*, [1910] 2 K. B. 930.
(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 59 (2).
(*t*) See the text, *supra*.
(*a*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 59; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 199, Sched. I.; and title LOCAL GOVERNMENT, Vol. XIX., p. 278. As to keeping order at meetings, see

SECT. 5. Boards of Guardians.

meetings are not necessarily public (*b*), and the guardians may decline to admit any person, save the Local Government Board inspector (*c*). The fact that a member who has a personal interest in a matter before the meeting takes part in the proceedings does not vitiate the proceedings (*d*).

Meetings must not be held in premises licensed for the sale of intoxicating liquor, except where no other room is available either free of charge or at a reasonable cost (*e*). If guardians have provided themselves with a board-room and offices, they must permit the rural district council to have the use thereof, for the purpose of their meetings and proceedings, at all reasonable hours; any question as to such hours may be determined by the Local Government Board (*f*).

Notice of meetings.

1113. At least one month's notice in writing must be given to every guardian (*g*) of a meeting at which proposals in the nature of superannuation or gratuities to officers or servants are to be considered (*h*), and at least seven days' notice of resolutions to authorise the attendance of delegates at meetings of the Poor Law Unions Association (*i*).

Where an Act requires the consent in writing of a majority of the guardians of a union, it will suffice if a resolution giving consent is passed at a meeting of the guardians, of which meeting, and of the business to be transacted thereat, not less than fourteen days' notice has been given to each guardian (*k*).

District committees.

1114. If the whole of any parish or parishes is situated more than four miles from the place of meeting of the board of guardians of the union of which it or they form part, the Local Government Board, on the application of the guardians, may form it or them

Dobson v. *Fussy* (1831), 7 Bing. 305; *Doyle* v. *Falconer* (1866), L. R. 1 P. C. 328. The powers of the Local Government Board with respect to the proceedings of guardians are not affected by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 59 (*ibid.* s. 59 (4)). The guardians of every parish or union acting under any local Act for the relief of the poor must meet once a fortnight or oftener, and, if there is no designated chairman, must appoint a chairman and vice-chairman annually and as vacancies occur (Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 64).

(*b*) As to the privilege of members in respect of speeches, see title LIBEL AND SLANDER, Vol. XVIII., pp. 677 *et seq.*, and of newspaper reports, *ibid.*, pp. 698, 746.

(*c*) See p. 527, *ante*.

(*d*) *Murray* v. *Epsom Local Board*, [1897] 1 Ch. 35.

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 61.

(*f*) *Ibid.*, s. 59 (3).

(*g*) In any case where a meeting is required to be summoned by notice, it is necessary that the notice should be served on every member of the board. A default may render the meeting invalid (*Dobson* v. *Fussy*, *supra*).

(*h*) Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), s. 9; see p. 546, *post*.

(*i*) Poor Law Unions Association (Expenses) Act, 1898 (61 & 62 Vict. c. 19), s. 1; see p. 549, *post*.

(*k*) Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58), s. 12.

into a district, and direct the guardians to appoint a committee of their members to receive applications from poor persons requiring relief in such district, to examine into the cases, and to report to the guardians thereon (*l*).

SECT. 5. Boards of Guardians.

SUB-SECT. 2.—*Duties, Powers, and Liabilities.*

1115. Guardians cannot act except at a meeting of the board of guardians (*m*). They govern the workhouse of the union (*n*), and administer the relief of the poor (*o*). Their duties in these respects are prescribed by the Local Government Board by a general order (*p*), declaring that, subject thereto, the guidance, government, and control of every workhouse, and of the officers, servants, assistants, and paupers therein, are to be exercised by the guardians (*q*). Duties of guardians.

1116. The guardians are a corporation by the name of "The Guardians of the Poor of the Union (*or* of the Parish of) in the county of ," with perpetual succession, and a common seal, and as such they may accept, take, and hold, for the benefit of such union or parish, any buildings, lands, or hereditaments, goods, effects, or other property (*r*). Constitution.

A board of guardians is a local authority within the meaning of the Local Loans Acts (*s*), and of the Local Government (Stock Transfer) Act, 1895 (*t*), and a spending authority within the meaning of the Agricultural Rates Act, 1896 (*a*). The Public Bodies Corrupt Practices Act, 1889 (*b*), applies to a board of guardians, its members, officers, and servants.

1117. Any contract by guardians in connection with the maintenance, clothing, lodging, employment, or relief of the poor, or Contracts.

(*l*) Poor Law Amendment Act, 1842 (5 & 6 Vict. c. 57), s. 7.
(*m*) Poor Law Amendment Act, 1834 (4 & 5 Will 4, c. 76), s. 38.
(*n*) See p. 558, *post*.
(*o*) See p. 563, *post*.
(*p*) General Consolidated Order of the Poor Law Commissioners, 24th July, 1847 (Stat. R. & O. Rev., Vol. X., Poor, England, pp. 74 *et seq.*).
(*q*) *Ibid.*, art. 152.
(*r*) Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), s. 7; Poor Law Amendment Act, 1842 (5 & 6 Vict. c. 57), s. 16. An injunction lies to prevent the improper application of the poor rate; see, however, *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516, C. A. Guardians are empowered to acquire land for the employment of the poor thereon; see Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 12; Poor Relief Act, 1831 (1 & 2 Will. 4, c. 42); Crown Lands Allotments Act, 1831 (1 & 2 Will. 4, c. 59); Union and Parish Property Act, 1835 (5 & 6 Will 4, c. 69), s. 4; and Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6. A board of guardians may provide buildings, appliances, and attendants for the purpose of carrying out the provisions of the Cleansing of Persons Act, 1897 (60 & 61 Vict. c. 31), ss. 1, 2. Permitting a verminous person to have the use of apparatus for cleansing the person and his clothing is not parochial relief (*ibid.*, s. 1).
(*s*) Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 34; see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 61 *et seq.*
(*t*) 58 & 59 Vict. c. 32, s. 1 (2).
(*a*) 59 & 60 Vict. c. 16, s. 9, Schedule. See also title RATES AND RATING.
(*b*) 52 & 53 Vict. c. 69, s. 7; and see title CRIMINAL LAW AND PROCEDURE, Vol IX., p. 484.

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for any other purposes relating to or connected with the general management of the poor, must conform to the orders in force of the Local Government Board or its predecessors, or be otherwise sanctioned by the Board, or it will be voidable or void at the option of the Board (*c*).

Exemption from stamp duty.

1118. Mortgages, bonds, instruments, or any assignment thereof, property given by way of security, contracts, agreements, and appointments of officers, and other documents given by guardians, are exempt from stamp duty (*d*).

Payments.

1119. Payment of debts, claims, or demands can only be made by guardians within the half-year in which the same were incurred or become due, or within three months after the expiration of such half-year, unless the Local Government Board extends the time for payment, which may be done for a period not exceeding twelve months after the date of the debt, claim, or demand (*e*).

Must not make profit.

1120. Guardians and their officers are prohibited, under a penalty of forfeiting £100 to the informer, from being concerned, either directly or indirectly, in the supply for profit (*f*) of goods to the workhouse, or otherwise for the support and maintenance of the poor, during their term of office, with an exception where two justices certify that the necessary articles cannot otherwise be obtained (*g*).

(*c*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 49. The orders regulating contracts are the General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 44—51, and the General Order of the Poor Law Commissioners, 1st December, 1877 (Stat. R. & O. Rev., Vol. X., Poor, England, pp. 135 *et seq.*). As to the necessity for the contracts of guardians to be under seal, see title CORPORATIONS, Vol. VIII., pp. 380 *et seq.*

(*d*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 86. As to stamp duties generally, see title REVENUE.

(*e*) Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), ss. 1, 4. This imposes a prohibition against payment after the fixed date (*Midland Rail. Co.* v. *Edmonton Union*, [1895] A. C. 485). As to when the time begins to run, see *ibid.*, and *West Ham Union Guardians* v. *St. Matthew, Bethnal Green (Churchwardens) etc.*, [1896] A. C. 477; *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Doncaster Union Guardians*, [1897] 1 Q. B. 117, C. A. As to extension of time, and the application of the statute generally, see *Rhodes* v. *Pately Bridge Union Guardians* (1884), 51 L. T. 235; *Baker* v. *Billericay Union Guardians* (1863), 2 H. & C. 642; *R.* v. *Stepney Union* (1874), L. R. 9 Q. B. 383; *Castle* v. *Fulham Union Guardians* (1872), 37 J. P. 56; *Dearle* v. *Petersfield Union Guardians* (1888), 21 Q. B. D. 447, C. A. See also title LIMITATION OF ACTIONS, Vol. XIX., p. 180. As to the method of payment, see General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 84, 85, and General Order of the Poor Law Commissioners, 7th April, 1857 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 129).

(*f*) See *Skinner* v. *Buckee* (1824), 3 B. & C. 6.

(*g*) See Poor Relief Act, 1815 (55 Geo. 3, c. 137), s. 6; Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 51, 77; *Robinson* v. *Emerson* (1866), 4 H. & C. 352; *Henderson* v. *Sherborne* (1837), 2 M. & W. 236; *West* v. *Andrews* (1822), 5. B. & Ald. 328; *Pope* v. *Backhouse* (1818), 8 Taunt. 239; *Stanley* v. *Dodd* (1822), 1 Dow. & Ry. (K. B.) 397; *Greenhow* v. *Parker* (1861), 26 J. P. 24; *Davies* v. *Harvey* (1874), L. R. 9 Q. B. 433; and other cases collected in Lumley's Public Health Acts, 7th ed., pp. 1088, 1089—1091. The restriction does not apply to materials supplied for the repair of the workhouse (*Barber* v. *Waite* (1834), 1 Ad. & El. 514).

1121. Guardians may incur reasonable expenses in collecting necessary information on matters connected with their duties (*h*). Collecting information.

1122. With the consent of the Local Government Board, guardians may subscribe towards the support and maintenance of any public hospital or infirmary for the reception of sick, diseased, disabled, or wounded persons, or of persons suffering from any permanent or natural infirmity (*i*), and to any asylum or institution for the blind, or the deaf and dumb, or for persons suffering from any permanent or natural infirmity, and towards any association or society for aiding such persons, or for providing nurses, or for aiding girls or boys in service, or towards any other asylum or institution which appears to the guardians to be calculated to render useful aid in the administration of the relief of the poor (*k*), and to any society or body corporate for the prevention of cruelty to children (*l*). Subscriptions to hospitals etc.

1123. Guardians must provide for the reception in the workhouse of children and young persons taken there in pursuance of the Children Act, 1908 (*m*), and may pay any expenses so incurred out of the common fund (*n*). They may institute proceedings under Part II. of that Act, which relates to the prevention of cruelty to children and young persons, and may pay the reasonable costs and expenses thereof (*o*), and they are the local authority, elsewhere than in London, for the purposes of Part I. of the Act, which deals with infant life protection (*p*). Children and young persons.

1124. With the sanction of the Local Government Board, guardians, including metropolitan guardians, may borrow for the purpose of raising the expenses incurred or proposed to be incurred for any permanent work or object, or any other thing the costs of which ought in the opinion of the Local Government Board to be spread over a term of years, but the total debts of the guardians under the Acts relating to the relief of the poor must not exceed one-fourth of the total annual rateable value of the union, unless the Local Government Board has by provisional order extended such maximum, which it may do up to one-half (*q*). The unapplied Borrowing powers.

(*h*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), ss. 15, 16.

(*i*) Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 4.

(*k*) Poor Law Act, 1879 (42 & 43 Vict. c. 54), s. 10. No subscription can be given to any asylum or institution that is not open to be of assistance to the paupers under the guardians (*ibid.*). In London the guardians may arrange with hospitals for the treatment of paupers on terms; see Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), s. 16.

(*l*) Children Act, 1908 (8 Edw. 7, c. 67), s. 36.

(*m*) 8 Edw. 7, c. 67.

(*n*) *Ibid.*, s. 126. The Local Government Board has advised that under this section guardians have no discretion as to receiving such cases, but must do so.

(*o*) *Ibid.*, s. 34 (1); see p. 541, *post*.

(*p*) Children Act, 1908 (8 Edw. 7, c. 67), s. 10. See, generally, title INFANTS AND CHILDREN, Vol. XVII., pp. 158 *et seq.* For the powers and duties of guardians in relation to the education of children, see title EDUCATION, Vol. XII., pp. 81 *et seq.*

(*q*) Under certain circumstances persons who have made advances to unions and parishes beyond the authorised borrowing powers may be

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balance of any loan may, with the consent of the Local Government Board, be applied for any purpose for which guardians may borrow (*r*). The loan must be repaid within such period not exceeding sixty years as the guardians, with the sanction of the Local Government Board, may determine, either by yearly or half-yearly instalments of principal or principal and interest, or by means of a sinking fund (*s*).

Guardians may borrow without any consent for the purpose of repaying outstanding loans which they have power to repay, but any money so borrowed must be repaid within the same period as that originally sanctioned, unless the Local Government Board consents to the term being extended (*t*).

Moneys borrowed by guardians are a charge on and are payable out of the common fund of the union (*a*). They must keep a register of the securities in respect of all sums borrowed by them, in the form prescribed by the Local Government Board (*b*). They must not invest in their own securities (*c*).

The Managers of the Metropolitan Asylums District (*d*) may borrow from the London County Council in the manner prescribed for borrowing from the defunct Metropolitan Board of Works (*e*).

Returns.

1125. Boards of guardians must make annual returns to the Local Government Board of their receipts and expenditure and of any rates levied by them. The clerk is responsible, under a penalty of not exceeding £20, for the due making of such returns in the prescribed form (*f*).

reimbursed with the consent of the Local Government Board; see the Poor Law Loans Act, 1872 (35 & 36 Vict. c. 2), s. 4.

(*r*) Poor Law Act, 1889 (52 & 53 Vict. c. 56), s. 2.

(*s*) Poor Law Act, 1897 (60 & 61 Vict. c. 29), s. 1 (1). The sinking fund must be created and applied in accordance with the Local Loans Acts, the prescribed rate not exceeding 3 per cent. per annum (*ibid.*, s. 1 (2)). In addition to the general power of borrowing, guardians in the Metropolis may be specially empowered to borrow from the London County Council by the annual money bills of that council, as to which see title METROPOLIS, Vol. XX., p. 444.

(*t*) Poor Law Act, 1897 (60 & 61 Vict. c. 29), s. 1 (4)—(6). Guardians cannot pay off a loan sooner or in a different manner than is provided for in the contract, unless the lender consents (*West Derby Union* v. *Metropolitan Life Assurance Society*, [1897] A. C. 647).

(*a*) Union Loans Act, 1869 (32 & 33 Vict. c. 45), s. 4. The form of security is prescribed by *ibid.*, s. 6. As to the common fund, see p. 549, *post*. The Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 24, provided that loans for the purpose of building, hiring, altering, or enlarging workhouses might be charged on the poor rate, and, by *ibid.*, s. 63, that the Public Works Loans Commissioners might make loans on such security. As to borrowing for the redemption of loans, see Poor Law Loans Act, 1871 (34 & 35 Vict. c. 11), s. 2.

(*b*) Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58), s. 14. The form of register is prescribed by General Order, 7th December, 1882 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 174).

(*c*) Poor Law Act, 1897 (60 & 61 Vict. c. 29), s. 1 (2).

(*d*) See title METROPOLIS, Vol. XX., p. 411.

(*e*) See Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 37.

(*f*) See Local Taxation Returns Acts, 1860 (23 & 24 Vict. c. 51) and 1877 (40 & 41 Vict. c. 66).

1126. Guardians have many powers and duties relating to matters which are dealt with elsewhere in this work (*g*).

SUB-SECT. 3.—*Legal Proceedings.*

Other powers.

1127. Guardians may bring actions, prefer indictments, and sue and be sued in their corporate name (*h*), and in such name take or resist all other proceedings for or in relation to any property held by them in virtue of their office. In any action or indictment relating to such property it is sufficient to state or lay the property to be that of the guardians of the union or parish (*i*).

Use of corporate name.

1128. In any civil or criminal proceeding it is not necessary to prove the original order constituting any board of guardians in any case in which any persons professing to form a board in obedience to such order have taken upon themselves to act, and have continued for three years to act, in the execution of the laws for the relief of the poor; and in no proceedings is it lawful to question the qualification or validity of the election of any person as a guardian after the end of twelve months next following the election, or the time when the alleged disqualification or want of qualification of the person against whom such proceedings shall be directed has arisen (*k*).

Proof of constitution.

1129. In all cases in which guardians may make an application or complaint, or take proceedings, before justices at petty, special, general, or quarter sessions, they may empower any of their officers to do so, by order in writing under the hand of the presiding chairman and sealed with the common seal of the board (*l*).

Proceedings before justices.

The clerk to or other officer of a board of guardians or district board may, if duly empowered by the board, make or resist any

(*g*) For the powers and duties of guardians with regard to lunatics, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 488 *et seq.*, 499 *et seq.*, 527. As to the burial of poor persons, see title BURIAL AND CREMATION, Vol. III., pp. 539 *et seq.*; as to the education of children, see title EDUCATION, Vol. XII., pp. 81 *et seq.*; as to the appointment of the assessment committee, see the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), and, generally, for the powers and duties of guardians as a rating authority, see title RATES AND RATING. For the protection of children and young persons, see title INFANTS AND CHILDREN, Vol. XVII., p. 171. As to inclosing common land for poor law purposes, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 510, 511, and the Commons Act, 1899 (62 & 63 Vict. c. 30), s. 22, Sched. I.; as to poor allotments, see title ALLOTMENTS, Vol. I., pp. 332, 333. For the powers of guardians as regards apprentices and servants, see pp. 565, 566, *post*, and title MASTER AND SERVANT, Vol. XX., p. 80.

(*h*) See p. 535, *ante*.

(*i*) Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), s. 7; Poor Law Amendment Act, 1842 (5 & 6 Vict. c. 57), s. 16. As to laying the property in indictments, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 336, 645, note (*d*), 647. Guardians are within the protection afforded by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61); see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*k*) Poor Law Board Act, 1847 (10 & 11 Vict. c. 109), s. 25; and see Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 72.

(*l*) Poor Law Amendment Act, 1842 (5 & 6 Vict. c. 57), s. 17.

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application, claim, or complaint, or take and conduct any proceedings on behalf of the board, before justices at petty or special sessions or out of sessions (*m*).

Prosecutions for poor law offences.

1130. A board of guardians or a district board may pay the reasonable costs of the apprehension, and prosecution of any person charged with refusing or neglecting to maintain himself or his family, or with running away and leaving his family chargeable, or whereby such family has become chargeable, or with wilfully neglecting or disobeying the rules, orders, and regulations of the Local Government Board, or with any offence or misbehaviour in any workhouse, or with deserting or running away from any workhouse, and carrying away clothes, linen, or other goods or things belonging to any workhouse, or given or procured or provided as or for relief, or with neglect of or disobedience to the reasonable and lawful orders of justices or guardians, or of any district board, in the administration of the laws relating to the relief of the poor, or with obstructing or assaulting any officer engaged in the administration of such laws, or with fraudulently obtaining, stealing, purloining, embezzling, wasting, or injuring, or wilfully misapplying any property applicable to or connected with the relief of the poor, or with any offence directly affecting the administration of the laws for the relief of the poor; and the reasonable costs of apprehending and prosecuting any officer who may have been employed in the administration of such laws for any neglect or breach of any duty of his office, or for any maltreatment or abuse of any poor person; and, subject to the approval of the Local Government Board, every board of guardians or district board must pay the costs of all legal proceedings taken by any auditor, or under his direction, for the protection of the poor rates or property of any parish, union, or district, or taken by any other person whom the board of guardians or district board have authorised or directed to institute such prosecution or legal proceedings; and to the extent to which any such costs may not be repaid by the offending or other party, or from the county, liberty, or borough rates, the guardians of any union may, in any of the cases aforesaid, having due regard to the circumstances of the case, and subject to the approval of the Local Government Board, charge such expenses to the common fund of the union; and the district board of any district may, having like regard to the circumstances of the case, and subject to the like approval, charge such expenses, either to the funds of the whole of such district, or on any one or more of the unions and parishes comprised therein (*n*). Costs and expenses lawfully incurred in and about the prosecution of any person for which the guardians are liable, or which they undertake to

Proceedings for the protection of property.

(*m*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 68; Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 33.

(*n*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 59. The costs of vaccination prosecutions by guardians or their officer or any registrar are within this section (Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 33). For vaccination generally, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

pay under this provision, must in all cases be charged to the common fund (*o*).

1131. Guardians may also out of their common fund pay the reasonable costs and expenses of any proceedings instituted by them under the Children Act, 1908 (*p*). Proceedings under the Children Act, 1908.

1132. In cases where justices certify that a prosecution against a master or mistress for neglecting to provide necessary food, clothing or lodging to an apprentice or servant (*q*), or for inflicting bodily injury upon a person under the age of sixteen years, should, in the interests of public justice, be conducted by the guardians or overseers, the guardians or overseers must prosecute and pay the costs reasonably incurred in that behalf (*r*). Offences against servants.

1133. Guardians who have engaged in litigation or any proceedings in court cannot be required to pay their solicitor his costs until the final determination of the action or proceedings, or until he has ceased to be retained by or for them. The bill of costs must be taxed and be paid within one year after such final determination, unless the Local Government Board authorises an extension of time for not exceeding six months (*s*). Payment of solicitor's costs.

1134. Where a union extends into several distinct jurisdictions, every matter, act, charge or complaint by which the guardians thereof are affected, or in which they have any interest, is for the purpose of jurisdiction deemed to arise or exist equally throughout the union (*t*). Jurisdiction.

SUB-SECT. 4.—*Officers.*

(i.) *Appointment and Duties.*

1135. The Local Government Board may by order direct the overseers or guardians of any parish or union, or of united parishes or unions, to appoint such paid officers with such qualifications as the Board prescribes, for superintending or assisting in the administration of the relief and employment of the poor, and may define Appointment of officers.

(*o*) Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 9. As to the common fund, see p. 549, *post.*

(*p*) 8 Edw. 7, c. 67, ss. 10, 34; see p. 537, *ante;* and title INFANTS AND CHILDREN, Vol. XVII., pp. 158, note (*g*), 171.

(*q*) See Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 26; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 623.

(*r*) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 73.

(*s*) Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), s. 5. This provision does not prevent guardians making payment on account of costs (*ibid.*). See also p. 540, *ante.* For the limitation of actions against guardians, see titles LIMITATION OF ACTIONS, Vol. XIX., p. 180; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*t*) Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s 27. The appellate jurisdiction of quarter sessions depends upon the jurisdiction of the justices making the order appealed from. If a union extends into a borough, and an order is made by the borough justices, the appeal therefrom lies to the borough quarter sessions, not to the quarter sessions for the county (*R.* v. *Staffordshire Justices* (1872) L. R. 7 Q. B. 288). See, generally, as to appeals to quarter sessions, title MAGISTRATES, Vol. XIX., p. 642.

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the duties of such officers, the mode of appointment and dismissal, the security, if any, to be given by them, and their remuneration (*a*). The officers covered by this authorisation include any clergyman (*b*), schoolmaster, medical man, vestry clerk, treasurer, collector, assistant overseer, governor, master or mistress of a workhouse, or any other person who is employed in any parish or union in connection with the administration of the poor law (*c*). The appointment of any paid officer rests with the guardians (*d*), but if guardians make default in appointing an officer whom it is their duty to appoint, an appointment may be made by the Local Government Board (*e*).

In pursuance of the aforesaid authorisation the Local Government Board has by order (*f*) provided that guardians must,

(*a*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 46. The power applies to parishes under Local Acts (*Re St. Giles and St. George, Bloomsbury, R.* v. *Poor Law Commissioners* (1851), 17 Q. B. 445; *R.* v. *St. Pancras* (*Directors of the Poor*) (1858), E. B. & E. 583; *R.* v. *St. James, Westminster* (*Governors etc. of the Poor*) (1859), 1 E. & E. 861).

(*b*) This includes a Roman Catholic clergyman (*R.* v. *Haslehurst* (1884), 13 Q. B. D. 253). A chaplain of a workhouse is an officer within the meaning of the section (*Ex parte Molyneux* (1863), 27 J. P. 56).

(*c*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 109. As to the appointment of rate collectors, see Poor Rate Act, 1839 (2 & 3 Vict. c. 84), s. 2; Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 62; and title RATES AND RATING.

(*d*) *R.* v. *Hunt* (1840), 12 Ad. & El. 130.

(*e*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 7; Metropolitan Poor Act, 1867 (30 Vict. c. 6), s. 80.

(*f*) General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, art. 153. Art. 154 provides that the officers must conform to the orders of the Local Government Board; see arts. 155, 156 for the mode of appointment. Arts. 162—167 deal with the qualification of officers. No person who has been convicted of felony, fraud, or perjury can be an officer (Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 48); General Consolidated Order of the Poor Law Commissioners. Arts. 172—176 deal with their remuneration (see also General Accounts and Audit Order, 14th January, 1867 (Stat. R. & O. Rev., Vol. X., Poor, England, pp. 301 *et seq.*), art. 36); General Consolidated Order of the Poor Law Commissioners, arts. 87, 184—186; General Order, 5th May, 1877; and General Order, 12th February, 1872, art. 1, provide for the security to be given by officers. The employment of assistant officers is regulated by General Order, 19th August, 1867. The tenure of office and dismissal of officers is the subject of the General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 188, 190, 192—198, and the General Order, 12th February, 1879 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 161), art. 1. The clerk, treasurer, chaplain, and medical officer can only be removed by the Local Government Board, though the guardians may suspend such an officer. Other officers may be dismissed by the guardians with the consent of the Local Government Board. Porters, nurses, and domestic servants may be dismissed by the guardians, who must report the reason therefor to the Local Government Board. Under the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 48, the Local Government Board may remove an officer without notice, and at its sole discretion, and mandamus does not lie to reinstate him (*R.* v. *Poor Law Commissioners* (1850), 14 J. P. 36). As to the power of guardians to appoint the superintendent registrar, see *R.* v. *Acason* (1862), 2 B. & S. 795; and title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.

whenever requisite, or whenever a vacancy occurs, appoint (*g*) fit persons to hold the offices, and perform the assigned duties, of clerk to the guardians (*h*), treasurer of the union (*i*), chaplain (*k*), medical officer for the workhouse (*l*), district medical officer (*m*), master of the workhouse (*n*), matron of the workhouse (*o*), school-

(*g*) If the salary or remuneration exceeds £50, an appointment must be under seal (*Dyte* v. *St. Pancras Guardians* (1872), 36 J. P. 375; *Austin* v. *Bethnal Green Guardians* (1874), L. R. 9 C. P. 91; and see *Smart* v. *West Ham Union Guardians* (1855), 10 Exch. 867).

(*h*) The duties of the clerk are prescribed by the General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 202, 219, 220; General Order, 14th January, 1878; and the books he must keep by General Accounts and Audit Order, 14th January, 1867, arts. 15, 16. For the duties of the clerk to a visiting committee of an asylum under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), and the rules made thereunder, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 484. An information in the nature of a *quo warranto* will lie in respect of the office; see title CROWN PRACTICE, Vol. X., p. 129, note (*l*).

(*i*) For the duties, liabilities, and remuneration of the treasurer, see General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts, 174, 184—186, 203, 204; General Accounts and Audit Order, 14th January, 1867, art 18. A treasurer who is a bank manager is entitled to the protection afforded to bankers by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 60 (*Halifax Union* v. *Wheelwright* (1875), L. R. 10 Exch. 183). A treasurer is not liable for a loss incurred through the necessary employment of an agent and without any negligence on his part (*Colchester Union Guardians* v. *Moy* (1894), 68 L. T. 564).

(*k*) As to the appointment of chaplain, see *R.* v. *Braintree Union Guardians* (1841), 1 Q. B. 130; and as to removal, *Ex parte Molineux* (1863), 7 L. T. 599. The duties of the chaplain are prescribed by the General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, art. 211. A Roman Catholic priest or Nonconformist minister may also be appointed; see General Order, 19th August, 1867, and *R.* v. *Haslehurst* (1884) 13 Q. B. D. 253. As to the power of the bishop to license a clergyman to officiate in the chapel of a public or charitable institution, see the Private Chapels Act, 1871 (34 & 35 Vict. c. 66), and title ECCLESIASTICAL LAW, Vol. XI., p. 651.

(*l*) As to the appointment of medical officers, see General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 153, 157; qualifications, *ibid.*, art. 169; General Order, 10th December, 1859 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 143); tenure of office, General Order, 25th May, 1857 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 157); General Order (Metropolis), 14th July, 1880; and as to the right of the Local Government Board to dismiss, see *Donahoo* v. *Local Government Board* (1882), 46 L. T. 300; remuneration, General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 75, 76, 177, 179—183; Regulations, 10th June, 1875; General Order, 12th February, 1879, art. 4 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 161; duties, General Consolidated Order, 24th July, 1847, arts. 199, 200, 205, 207; General Order of the Poor Law Commissioners, 4th April, 1868; General Order, 12th February, 1879, art. 3; General Boarding Out Order, 28th May, 1889, arts. 4, 9. As to physicians and surgeons generally, see title MEDICINE AND PHARMACY, Vol. XX., pp. 305 *et seq.*

(*m*) As to the division of unions into medical districts, see General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 158—161.

(*n*) The duties of the master are set out in the General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 208, 209; General Accounts and Audit Order, 14th January, 1867, arts. 19—21;

(*o*) For note (*o*) see next page.

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master, schoolmistress (*p*), porter (*q*), nurse (*r*), relieving officer (*s*), superintendent of outdoor labour (*t*), and also such assistants as the guardians, with the consent of the Board, may deem necessary for the efficient performance of the duties of any of the said offices. The Board have also directed the guardians of certain unions and parishes to appoint fit and proper persons to collect the moneys due and payable to such guardians, who are called collectors of the guardians (*a*).

Removal of officers.

1136. The Local Government Board may by order remove any paid officer for disobedience or neglect, and require another to be appointed in his place. No person so removed can afterwards be appointed to any paid office without the consent of the Board (*b*).

Visitors of children.

1137. Guardians may appoint and pay any officer or other competent person to visit and report upon the condition, treatment,

General Order, 16th February, 1869. A master cannot, while holding office as such, hold any other parochial or township office (Poor Law Amendment Act, 1850 (13 & 14 Vict. c. 101), s. 6). If a master and matron be husband and wife, and one of them is dismissed, or vacates office, or dies, the other ceases to hold his or her office at the end of the current quarter (General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, art. 189).

(*o*) See *ibid.*, art. 210, and General Accounts and Audit Order, 14th January, 1867, for the duties of the matron.

(*p*) The duties of the schoolmaster and schoolmistress are prescribed by the General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, art. 212.

(*q*) See *ibid.*, art. 214, for the duties.

(*r*) See *ibid.*, art. 213, for the duties. A porter and nurse may be dismissed by the guardians without the consent of the Local Government Board, but the dismissal and the grounds thereof must be reported to the Board (*ibid.*, art. 188). Guardians may appoint district nurses for the sick poor out of the workhouse; see General Order, 17th January, 1892.

(*s*) Except with the consent of the Local Government Board, a relieving officer cannot hold any other parochial office (Poor Law Amendment Act, 1850 (13 & 14 Vict. c. 101), s. 6). His appointment, tenure of office, and duties are regulated by the General Consolidated Order, 24th July, 1847, arts. 153, 192, 215, 216; General Accounts and Audit Order, 14th January, 1867, arts. 23, 24; General Order, 12th February, 1879, art. 2; and see Circular Letters of the Local Government Board, dated 18th March, 1910, and 25th March, 1912. He also has duties with regard to lunatics; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 505; burial, see Infectious Disease Prevention Act, 1890 (53 & 54 Vict. c. 34), s. 10; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 72, 89, and title BURIAL AND CREMATION, Vol. III., p. 551; and as to the registration of electors, see title ELECTIONS, Vol. XII., p. 198. In connection with the obligation upon a relieving officer to give relief in urgent cases, reference may be made to *Clark* v. *Joslin* (1873), 27 L. T. 762.

(*t*) See General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, art. 217.

(*a*) See General Orders of 7th October, 1865; 27th November, 1866 (Stat. R. & O. Rev., Vol. X., Poor, England, pp. 145, 150); 4th January, 1871; 9th April, 1875; and General Accounts and Audit Order, 14th January, 1867, art. 17. As to the collection of the poor rate, see title RATES AND RATING.

(*b*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 48.

and conduct of any poor child under the age of sixteen, who has gone into service from the workhouse (*c*).

Disobedient officers.

1138. Any master of a workhouse or other officer of any parish or union who wilfully disobeys the legal and reasonable orders of justices and guardians in carrying the orders of the Local Government Board, or the provisions of the Poor Law Acts, into execution, is liable on summary conviction to a penalty of not more than £5 (*d*).

Dishonest officers.

1139. If any overseer, assistant overseer, master of a workhouse, or other paid officer, or any other person employed by or under the authority of the guardians, purloins, embezzles, or wilfully wastes or misapplies any of the moneys, goods, or chattels belonging to any parish or union, every such offender shall, in addition to such other pains and penalties as he may be liable to, upon conviction before any two justices, forfeit and pay for every such offence any sum not exceeding £20, and also treble the amount or value of such money, goods, or chattels so purloined, embezzled, wasted, or misapplied; and every person so convicted is for ever thereafter incapable of serving any office in relation to the relief of the poor (*e*).

A person serving under a board of guardians is an agent within the meaning of the Prevention of Corruption Act, 1906 (*f*).

Assaults on officers.

1140. An assault upon an officer acting in the due execution of his duty, or upon a person aiding such officer, is punishable with imprisonment for not more than two years, with or without hard labour. The court may also order the offender to pay the costs of the prosecution (*g*).

Guardians may pay to or reimburse an officer the expenses of repairing property belonging to him which has been damaged or destroyed by an applicant for poor relief, and also certain costs incurred by him in connection with the prosecution of the offender (*h*).

(*c*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 33. A like power is given to the managers of a district school (*ibid.*; and see p. 566, *post*).

(*d*) See Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 98. Poor law officers must not interfere as such in any matter connected with a bastardy order (see Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 7). If any officer of a union, parish, or place endeavours to induce any person to contract a marriage by any threat or promise respecting any affiliation proceedings, he is guilty of a misdemeanour; penalty, 40*s.* on conviction before any two justices (*ibid.*, s. 8).

(*e*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 97. An information for misapplication must allege that it was wilful (*Carpenter* v. *Mason* (1840), 12 Ad. & El. 629).

(*f*) 6 Edw. 7, c. 34, s. 1 (3); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 710. For the restriction against officers making an illicit profit out of their office, see p. 536, *ante*, and General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, art. 218.

(*g*) Poor Law Amendment Act, 1850 (13 & 14 Vict. c. 101), s. 9; Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 18; Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 38; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 505.

(*h*) Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 5.

SECT. 5. Boards of Guardians.

Responsibility of guardians for torts of officers.

1141. Guardians are not liable for the neglect or default of their officers and servants in carrying out ministerial acts (*i*), but if they choose to adopt and ratify the independent tort of an officer or servant, not committed ministerially, but intended to be done for the benefit of the guardians, they are liable (*k*).

(ii.) *Superannuation.*

Contributions by officers.

1142. Every officer and servant (*l*) in the service or employment of guardians (*m*) must contribute annually for the purposes of superannuation, in the case of those having less than five years' service on the 14th August, 1896 (*n*), or appointed after that date, 2 per cent. of the salary or wages and emoluments (*o*) for each year; in the case of those with more than five and less than fifteen years' service at that date, 2½ per cent.; and in the case of those with more than fifteen years' service at that date, 3 per cent. All contributions are deducted from the remuneration and carried to the common fund of the union (*p*).

Officers and servants appointed before the 29th September, 1896 (*q*), and female nurses, assistant nurses, and attendants on the sick or insane, have an option, which must be exercised in the prescribed manner, to remain outside the provisions as to superannuation (*r*).

(*i*) *Tozeland* v. *West Ham Union*, [1907] 1 K. B. 920, C. A.; see also cases cited in note (*n*), p. 561, *post*.

(*k*) *Barns* v. *St. Mary, Islington, Guardians* (1911), 76 J. P. 11, *per* BUCKNILL, J.

(*l*) For the meaning of these expressions, see Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), s. 19. A public vaccinator (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION) is not an officer in the employment of guardians within the meaning of this Act (*Lawson* v. *Marlborough Union Guardians*, [1912] 2 Ch. 154).

(*m*) Including incorporated trustees or overseers of a parish, managers of district schools and sick asylums, Managers of the Metropolitan Asylums District, and any authority charged with the administration of the relief of the poor (Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), ss. 14, 19).

(*n*) The date of the passing of the Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50).

(*o*) "Emoluments" includes all fees, poundage, and other payments made to any officer or servant as such for his own use; also the money value of any apartments, rations, or other allowances in kind appertaining to his office or employment (*ibid.*, s. 19).

(*p*) See *ibid.*, ss. 12, 13. It has been held in *Beaumont* v. *Bowers*, [1900] 2 Q. B. 204, that the superannuation contributions may be deducted from the salary for the purpose of assessment to income tax under Sched. E, but this decision was severely criticised by the Court of Appeal in *Hudson* v. *Gribble*, *Bell* v. *Gribble*, [1903] 1 K. B. 517, C. A., and it may be doubted whether it is good law. As to paid rate collectors or assistant overseers, see Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), s. 16; and as to superintendent registrars, see *ibid.*, s. 17.

(*q*) The date of commencement of the Poor Law Officers' Superannuation Act, 1896 59 & 60 Vict. c. 50).

(*r*) *Ibid.*, s. 15; Poor Law Officers' Superannuation Act Amendment Act, 1897 (60 & 61 Vict. c. 28), s. 1. If this option has been exercised by such an officer or servant, he will remain subject to the provisions of the repealed Poor Law Officers' Superannuation Act, 1864 (27 & 28 Vict. c. 42), and the Acts amending the same (Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), s. 15).

Right to benefit.

1143. Every contributing officer and servant who becomes incapable of discharging the duties of his office with efficiency, by reason of permanent infirmity of mind or body, or of old age, or who has attained the age of sixty years and completed an aggregate service of forty years, or who has attained the full age of sixty-five years, is entitled, on resigning or otherwise ceasing to hold his office or employment, to receive during life out of the common fund of the union a superannuation allowance on the prescribed scale. An officer or servant is not entitled to an allowance on the ground of old age unless he has completed the full age of sixty years. Guardians may require an officer or servant who has attained the age of sixty-five to retire upon superannuation (*s*).

If a person in receipt of superannuation allowance is subsequently appointed to an office or employment by guardians or similar authorities, the allowance is suspended or reduced to the extent to which the salary or wages and emoluments of that office or employment are equal to or in excess of the allowance (*t*).

Forfeiture.

1144. The claim to superannuation will be forfeited if the person ceases to hold office in consequence of any offence of a fraudulent character or of grave misconduct; though in such a case the amount of his contributions may be returned to him (*a*).

Scale of allowance.

1145. An officer or servant who has served for ten years but less than eleven years is entitled to an annual allowance equal to ten-sixtieths of the average amount of his salary or wages and emoluments during the five years ending on the quarter day before he ceases to hold his office or employment, with an addition of one-sixtieth of such average amount for every additional completed year of service until a maximum allowance of forty-sixtieths is reached (*b*).

All service is reckoned, whether continuous or not, and whether whole time or not (*c*). In consideration of peculiar professional qualifications, or of special circumstances, and with the consent of the Local Government Board, the guardians in computing the allowance may add a number of years, not exceeding ten, to the actual service of the officer or servant (*d*).

A superannuation allowance is not assignable, and cannot be charged with the debts or liabilities of the recipient (*e*).

Repayment of contributions.

1146. An officer or servant who has not become entitled to a superannuation allowance, and who loses his office or employment by reason of a reduction of staff, alteration of areas or boundaries, or otherwise ceases to hold office or employment by reason of bodily injury not occasioned by his own default, or of any other cause whatever other than his own misconduct or voluntary resignation,

(*s*) Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), s. 2.
(*t*) *Ibid.*, s. 6.
(*a*) *Ibid.*, s. 7.
(*b*) *Ibid.*, s. 3.
(*c*) *Ibid.*, s. 4.
(*d*) *Ibid.*, s. 5. As to the notice of meeting to be given in this case, see *ibid.*, s. 9, and p. 534, *ante*.
(*e*) Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), s. 10.

SECT. 5. Boards of Guardians.

is entitled to be repaid his contributions to the superannuation fund; but if after claiming repayment he obtains a fresh office or employment he cannot reckon his former service for superannuation unless he pays the amount so received to the common fund of the authority so employing him. In any such case of loss of office or employment the guardians may also, with the consent of the Local Government Board, grant to the officer or servant a gratuity not exceeding two years' salary or wages and emoluments (*f*).

Annual return.

1147. The guardians must make an annual return to the Local Government Board of all superannuation allowances and gratuities paid by them (*g*).

Loss of office.

1148. If an officer suffers loss by the dissolution of a union (*h*) or by the addition of a parish to or its separation from a union (*i*), and if any person is deprived of any office or employment, or if his profits in respect thereof are diminished under or by reason of any provision of the Divided Parishes and Poor Law Amendment Act, 1876 (*k*), the Local Government Board may by its order award compensation to him, of such amount, and payable in such manner, as it deems equitable (*l*).

Alteration of union.

1149. Every superannuation allowance properly granted by a board of guardians, and every compensation ordered to be paid to any officer by or on account of any parish, whether part of a dissolved union or not, must, if such parish is added to or formed with another into a union, be paid by the guardians of such union to the person entitled thereto, and be charged by them to the account of such parish (*m*).

SUB-SECT. 5.—*Poor Law Conferences.*

Conferences.

1150. When empowered by the Local Government Board, the guardians of a union may pay the reasonable expenses of any guardian or guardians, or the clerk, in attending a conference of guardians on any matter connected with their duties, and may purchase reports of such conference, and may charge the amount to their common fund or to the fund under their control (*n*).

Poor Law Unions Association.

1151. Subject to regulations made by the Local Government

(*f*) Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), s. 8; as to joint appointments, see *ibid.*

(*g*) *Ibid.*, s. 11.

(*h*) Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 20.

(*i*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 15.

(*k*) 39 & 40 Vict. c. 61.

(*l*) *Ibid.*, s. 7. See *R.* v. *Poor Law Board* (1871), L. R. 6 Q. B. 785; *R.* v. *Local Government Board* (1874), L. R. 9 Q. B. 148, as to matters to be taken into consideration in assessing the compensation. For compensation for loss of office generally, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*m*) Dissolved Boards of Management and Guardians Act, 1870 (33 & 34 Vict. c. 2), s. 9.

(*n*) Poor Law Conferences Act, 1883 (46 & 47 Vict. c. 11), s. 2; see Poor Law Conferences Order, 26th February, 1903 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 133).

Board (*o*), a board of guardians may subscribe not more than £5 per annum to the Poor Law Unions Association, and may pay the expenses of two representatives at the meetings thereof (*p*).

Deputations.

1152. The powers of guardians to send deputations to confer with the Local Government Board or with other bodies or authorities are regulated by a General Order (*q*).

SUB-SECT. 6.—*The Common Fund.*

Payments out of the common fund.

1153. The parishes comprised in a union must contribute and are assessed to a common fund, out of which are taken the moneys required for purchasing, building, hiring, or providing, altering, or enlarging any workhouse or other place for the reception and relief of the poor of such parishes, for the purchase or renting of land or tenements for such union, for the upholding and maintaining of such workhouses and places, for the payment or allowance of officers, for providing utensils and materials for setting the poor to work therein, for any other expense incurred for the common use or benefit or on the common account of such parishes, all the cost of the relief of the poor, the expenses of the burial of the dead body of any poor person, all charges incurred by the guardians in respect of vaccination and registration fees and expenses (*r*), and for all other purposes the cost of which is by statute specifically charged upon the common fund.

Contributions.

1154. The several parishes contribute in proportion to their annual rateable value (*s*), which is ascertained from the last approved valuation lists for the parishes (*a*), the proportions payable by divided or added parishes being determined by the Local Government Board (*b*). The guardians make half-yearly orders on the overseers to pay over the amount to be contributed by each parish (*c*), and the overseers must thereupon collect a sufficient poor rate, and pay the amount ordered to the guardians (*d*).

A contribution order may be enforced by proceedings before justices at a special sessions summoned for the purpose (*e*), and an

(*o*) See General Order, 17th February, 1899 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 131).

(*p*) Poor Law Unions Association (Expenses) Act, 1898 (61 & 62 Vict. c. 19), s. 1.

(*q*) General Order, 27th June, 1870 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 376).

(*r*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 28; Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 1.

(*s*) Poor Removal Act, 1861 (24 & 25 Vict. c. 55), s. 9.

(*a*) Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 30.

(*b*) Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 15.

(*c*) As to service of the contribution order, see Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 7.

(*d*) See, generally, General Order, 22nd April, 1842 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 180); Consolidated Orders Amendment Order, 26th February, 1866; see Macmorran and Lushington, Poor Law General Orders, Vol. I., p. 380).

(*e*) Poor Rate Act, 1839 (2 & 3 Vict. c. 84), s. 1, which provides that in every case in which any contribution by overseers or other officers of any

SECT. 5. Boards of Guardians.

overseer wilfully neglecting to comply with the order, whereby any relief directed by the guardians to be given to any poor person is delayed or withheld during a period of seven days, may on summary conviction be fined not exceeding £20 (*f*).

Metropolitan common poor fund.

1155. Among the purposes for which the metropolitan common poor fund (*g*) is raised is the maintenance of patients in fever and small-pox hospitals; the Metropolitan Asylum Managers are entitled to be repaid the expenses incurred in respect of such patients by the board of guardians of the union from which the patient is received, and the guardians are reimbursed out of the fund (*h*).

The cost of the maintenance and instruction of orphan and deserted children placed out by guardians with the consent of the Local Government Board, is charged to the metropolitan common poor fund (*i*).

In the Metropolis the maintenance of indoor paupers is a charge upon the metropolitan common poor fund, and the expenses incurred in respect thereof must be repaid, at the rate of 5*d.* per day for each pauper, by the receiver to the guardians of the particular union, subject to certain conditions (*k*).

SUB-SECT. 7.—*Accounts and Audit.*

Accounts.

1156. The accounts of guardians and their officers must be kept in the manner prescribed by the Local Government Board (*l*).

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parish of moneys required by the board of guardians, or persons acting as guardians for such parish, or for any union which shall include such parish, for the performance of their duties, is in arrear, any two justices acting within the district wherein such parish is situated, on application under the hand of the chairman or acting chairman of such board, may summon the said overseer or other officer to show cause, at a special sessions to be summoned for the purpose, why such contribution has not been paid, and after hearing the complaint preferred under the authority of such chairman or acting chairman, and on behalf of such board, if the justices at such sessions shall think fit, by warrant under their hands and seals, may cause the amount of the contribution so in arrear, together with the costs occasioned by such arrear, to be levied and recovered from the said overseers or other officers, or any of them, in like manner as moneys assessed for the relief of the poor may be levied and recovered, and the amount of such arrear, together with the costs as aforesaid, when levied and recovered, shall be paid to the said board: no distress made under any such warrant of justices is replevisible; see title DISTRESS, Vol. XI., pp. 199, 210. As to the discretion of justices, see *Tynemouth Union Guardians* v. *Backworth Overseers* (1888), 57 L. J. (M. C.) 53; as to enforcing orders in respect of dissolved unions or added parishes, see Dissolved Boards of Management and Guardians Act, 1870 (33 & 34 Vict. c. 2), s. 1; and as to orders made for the purpose of paying past debts, see Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49). For retrospective rates, see title RATES AND RATING.

(*f*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 63. The receiver of the metropolitan common poor fund (see title METROPOLIS, Vol. XX., p. 415) has similar powers to recover contributions; see Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), s. 68.

(*g*) See title METROPOLIS, Vol. XX., p. 415.

(*h*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 80, 81.

(*i*) Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), s. 21.

(*k*) See Metropolitan Poor Amendment Act, 1870 (33 & 34 Vict. c. 18), s. 1.

(*l*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 15; see

Accounts must be closed and made up half-yearly, on the 25th March and the 29th September, and from them the clerk must prepare in duplicate a statistical table showing the number of paupers of all classes actually relieved in the course of the half-year, and a financial statement showing the amount of the receipts and expenditure of the union during the half-year. The statements are submitted to the auditor at the audit, and, if he signs them as correct, one copy of each must forthwith be sent by the clerk to the Local Government Board (*m*).

Audit.

1157. The accounts are audited by district auditors appointed by the Local Government Board, and subject to the same conditions as apply to the audit of the accounts of local authorities other than municipal boroughs (*n*).

Expenses which have been sanctioned by the Local Government Board must not be disallowed by the auditor (*o*).

Within one month of each audit, guardians in the Metropolis must send a copy of their financial statement for the half-year to the borough council (*p*).

Extraordinary audit.

1158. Besides the usual half-yearly audit, the Local Government Board may require the auditor to hold an extraordinary audit at other times, either of the whole or any portion of the accounts of the union or any parish therein, or of any guardians or overseers, or of any officer, whether still continuing or upon his resignation or removal from office. Such an audit may be held after three days' notice thereof, and is conducted in the same way and governed by the same rules as apply to an ordinary audit (*q*).

Payments.

1159. The payment of any sum certified by a district auditor to be due in accordance with the Poor Law Amendment Act, 1844 (*r*), and the Acts amending the same, or with any other Act, may, together with the costs of the proceedings for the recovery thereof, be enforced in like manner as if it were a sum due in respect of poor rate (*s*).

General Consolidated Order of the Poor Law Commissioners, 24th July, 1847; General Order, 7th April, 1857 (Stat. R. & O. Rev., Vol. X, Poor, England, p. 129); General Accounts and Audit Order, 14th January, 1867; General Order (Financial Statement), 25th April, 1879; General Order, 28th November, 1903 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 171); Poor Law Unions (Dates for Closing Accounts etc.) Order, 1910 (Stat. R. & O., 1910, p. 595); Poor Law Joint Committees and Boards of Management (Dates for Closing Accounts etc.) Order, 1911; and the orders mentioned in the notes to the portions of this work dealing with the duties of officers.

(*m*) District Auditors Act, 1879 (42 & 43 Vict. c. 6), s. 3.

(*n*) See title LOCAL GOVERNMENT, Vol. XVIII., pp. 283 *et seq.* For the purposes of the audit of accounts the Local Government Board may by order combine parishes and unions into districts (District Auditors Act, 1879 (42 & 43 Vict. c. 6), s. 4). As to the powers and duties of the auditors, see Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 32.

(*o*) Local Authorities (Expenses) Act, 1887 (50 & 51 Vict. c. 72), s. 3.

(*p*) Metropolitan Poor Amendment Act, 1870 (33 & 34 Vict. c. 18), s. 3.

(*q*) Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), s. 6; General Accounts and Audit Order, 14th January, 1867, art. 38.

(*r*) 7 & 8 Vict. c. 101.

(*s*) Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 11. As to

SECT. 6. The Metropolitan Asylums Board.

SECT. 6.—*The Metropolitan Asylums Board.*

Constitution and management.

1160. The unions and parishes in the administrative county of London (*t*) are comprised within the Metropolitan Asylums District, which was formed for the better provision and management of accommodation for the relief and medical treatment of the sick or infirm poor in the metropolitan area, and is managed, under the control of the Local Government Board, by a Board of Managers, who are either elected by the guardians of the contributory places or nominated by the Local Government Board (*u*).

Powers and duties.

1161. The Metropolitan Asylums Board is a corporation, with a common seal, and has power to take and hold land for the purposes for which it is constituted, while the Managers may exercise the general powers of guardians of the poor with respect to the borrowing of money for their various duties and as regards other matters as if the asylums were workhouses (*v*), and are subject to the like general control of the Local Government Board. The functions of the Managers, which lie rather with the treatment of disease and the prevention of infection than with ordinary poor law relief, are referred to in the various sections of this article and in other appropriate titles (*w*).

Casual wards.

1162. By a recent order of the Local Government Board (*x*), which came into operation on the 1st April, 1912, a district coterminous with the Asylums District has been formed for the relief of the casual poor of the Metropolis, and placed under the Managers of the Asylums District. The casual wards are in future to be for the common use of the District (*a*).

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poor rate, see title RATES AND RATING; and for the recovery of poor rate by distress, see title DISTRESS, Vol. XI., pp. 210 *et seq.*

(*t*) See title METROPOLIS, Vol. XX., p. 393.

(*u*) See Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6); Metropolitan Asylums District Order, 15th May, 1867; Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 9; Pauper Inmates Discharge and Regulation Act, 1871 (34 & 35 Vict. c. 108), s. 10; Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 40; see title METROPOLIS, pp. 411, 412, for the constitution etc. of the Metropolitan Asylums Board.

(*v*) See Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), ss. 21—25; Poor Law Act, 1879 (42 & 43 Vict. c. 54), s. 104; Poor Law Act, 1897 (60 & 61 Vict. c. 29), s. 2.

(*w*) For example, the Managers may, subject to the control of the Local Government Board, admit into their asylums non-pauper sick persons, may allow the asylums to be used for purposes of medical instruction and for training nurses, and may allow their ambulances to be used for the conveyance of persons suffering from dangerous infectious disorders, and charge for such use; see Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 42; Poor Law Act, 1889 (52 & 53 Vict. c. 56), ss. 3, 4, 6; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76); and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*x*) Made in pursuance of powers conferred by the Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), s. 6, and the Pauper Inmates Discharge and Regulation Act, 1871 (34 & 35 Vict. c. 108), s. 10.

(*a*) See Metropolitan Casual Paupers Order, 1911; and p. 568, *post.*

Part III.—Unions.

Constitution of unions.

1163. For poor law and various other administrative purposes the country is divided into unions, each of which may comprise one or more parishes, though, as the name indicates, usually a union extends over the areas of two or more parishes. To each union is attached a board of guardians, which has an almost exclusive authority as to the ordering, giving, and directing the relief to the poor in the parish or parishes under its control (*b*).

The Local Government Board may by order declare parishes to be united for the administration of the laws for the relief of the poor, whereupon such parishes will be deemed a union and the workhouse or workhouses of such parishes will be for their common use (*c*). But when the relief of the poor is administered in a parish by guardians appointed under a local Act, and such parish has a population exceeding twenty thousand, it cannot be united with any other parish unless at least two-thirds of such guardians consent in writing (*d*).

The Local Government Board may by order change the name of a union (*e*).

Combined unions.

1164. Where on any representation it appears to the Local Government Board that the combination of two or more unions (not in the Metropolis) for any purpose connected with poor relief would be advantageous, the Board may, with the consent of the guardians of the unions to be combined, make an order for combining such unions for the purposes named therein, and for constituting, for the execution of such purposes, a joint committee of the guardians of each of the combined unions. Save as otherwise provided in the order, the guardians will cease to act in any matter vested in the joint committee. All property acquired by the joint committee will be vested in the boards of guardians of the combined unions as tenants in common. Such an order may be altered or revoked (*f*).

Dissolution or alteration of union.

1165. A union may be dissolved, or any parish or parishes may be separated from or added to a union, by order of the Local Government Board (*g*), and without the concurrence of the

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(*b*) See pp. 529, 530, *ante*, for cases in which justices and overseers may give relief.

(*c*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 26.

(*d*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 64. This provision does not apply in the metropolis (Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), s. 78), nor to a parish forming part of a union (*Local Government Board* v. *South Stoneham Union*, [1909] A. C. 57).

(*e*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 13.

(*f*) Poor Law Act, 1879 (42 & 43 Vict. c. 54), s. 8.

(*g*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 32; and see Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 4. This power does not extend to parishes united for the purposes of settlement or

PART III. Unions.

guardians being necessary (*h*). A separate board of guardians may be ordered to be elected for a single parish separated from a union, notwithstanding the provisions of any local Act (*h*).

If the Local Government Board considers it expedient for rectifying or simplifying the areas of management, or otherwise for the better administration of the relief of the poor, that any union should be dissolved, the Board may, after inquiry held in some one of the unions to be affected, after public notice, so that all persons interested may attend and be heard, issue its order for the dissolution of any such union, and such dissolution will have the same effect and be attended with the same consequences as in the case of a union dissolved under the provisions of the Act of 1834 (*i*).

The Local Government Board, where it appears expedient so to do with reference to any poor law union which is situate in more than one county, instead of dissolving the union, may by order provide that the same shall continue to be one union for the purposes of indoor paupers or any of those purposes, and shall be divided into two or more poor law unions for the purpose of outdoor relief, and may by the order make such provisions as seem expedient for determining all other matters in relation to which such union is to be one union or two or more unions (*k*).

Effect of dissolution.

1166. On the dissolution or absorption of a union, school district, or asylum district, the board of guardians or board of management ceases to exist, and its property and liabilities vest in its successors without any deed or order being necessary (*l*).

All deeds, bonds, covenants, indentures, orders of justices, or other matters affecting any poor persons, apprentices, or officers entered into by or made upon or in favour of any board of guardians of a parish which is added to a union will vest in and enure to the benefit of or will be a charge upon the guardians of the union to which such parish has been added, without any assignment, transfer, or other act; and all securities, deeds, orders, books of account, and other documents relating thereto, must, when required by the said guardians, be delivered to them by the persons having the custody thereof; and all such deeds (other than the title deeds to property), bonds, indentures, orders of justices, or other documents and matters as aforesaid belonging to any dissolved district or union, must be preserved in such custody

rating (Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 32). As to the apportionment of property on the separation of a parish from a union, see *R.* v. *Local Government Board*, [1901] 1 K. B. 210, C. A.

(*h*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 66.

(*i*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 11.

(*k*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 58. As to the somewhat similar powers of county councils, see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 36 (6), and title LOCAL GOVERNMENT, Vol. XIX., pp. 238, 377, 378.

(*l*) Poor Law Authorities (Transfer of Property) Act, 1904 (4 Edw. 7, c. 20), ss. 1, 2. As to transfers of stock, see *ibid.*

and be open to inspection in such manner as the Local Government Board by its order from time to time directs (*m*). PART III. Unions.

1167. Upon the dissolution of any district or union, or the addition of any parish in which the relief to the poor has been or is administered by a board of guardians, to a union or to another parish, the real and personal estate vested in the managers or guardians of such district, union, or parish respectively must be transferred to and vested in the persons who were acting as managers or guardians respectively at the time of such dissolution or addition, to be held by them as joint tenants, according to the nature of such property, in trust for the parishes comprised in such district or union, or for the parish, as the case may be, until the same shall be sold, let, or otherwise disposed of under lawful authority (*n*). Transfer of property.

1168. On the dissolution of a union or an addition thereto, the existing guardians will continue in office for the purpose of winding up the affairs of the union, for a period not exceeding twelve months, unless the period be specially extended by the Local Government Board (*o*), and may retain the services of the officers (*p*). Necessary adjustments of rights and liabilities may be made by the Local Government Board (*q*). Existing guardians.

Part IV.—Workhouses.

SECT. 1.—*Establishment.*

1169. With the consent in writing of the majority of the guardians of any union (*r*), or with the consent of the ratepayers and owners Power to provide workhouse.

(*m*) Dissolved Boards of Management and Guardians Act, 1870 (33 & 34 Vict. c. 2), s. 8.

(*n*) *Ibid.*, s. 12. This provision does not apply to a parish provided for by the Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), s. 5, or by a local Act.

(*o*) Dissolved Boards of Management and Guardians Act, 1870 (33 & 34 Vict. c. 2), ss. 1, 5.

(*p*) *Ibid.*, s. 2. For compensation to officers, see Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 20; *R.* v. *Poor Law Board* (1871), L. R. 6 Q. B. 785; *R.* v. *Local Government Board* (1874), L. R. 9 Q. B. 148; p. 547, *ante*; and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*q*) Dissolved Boards of Management and Guardians Act, 1870 (33 & 34 Vict. c. 2), s. 4; Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58), s. 11. For the repayment of loans made to the dissolved union, see Dissolved Boards of Management and Guardians Act, 1870 (33 & 34 Vict. c. 2), s. 7; and as to the valuation of property, see *ibid.*, s. 11. For the dissolution or amalgamation of asylum districts and unions in the metropolis, see the Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), ss. 1—9. Compensation payable to an officer by reason of the dissolution etc. is repaid to the paying guardians out of the metropolitan common poor fund (*ibid.*, s. 18). For the power of the Local Government Board to vary orders of dissolution or alteration, see Poor Law Authorities (Transfer of Property) Act, 1904 (4 Edw. 7, c. 20), s. 3.

(*r*) See *Re St. Mary Abbots, Kensington, R.* v. *Poor Law Commissioners* (1846), 9. Q. B. 291.

SECT. 1. Establishment.

of property in any parish (*s*), the Local Government Board may (*t*) (1) order the guardians of any parish or union not having a workhouse or workhouses to build a workhouse or workhouses, and to purchase or hire land for the purpose of building thereon, or to purchase or hire a workhouse or workhouses, or a building or buildings to be used as or converted into a workhouse or workhouses; (2) order the guardians of any parish or union having a workhouse, or buildings capable of being converted, to enlarge or alter the same, or to build, hire or purchase additional buildings, and to purchase and hire land for such purpose (*a*); (3) order the guardians to provide a workhouse with proper drainage, sewers, ventilation, fixtures, furniture, surgical and medical appliances, and other conveniences (*b*). Guardians may expend not more than £500 on enlargement, alteration, improvement, or equipment of the workhouse, by obtaining the consent of the Local Government Board, without an order being necessary (*c*).

Borrowing powers.

1170. The guardians may borrow for the above purposes (*d*), but the sum raised therefor must not exceed one-tenth of the average annual amount of the rates raised for the relief of the poor in the union or parish for the three years ending at the Easter next preceding the raising of such money (*e*).

(*s*) The method of ascertaining consent is prescribed by the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 70), s. 40, as amended by subsequent enactments. As to consents in parishes under a select vestry or guardians appointed under a local Act, see Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 18; and as to consents to dealing with parish property, see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 52 (1). For earlier enactments regulating the establishment of workhouses, see Poor Relief Act, 1601 (43 Eliz. c. 2), s. 4; Poor Relief Act, 1662 (14 Car. 2, c. 12), ss. 4—14 (now repealed); Poor Relief Act, 1722 (9 Geo. 1, c. 7), s. 4 (now repealed); Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 12; Poor Relief Act, 1831 (1 & 2 Will. 4, c. 42), s. 1.

(*t*) The court will not interfere with the direction of the Board (*Re Newport Union, R.* v. *Poor Law Commissioners* (1837), 6 Ad. & El. 54; *Cantrell* v. *Windsor Union* (1838), 4 Bing. (N. C.) 348).

(*a*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 23. The consent of the guardians or ratepayers and owners is not required to the enlargement or alteration of an existing workhouse (*ibid.*, s. 25).

(*b*) *Ibid.*, s. 25; Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), s. 8; Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 8. The consent of the guardians or ratepayers is not required. For regulations as to the cleansing and repair of workhouses, see General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 150, 151.

(*c*) Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), s. 8. With the consent of the Local Government Board, guardians may hire or take on lease, temporarily or for a term not exceeding five years, any land or buildings for the purpose of the relief or employment of the poor and the use of the guardians or their officers (Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 13).

(*d*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 23.

(*e*) Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), s. 8. In addition to the borrowing authorised by these provisions, the guardians of any parish or union any part of which is situated within the Metropolitan Police District, or the City of London, or the select vestry of the parish of Liverpool, may, with the consent of the Local Government Board, also raise or borrow, and charge the future poor rates of such parish or union with such further or other sum or sums of money as may be or may have

Guardians may also borrow for the purpose of fitting up and furnishing any workhouse under their control (*f*).

Special provisions applicable to London.

1171. The Managers of the Metropolitan Asylums District may be ordered by the Local Government Board to purchase, hire, or build, and fit up the necessary buildings, ships (*g*), or temporary erections for the reception of paupers (*h*), and may provide land and buildings required for any purpose of the Metropolitan Poor Act, 1867 (*i*).

With the consent of the Local Government Board, guardians in London may let the workhouse or other premises to the Metropolitan Asylums Managers (*k*) for the reception and treatment of epidemic patients (*l*).

Poor law dispensaries.

1172. If guardians in London provide a dispensary (*m*), they need not necessarily appoint a dispensary committee, unless required by the Local Government Board to do so (*n*), and that Board may also require them to provide at the dispensary a proper room in which the medical officer may see patients, and such doctor must personally, or by his authorised substitute, attend there at fixed times for that purpose (*o*). If the guardians do not provide a dispensary when required by the Board to do so, they will not be entitled to receive from the metropolitan common poor fund any allowance for medicine, or medical or surgical appliances, or the salaries of the medical officers (*p*).

Acquiring lands etc.

1173. Corporations, including ecclesiastical corporations (*q*) and persons under disability, may sell or exchange lands or buildings to be used for workhouse or poor law purposes, and may make conveyance thereof to the guardians (*r*). The powers formerly vested in the churchwardens and overseers with regard to the acquisition of parish, or waste, or common, or Crown land for poor law purposes, are now exercised by the guardians, subject to the control of the Local Government Board, and are extended to workhouse purposes (*s*).

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been necessary for the purchase of any land, or interest in land, required as the site of such workhouse, or of any additions to any such workhouse (Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 30).

(*f*) Poor Law Act, 1879 (42 & 43 Vict. c. 54), s. 11. For the general borrowing powers of guardians, see p. 537, *ante*.

(*g*) Including ships for the training of boys for the sea service (Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), s. 11).

(*h*) Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), s. 15, as extended by the Metropolitan Poor Act, 1871 (34 Vict. c. 15), s. 1.

(*i*) 30 & 31 Vict. c. 6; Poor Law Act, 1897 (60 & 61 Vict. c. 29), s. 2.

(*k*) See title METROPOLIS, Vol. XX., p. 412.

(*l*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 86.

(*m*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*n*) Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), s. 12.

(*o*) *Ibid.*, s. 13.

(*p*) *Ibid.*, s. 14; and see p. 550, *ante*.

(*q*) Workhouse Sites Act, 1857 (20 & 21 Vict. c. 13).

(*r*) Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), s. 1.

(*s*) *Ibid.*, s. 4. The powers referred to were conferred by the Poor Relief Act, 1819 (59 Geo. 3, c. 12); the Poor Relief Act, 1831 (1 & 2 Will. 4, c. 42); and the Crown Lands Allotments Act, 1831 (1 & 2 Will. 4, c. 59).

SECT. 1. Establishment.

Copyholds may be acquired and enfranchised (*t*). Any land, workhouse, buildings or property may be sold, exchanged, or let by the guardians with the consent of the Local Government Board (*a*). Conveyances, exchanges, assignments, and transfers are made in such form as the Local Government Board may order (*b*). Conveyances to guardians of land or hereditaments for the accommodation of the poor do not require enrolment under the Mortmain Acts (*c*).

On the acquisition of land for the site of a poor law institution, any tithe rentcharge thereon must be redeemed (*d*).

Rates and taxes.

1174. House tax is not payable in respect of a workhouse (*e*), but such a building is rateable to the poor rate (*f*). For the purposes of water supply a workhouse is deemed to be a house occupied by one family, and the guardians are the owners (*g*), but a workhouse is not a private dwelling-house within the meaning of a provision enabling such a house to be supplied with water at special rates (*h*)

Situation of workhouse.

1175. For the purposes of relief, settlement, removal, and the burial of the poor, the workhouse of any union or parish is considered to be situate in the parish to which the poor person in question is or has been chargeable (*i*). But for the purpose of the burial of a poor person dying in a workhouse, the workhouse is considered to be situate in the parish in the union where such person last resided before removal to the workhouse (*k*).

SECT. 2.—*Management of Workhouse and Control of Inmates.*

Duty of guardians.

1176. The management of the workhouse and the government of the officers, servants, assistants, and paupers therein are imposed upon the guardians, who must observe and enforce such rules, orders, and regulations as the Local Government Board may make

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(*t*) Union and Parish Property Act, 1837 (7 Will. 4 & 1 Vict. c. 50), ss. 1—3.

(*a*) Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), s. 3; Parish Property and Parish Debts Act, 1842 (5 & 6 Vict. c. 18); Poor Law Act, 1889 (52 & 53 Vict. c. 56), ss. 5, 8. The powers of guardians as to the sale, exchange, or letting of parish property are now vested in the parish council (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (d)).

(*b*) Union and Parish Property Act, 1837 (7 Will. 4 & 1 Vict. c. 50), s. 4.

(*c*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 73; see title CHARITIES, Vol. IV., pp. 127 *et seq.*

(*d*) See Tithe Act, 1878 (41 & 42 Vict. c. 42), and title ECCLESIASTICAL LAW, Vol. XI., p. 750.

(*e*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B; see titles CHARITIES, Vol. IV., pp. 213, 214; INHABITED HOUSE DUTY, Vol. XVII., p. 191.

(*f*) See title RATES AND RATING.

(*g*) *Liskeard Union* v. *Liskeard Waterworks Co.* (1881), 7 Q. B. D. 505; see title WATER SUPPLY.

(*h*) *Bristol Guardians* v. *Bristol Waterworks Co.*, [1912] 1 Ch. 846, C. A.

(*i*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 56.

(*k*) Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 10. As to the registration of births and deaths occurring in a workhouse, see Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 56; Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 21; and title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.

with respect to the relief of the poor, for the government thereof, and the nature and amount of the relief to be given to, and the labour to be exacted from, the persons relieved, and the preservation therein of good order (*l*).

1177. To secure due observance of the rules, the workhouse may at any time be visited by an inspector (*m*), and any justice of the peace, and any medical man, or the officiating clergyman of the parish, if authorised by a warrant of a justice, may visit a workhouse and examine the state and condition thereof, and of the inmates, and of their food, clothing and bedding, and report the result to the next quarter sessions, who may order any cause of complaint to be remedied (*n*). A justice acting for the place in which the workhouse is situate (*o*) may at any time visit it for the purpose of seeing whether the regulations are being duly obeyed, and may summon an offender to appear before a court of summary jurisdiction (*p*). Visitation.

1178. Guardians must appoint a visiting committee from their own body, who must examine the workhouse at least once a week (*q*), and if a board of guardians does not appoint a visiting committee or if the committee neglects to visit for over three months, the Local Government Board may appoint a salaried visitor, not being one of the guardians, who will be paid out of the general fund of the union (*r*). Visiting committee.

1179. The admission of paupers into the workhouse is in the main regulated by order of the Local Government Board (*s*), but the following statutory requirements may be referred to. Any poor person professing to be a destitute wanderer or wayfarer, who applies for admission, may be searched, and any money found upon Admission to workhouse.

(*l*) See Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 15, 21, 22, 38, 39, 42; General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, art. 152.

(*m*) See p. 527, *ante*.

(*n*) Workhouses Act, 1790 (30 Geo. 3, c. 49), s. 1. In the case of the justice finding that a more speedy remedy is necessary in certain events, he may report to two other justices, who may make an order forthwith (*ibid.*, s. 2).

(*o*) See p. 558, *ante*.

(*p*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 43. Penalty, fine not exceeding £5 for a first offence, and not less than £5 and not exceeding £20 for a second offence. A third offence is a misdemeanour; see p. 527, *ante*. Justices may also visit other houses in which poor persons are lodged and maintained under contract with the guardians (Poor Relief Act, 1849 (12 & 13 Vict. c. 13), s. 8).

(*q*) General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 148, 149.

(*r*) See Poor Law Board Act, 1847 (10 & 11 Vict. c. 109), s. 24. Under the Poor Relief Act, 1849 (12 & 13 Vict. c. 13), s. 7, the Local Government Board may appoint an inspector, who is paid by the guardians, to visit houses, not being workhouses, in which poor persons are lodged and maintained under contract with the guardians.

(*s*) See General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 42, 88—96. As to the admission under contract of paupers from other workhouses etc., see Poor Law Amendment Act, 1849

SECT. 2. Management of Workhouse and Control of Inmates.

him taken and applied in aid of the common fund of the union (*t*). Spirituous or fermented liquor must not be introduced (*a*).

Classification.

1180. The classification of the inmates is also provided for by the order of the Local Government Board (*b*), while, as regards metropolitan workhouses, it is expressly provided that guardians may, with the approval of the Local Government Board, provide in their workhouse for the reception of particular classes and descriptions of poor persons, and receive therein, upon such terms as may be agreed, poor persons of the same class or description from other unions and parishes. So far as such last-mentioned poor persons are concerned, the workhouse will be deemed to be situated within the union or parish from which they were sent there (*c*).

Married couples.

1181. If husband and wife are admitted to the workhouse, and either of them is infirm, sick, or disabled by any injury, or above the age of sixty years, the guardians may permit them to live together. Every such case must be reported forthwith to the Local Government Board (*d*).

Married couples, both of whom are over sixty years of age, cannot be compelled to live separate and apart from each other in a workhouse (*e*).

Discipline and diet.

1182. The preservation of order, the conduct of the inmates, and their diet are the subjects of many orders of the Local Government Board (*f*). Corporal punishment must not be inflicted upon adults, nor must they be confined for any offence or misbehaviour for longer

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(12 & 13 Vict. c. 103), s. 14; Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 22; of children under sixteen, see Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 6; Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), s. 16; and as to the reception of strayed children or insane persons into metropolitan workhouses, see General Order, 3rd December, 1841, arts. 1, 2 (Macmorran and Lushington, Poor Law General Orders, Vol. I., p. 1). As to lunatics and idiots in workhouses, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 512 *et seq.* For the relief of casual paupers, see p. 567, *post.*

(*t*) Poor Law Amendment Act, 1848 (11 & 12 Vict. c. 110), s. 10. As to obtaining admission by false statement or omission to disclose the possession of money or property, see p. 608, *post.*

(*a*) See Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 92, 93, 94; General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, art. 146. For other prohibited articles, see *ibid.*, arts. 107, 119—121.

(*b*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 26; General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 98—101; Workhouse Regulation (Dietaries and Accounts) Order, 10th October, 1900 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 269).

(*c*) Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), s. 17.

(*d*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 10.

(*e*) Poor Law Amendment Act, 1847 (10 & 11 Vict. c. 109), s. 23. See also title HUSBAND AND WIFE, Vol. XVI., p. 319.

(*f*) See General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 102—147; General Order, 26th January, 1893; Workhouse Regulation Order, 8th March, 1894; Workhouse Regulation (Dietaries and Accounts) Order, 10th October, 1900, and other orders published in Macmorran and Lushington, Poor Law General Orders.

than twenty-four hours, or such further time as may be necessary in order to have them brought before a justice (*g*). Sane persons must not be manacled (*h*), and the hair of an adult pauper should not be cut against his or her will (*i*). Clothing supplied to a pauper must not bear a stamp or mark on the outside, so as to be publicly visible (*k*).

Labour.

1183. In return for the relief afforded in the workhouse, the recipient may be set a prescribed task of work, but he cannot be detained against his will for the performance of such work for longer than four hours from the breakfast hour in the morning succeeding his admission (*l*).

Refusal to work and misbehaviour.

A person maintained in a workhouse who refuses to work at any work, occupation, or employment suited to his or her age, strength, and capacity, or who is guilty of drunkenness or other misbehaviour, may, on summary conviction, be imprisoned for any period not exceeding twenty-one days, or, if previously convicted of a like offence, for not exceeding forty-two days (*m*).

Accidents to paupers.

1184. In employing a pauper upon work suited to his capacity, guardians are discharging a ministerial duty imposed upon them by the Poor Law Acts and regulations, and are not responsible in damages for personal injuries sustained by the pauper in the course of such work owing to the negligence of their officers or servants (*n*).

Detention.

1185. A pauper inmate, other than a casual pauper, who has given notice of intention to quit the workhouse may notwithstanding be detained by direction of the guardians for a period varying from twenty-four hours to seven days, but a direction requiring a longer notice than seventy-two hours to be given must be entered in the minutes, and must specify the name or names of the pauper or paupers to whom it applies (*o*).

Religious services and instruction.

1186. Upon the admission of an inmate the master must make due inquiry into the religious creed of such inmate, and enter

(*g*) Poor Relief Act, 1814 (54 Geo. 3, c. 170), s. 7.
(*h*) Workhouse Act, 1816 (56 Geo. 3, c. 129), s. 2.
(*i*) See *Forde* v. *Skinner* (1830), 4 C. & P. 239.
(*k*) Poor Relief Act, 1815 (55 Geo. 3, c. 137), s. 2.
(*l*) Poor Law Amendment Act, 1842 (5 & 6 Vict. c. 57), s. 5; and see the text, *infra*.
(*m*) Poor Relief Act, 1815 (55 Geo. 3, c. 137), s. 5; Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 58. Wilful disobedience to orders is not necessarily misbehaviour (*Mile End Guardians* v. *Sims*, [1905] 2 K. B. 200), but an act of immorality committed by a pauper in a workhouse is evidence of misbehaviour by the pauper within the meaning of the Poor Relief Act, 1815 (55 Geo. 3, c. 137), s. 5 (*Holland* v. *Peacock*, [1912] 1 K. B. 154).
(*n*) *Toseland* v. *West Ham Union*, [1907] 1 K. B. 920, C. A., following *Brennan* v. *Limerick Union Guardians* (1878), 2 L. R. Ir. 42, and *Dunbar* v. *Ardee Union Guardians*, [1897] 2 I. R. 76, C. A. See also p. 546, *ante*.
(*o*) See the Pauper Inmates Discharge and Regulation Act, 1871 (34 & 35 Vict. c. 108), s. 4, as amended by the Poor Law Act, 1899 (62 & 63 Vict. c. 37), s. 4. As to the detention of paupers suffering from disease, see Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 22.

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it in the creed register which he is required to keep (*p*). As regards children under twelve, the religious creed of the father, or, if that cannot be ascertained, of the mother, must be entered (*q*). The register is to be open to inspection (*r*), and an inmate must be permitted to be visited by a minister of his creed (*s*).

An inmate cannot be compelled to attend any religious service contrary to his religious principles, and a clergyman or minister of religion must be permitted, on the request of an inmate, to visit the workhouse for the purpose of affording religious assistance to such inmate, and for the purpose of instructing his child or children in the principles of their religion (*t*).

Every inmate for whom a religious service according to his own creed is not provided in the workhouse must be permitted, subject to regulations to be approved of or ordered by the Local Government Board, to attend, at such times as the Board shall allow, some place of worship of his own denomination within a convenient distance of the workhouse, if there be such in the opinion of the Board. But the guardians may, for abuse of such permission previously granted, or on some other special ground, refuse permission to any particular inmate, and must in such case cause an entry of such refusal and the grounds thereof to be made in their minutes (*a*).

Running away etc.

1187. It is an offence to desert or run away from a workhouse and carry away any clothes, linen, or other goods. Penalty, imprisonment for not less than seven days nor more than three months (*b*), with or without hard labour (*c*).

A person convicted of an offence committed in a workhouse while maintained therein, or of absconding from a workhouse and carrying away clothes or other property therefrom, may be committed to the prison of the county or place in which the parish is situated to which such person, at the time of the commission of the offence, was chargeable (*d*).

(*p*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 16; General Order, 26th November, 1868 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 259).

(*q*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 17. As to amendment of entries, see *ibid.*, s. 18. Mandamus lies to compel an alteration (*Re M'Conway, R.* v. *Belfast Guardians*, [1908] 2 I. R. 343).

(*r*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 19. For the religious instruction of pauper children, see title EDUCATION, Vol. XII., p. 89.

(*s*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 20.

(*t*) See Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 19; Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 74; Poor Law Act, 1889 (52 & 53 Vict. c. 56), s. 1 (6). For the appointment of chaplains, see note (*k*), p. 543, *ante*.

(*a*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 21.

(*b*) Poor Relief Act, 1815 (55 Geo. 3, c. 137), s. 2; Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 58.

(*c*) Poor Law Amendment Act, 1850 (13 & 14 Vict. c. 101), s. 8. See also, as to offences under the Vagrancy Acts, pp. 606 *et seq.*, *post*.

(*d*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 57; and see Poor Law Amendment Act, 1848 (11 & 12 Vict. c. 110), s. 9.

Part V.—Relief of the Poor.

SECT. 1.—*Kinds of Relief.*

SECT. 1. Kinds of Relief.

1188. The duty imposed upon guardians in respect of the administration of relief is, primarily, to set to work or apprentice the children of parents who are not able to keep and maintain their children; to set to work "all such persons, married or unmarried, having no means to maintain them, use no ordinary and daily trade of life to get their living by"; and to give necessary relief to the lame, impotent, old, blind, and other poor persons not able to work (*e*). This duty is discharged in various ways: relief in the workhouse has already been considered (*f*); the other methods, and some further statutory duties, are referred to in the following pages. The duty to relieve.

It should be premised, however, that although guardians are bound to relieve a poor person in need who applies for relief, they have a very wide discretion as to the kind of relief they will afford, and, if the recipient has any property, or has a relative who is in law obliged to maintain him or her, the cost of any relief given may be reimbursed from the sale of such property or be recovered from such relative (*g*).

1189. As an alternative to giving relief in the workhouse or in other institutions in which they are entitled to afford relief (*h*), guardians may, if they think fit, grant relief at their own houses to persons who are sick (*i*), or incapable of work, or out of employment, and may in other ways assist poor persons and their families. Out-relief to able-bodied persons or to their families, whether by payments in money, or in food and clothing, or partly in kind and partly in money, can only be given in accordance with regulations made by the Local Government Board. These provide, *inter alia*, that out-relief must not take the form of paying rent (other than for temporary lodging), setting up in trade, redeeming pawned tools, or purchasing tools, other than such articles as are included in the expression "relief in kind" (*k*). Out-relief.

(*e*) Poor Relief Act, 1601 (43 Eliz. c. 2), s. 1. As to the class of persons guardians are entitled to relieve, see *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516, C. A., where it was held that the grant of relief to able-bodied "strikers" was unlawful.

(*f*) See p. 559, *ante*.

(*g*) See p. 570, *post*.

(*h*) For relief in such institutions, see p. 564, *post*. Relief in a workhouse or an institution is called "institutional relief" in contradistinction to "out-relief."

(*i*) See also p. 530, *ante*, and General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 75, 76; General Order as to Out-door Relief, 21st December, 1844 (Stat. R. & O. Rev., Vol. X, Poor, England, p. 184); and see note (*k*), *infra*).

(*k*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 52. For the cases and manner in which out-relief may be given, see the Relief Regulation Order, 1911, which came into operation on the 1st April, 1912. For the orders governing out-relief before that date, see the General Order as to Out-door Relief, 21st December, 1844; General Out-door Relief Regulation Order, 14th December, 1852 (Stat. R. & O. Rev., Vol. X., Poor, England,

SECT. 1. Kinds of Relief.

Members of friendly societies.

1190. In granting outdoor relief to a member of a friendly society the guardians must not take into consideration any sum received from such friendly society as sick pay, except in so far as such sum exceeds *5s.* a week (*l*).

Insured persons.

1191. In granting outdoor relief to a person in receipt of or entitled to receive any benefit under the National Insurance Act, 1911 (*m*), a board of guardians must not take into consideration any such benefit, except so far as such benefits exceed *5s.* a week (*n*).

Refusal to perform task.

1192. Where guardians prescribe, under the regulations (*o*), a task of work to be performed by any poor person to whom, or to whose wife, if he be liable to maintain such wife (*p*), or child, whether legitimate or illegitimate, under the age of sixteen, relief has been lawfully granted by such guardians out of the workhouse (*q*), such task being suited to the age, sex, strength, and capacity of such person, and being of a nature and description of which the Local Government Board have previously approved, and such person refuses or wilfully neglects to perform such task, or wilfully destroys or damages any of the tools, materials, or other property belonging to the said guardians, he shall be deemed to be and be punishable as an idle and disorderly person (*a*).

Maintenance in homes and institutions.

1193. Guardians may arrange for the lodging and maintenance of poor persons in houses or establishments other than the workhouse, and may make contracts in that behalf with the proprietors or managers of such places. Such arrangements, and the supervision and control of such places, must be in accordance with the rules and regulations of the Local Government Board (*b*). Guardians

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p. 189); General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, art. 43. See also Circulars on the Administration of Outdoor Relief, issued by the Local Government Board on 18th March, 1910, and 29th December, 1911. As to out-relief to a parent being conditional upon his child attending school, see Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 40; Elementary Education Act, 1880 (43 & 44 Vict. c. 23), s. 5; and see title EDUCATION, Vol. XII., pp. 82 *et seq.*, for the powers and duties of guardians as to giving relief in connection with the education and maintenance of children. As to industrial and reformatory schools, see *ibid.*, pp. 70 *et seq.*, 83. As to the relief of underfed school children, see Relief (School Children) Order, 27th April, 1905 (Stat. R. & O., 1905, p. 273). "Relief in kind" means relief afforded by the grant of food, medicine, or other articles of absolute necessity, or by the provision of temporary lodging (Relief Regulation Order, 1911, art. i).

(*l*) Out-door Relief (Friendly Societies) Act, 1904 (4 Edw. 7, c. 32), s. 1.

(*m*) 1 & 2 Geo. 5, c. 55; see title WORK AND LABOUR.

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 109.

(*o*) See General Out-door Relief Regulation Order, 14th December, 1852, arts. 6, 7.

(*p*) See p. 573, *post*, and title HUSBAND AND WIFE, Vol. XVI., p. 316.

(*q*) See p. 573, *post*.

(*a*) Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), s. 15; and see p. 607, *post*.

(*b*) See Poor Relief Act, 1849 (12 & 13 Vict. c. 13), and the orders made thereunder.

are also empowered to provide for the reception, maintenance, and instruction of adult blind, or deaf and dumb, poor persons in proper institutions (*c*).

Boarding out.

1194. Instead of retaining in the workhouse children chargeable to the union or parish, guardians may board out such children in homes within or without the limits of the union or parish, by arrangement with boarding-out committees established for the purpose of finding and superintending homes for pauper children. Any such arrangements, committees, and homes are subject to regulations made by the Local Government Board (*d*).

Emigration.

1195. If the inhabitants of any parish or parishes within a union have raised or borrowed money (*e*) to assist in the emigration of poor persons, the administration of such money is entrusted to the guardians (*f*), who, with the consent of the Local Government Board, may also procure or assist in procuring the emigration of any irremovable poor person (*g*) who is or may be chargeable, or of orphans and deserted children (*h*).

Apprenticeship.

1196. Guardians may bind a poor child as apprentice (*i*), in which case the indenture of apprenticeship will be executed by them. A register must be kept by the clerk of all children so bound. The Local Government Board may by order prescribe the duties of the masters, and the terms and conditions of the apprenticeship (*k*).

In apprenticing boys to the sea-fishing service, the guardians must conform to the requirements of Part IV. of the Merchant Shipping Act, 1894 (*a*).

(*c*) Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 21. As to blind and deaf and dumb children, see title EDUCATION, Vol. XII., p. 83.

(*d*) See General Boarding-out Order, 1911; Relief Regulation Order, 1911, art. xiv.; and Circular Letter of the Local Government Board, dated 16th October, 1911.

(*e*) Under the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 62, 63; see also Public Works Loans Act, 1875 (38 & 39 Vict. c. 89); and, for the powers of the county council to aid emigration, title LOCAL GOVERNMENT, Vol. XIX., p. 374.

(*f*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 29.

(*g*) As to when persons are irremovable, see p. 591, *post*.

(*h*) See Poor Law Amendment Act, 1848 (11 & 12 Vict. c. 110), s. 5; Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), ss. 14, 20; Poor Law Amendment Act, 1850 (13 & 14 Vict. c. 101), s. 4; Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), s. 9; Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 22; Minute of Local Government Board, April, 1888.

(*i*) As to apprentices, see also titles INFANTS AND CHILDREN, Vol. XVII., pp. 70 *et seq.*; MASTER AND SERVANT, Vol. XX., pp. 71, 79 *et seq.*

(*k*) See Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 12; General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 52—63; General Order (Apprenticeship of Pauper Children), 15th February, 1898 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 233); Relief Regulation Order, 1911, art. xiv. Powers and duties as to apprenticeship are also contained in the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 3; Parish Apprentices Acts, 1792 (32 Geo. 3, c. 57), 1802 (42 Geo. 3, c. 46), and 1816 (56 Geo. 3, c. 139); Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 15; and see title EDUCATION, Vol. XII., p. 82.

(*a*) 57 & 58 Vict. c. 60, s. 393 (3); see also *ibid.*, ss. 106, 107, and titles MASTER AND SERVANT, Vol. XX., p. 80; SHIPPING AND NAVIGATION

SECT. 1. Kinds of Relief.

Young persons in service.

1197. In addition to the register of apprentices, guardians must keep a register showing the name, age, date of hiring, and name, trade and address of the master or mistress, of every young person under the age of sixteen who is hired or taken as a servant from the workhouse, and must cause such young persons and apprentices, if serving within five miles of the union, to be visited by the relieving officer or some other authorised officer at least twice in every year. If the young person or apprentice is serving at a place more than five miles from the union, notice must be sent to the guardians of the place of service, who must then cause the visitation to be made (*b*). If it is found that the master or mistress is ill-treating the apprentice or young person, the guardians may prosecute (*c*).

Assisting boys to join the Navy.

1198. If any boy not already an apprentice in the merchant service who, or whose parent or parents, is or are receiving relief in any union or parish, is desirous of serving in the naval service of His Majesty, and is forwarded for approval by competent authority for such service, the guardians may enable any such boy to be so forwarded, and may pay out of their funds such sum, if any, as may be required by the regulations of such service for providing outfit or otherwise, and also such expenses as may be necessary to be incurred for the conveyance of such boy in charge of a proper person to and from the port or place in the United Kingdom at which he may be required to attend for examination, and if accepted, for entry into such service (*d*).

Relief by loan.

1199. Relief given to or on account of any poor person above the age of twenty-one, or to his wife, or any part of his family under the age of sixteen, may, if the guardians think fit, be given by way of loan (*e*), which may be recovered either before justices or in the county court (*f*). But no relief by loan can be given which may contravene the regulations as to out-relief (*g*).

When relief has been given by way of loan, a justice may, upon the application of the guardians, require the pauper and his master to appear before him, and may order the master to pay to the guardians the whole or part of the wages due or to become due to the pauper, in liquidation of such loan, and may enforce payment thereof (*h*).

Casual relief.

1200. Where a poor person who is neither settled nor resident in

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(*b*) Poor Law (Apprentices, etc.) Act, 1851 (14 & 15 Vict. c. 11).

(*c*) Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 73; see p. 541, *ante*, and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 294, note (*r*).

(*d*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 28.

(*e*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 58.

(*f*) *Ibid*, s. 59; Poor Law Amendment Act, 1848 (11 & 12 Vict. c. 110), s. 8.

(*g*) Relief Regulation Order, 1911, art. xiii.; and see note (*k*), p. 563, *ante*.

(*h*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 59.

a parish, but who happens to be there when some accident occurs to him or some sudden illness overtakes him, is compelled thereby to apply for relief, the guardians for the parish or union must relieve him (*i*), and may be reimbursed the cost of such relief by the guardians of the union containing the place to which such person belongs (*k*).

Widows.

1201. In the case of any person, being a widow, having a legitimate child dependent on her for support, and no illegitimate child born after the commencement of her widowhood, and who at the time of her husband's death was resident with him in some place other than the parish of her legal settlement, and not situated in any union in which such parish is comprised, the guardians of such parish or union, if they see fit, may grant relief to such widow although not residing in such parish or union. But the guardians of any union or parish, and the overseers of any parish, in which such widow may be resident or may require relief, remain liable to relieve such widow in the same manner as any other person requiring relief in such union or parish (*l*).

Casual paupers.

1202. A casual pauper is a destitute wayfarer or wanderer who applies for or receives relief. A casual ward means any ward or wards, building or premises, set apart or provided for the reception and relief of destitute wayfarers and wanderers (*m*).

The guardians of every union must provide within the union such casual wards with such fittings and furniture as the Local Government Board considers necessary in view of the number of casual paupers likely to require relief therein (*n*).

Metropolitan casual wards.

1203. In the Metropolis, where no adequate accommodation exists otherwise, the guardians must provide such wards or other places for destitute wayfarers and foundlings as the Local Government Board directs (*o*); such wards or places must be open for the admission of destitute persons and foundlings who apply to be admitted between 6 p.m. and 8 a.m. from October to March inclusive, and between 8 p.m. and 8 a.m. from April to September inclusive (*p*). Any constable of the Metropolitan or City of London Police may personally

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(*i*) See *Atkins* v. *Banwell* (1802), 2 East, 505; *Tomlinson* v. *Bentall* (1826), 5 B. & C. 738; *Gent* v. *Tompkins* (1822), 5 B. & C. 746, n.; *Lamb* v. *Bunce* (1815), 4 M. & S. 275.

(*k*) Poor Law Amendment Act, 1848 (11 & 12 Vict. c. 110), s. 2; General Consolidated Order of the Poor Law Commissioners, 24th July, 1847, arts. 77—80; see *Wycombe Union* v. *Eton Union* (1857), 1 H. & N. 687.

(*l*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 26.

(*m*) Pauper Inmates Discharge and Regulation Act, 1871 (34 & 35 Vict. c. 108), s. 3; Relief Regulation Order, 1911, art. i.

(*n*) Pauper Inmates Discharge and Regulation Act, 1871 (34 & 35 Vict. c. 108), s. 9. As to the Metropolis, see also *ibid.*, s. 10.

(*o*) Metropolitan Houseless Poor Act, 1864 (27 & 28 Vict. c. 116), s. 5. Wards so provided must be inspected by the Local Government Board; see Metropolitan Houseless Poor Act, 1865 (28 & 29 Vict. c. 34), s. 2, which Act extended and made perpetual the Metropolitan Houseless Poor Act, 1864 (27 & 28 Vict. c. 116).

(*p*) Metropolitan Houseless Poor Act, 1865 (28 & 29 Vict. c. 34), s. 5.

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conduct any destitute wayfarer, wanderer, or foundling, or other destitute person, not having committed or being charged with an offence, to any such ward or place of reception, and every such wayfarer, wanderer, or foundling must, if there be room, be temporarily relieved therein (*q*).

The whole area of the Metropolis has been formed into one district for the relief of the casual poor, and the Managers of the Metropolitan Asylum District (*r*) have been constituted the managers of such district, and the casual wards in the Metropolis are now under their control (*s*).

Admission etc. of casual paupers.

1204. Every casual pauper must be admitted, dieted, and set to work and discharged in the prescribed manner (*a*).

A casual pauper is not entitled to discharge himself from a casual ward before 9 o'clock in the morning of the second day following his admission, nor before he has performed the prescribed task; if he has been admitted more than once in the month into any casual ward of the same union (*b*) he may not discharge himself before the fourth day, and may be removed to the workhouse of the union (*c*) and be required to remain there for the remainder of his period of detention. Sunday is not to be included in computing the detention days (*d*).

Adoption of children.

1205. Where a child is maintained (*e*) by guardians and (1) has been deserted by its parent, or (2) the guardians are of opinion that by reason of mental deficiency, or of vicious habits or mode of life, a parent of the child is unfit to have control of it, or (3) a parent is unable to perform his or her parental duties by reason of being under sentence of penal servitude or of being detained under the

(*q*) Metropolitan Houseless Poor Act, 1865 (28 & 29 Vict. c. 34), s. 4. The expenses so incurred by guardians are a charge on the metropolitan common poor fund (Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), s. 69); see p. 550, *ante*.

(*r*) See p. 552, *ante*, and title METROPOLIS, Vol. XX., p. 411.

(*s*) Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), s. 6; Pauper Inmates Discharge and Regulation Act, 1871 (34 & 35 Vict. c. 108), s. 10; Metropolitan Casual Paupers Order, 1911.

(*a*) Pauper Inmates Discharge and Regulation Act, 1871 (34 & 35 Vict. c. 108), s. 6. See General Order, 18th December, 1882 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 193); General Order (Metropolis), 3rd November, 1887 (Macmorran and Lushington, Poor Law General Orders, Vol. II., p. 687). As to the punishment of absconding paupers etc., see pp. 607, 610, *post*.

(*b*) In the Metropolis every casual ward is deemed to be a casual ward of the same union for this purpose (Casual Poor Act, 1882 (45 & 46 Vict. c. 36), s. 4).

(*c*) In the Metropolis the removal may be to any workhouse or asylum provided under the Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), for the reception and setting to work of the casual poor, to which the casual poor of the union can be sent (Casual Poor Act, 1882 (45 & 46 Vict. c. 36), s. 4).

(*d*) Casual Poor Act, 1882 (45 & 46 Vict. c. 36), s. 4. This provision is not affected by the Poor Law Amendment Act, 1842 (5 & 6 Vict. c. 57), s. 5.

(*e*) For the meaning of "maintained," see Poor Law Act, 1889 (52 & 53 Vict. c. 56), s. 1 (3).

Inebriates Act, 1898 (*f*), or (4) a parent has been sentenced to imprisonment in respect of an offence against any of his or her children, or (5) is permanently bedridden or disabled, and is the inmate of a workhouse and consents, or (6) both the parents, or in the case of an illegitimate child the mother, are or is dead, the guardians may at any time resolve that, until the child reaches the age of eighteen years, all the rights and powers of such parent, or if both parents are dead, of the parents, shall vest in the guardians, whereupon those rights and powers will so vest, and will continue so vested whether the child does or does not continue to be maintained by the guardians. Such a resolution may be rescinded if the guardians think that to do so will be for the benefit of the child, or the guardians may permit the child to be, either permanently or temporarily, under the control of the parent, or of any other relative, or of any friend, or of any society or institution for the care of children. A resolution may also be determined or varied by a court of summary jurisdiction (*g*). The passing of the resolution does not relieve any person from any liability to contribute to the maintenance of the child, but the fact of such contribution being made does not lessen the powers and rights conferred on the guardians (*h*).

Anyone who assists and induces a child so placed under the control of the guardians to escape therefrom is liable on summary conviction to a fine not exceeding £20 (*i*).

Visitation of adopted children.

1206. If a child maintained by guardians (*k*) is with their consent adopted by any person, the guardians must, during three years from the date of such adoption, cause the child to be visited at least twice a year by some competent person, and may during such period revoke their consent to the adoption, whereupon the child must be forthwith returned to the guardians by the person having the custody thereof (*l*).

Relief to released prisoners.

1207. If it appears that a person about to be released from prison, or from an industrial or reformatory school, or from an inebriate reformatory, will on his release require immediate poor law relief by reason of infirmity of mind or body, he may be removed on release, on an order made in the prescribed method, to the workhouse of the poor law union consisting of or comprising the parish in which he is settled, or if that cannot be ascertained, or he has no place of settlement or residence in England or

(*f*) 61 & 62 Vict. c. 60; see title INTOXICATING LIQUORS, Vol. XVIII., p. 168.

(*g*) Poor Law Act, 1899 (62 & 63 Vict. c. 37), s. 1. The section does not affect the removability (see p. 590, *post*) of a pauper child (*Wantage Union* v. *Bristol Union*, [1907] 1 K. B. 68).

(*h*) Poor Law Act, 1889 (52 & 53 Vict. c. 56), s. 1 (5); and see *Hackney Union* v. *Tombs*, *Tombs* v. *Hackney Union* (1909), 73 J. P. 271. The passing of a resolution does not affect the religious instruction of the child; see Poor Law Act, 1889 (52 & 53 Vict. c. 56), *ibid.*, s. 1 (6), and title EDUCATION, Vol. XII., p. 89.

(*i*) Poor Law Act, 1899 (62 & 63 Vict. c. 37), s. 2.

(*k*) See note (*e*), p. 568, *ante*.

(*l*) Poor Law Act, 1899 (62 & 63 Vict. c. 37), s. 3.

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Wales, to the workhouse of the union in which he resided when the offence for which he was detained was alleged to have been committed, or, if that cannot be ascertained, to that of the union in which the offence was alleged to have been committed, or if the offence was committed out of the United Kingdom, to that of the union in which the court of summary jurisdiction by which he was convicted or committed for trial, or ordered to be detained, sat. The operation of such an order may be suspended if the person is too ill to be removed to the workhouse named, in which case he will on release be conveyed to the workhouse of the union in which the prison is situate, and the expenses of his maintenance there will be repaid by the guardians of the poor law union named in the order.

Such an order will not prevent the guardians subsequently obtaining a removal order to the place of actual settlement (*m*).

SECT. 2.—*Recovery of the Cost of Relief.*

Guardians may take property of pauper.

1208. Expenses incurred in the maintenance of a pauper constitute a debt due from the pauper to the guardians who have relieved him (*n*). Where relief has been given to or on account of any person who is in possession of or owns any money or valuable security for money (*o*), the guardians may take and appropriate so much of such money or the produce of such security, or recover the same as a debt before any local court, as will reimburse them the amount expended in such relief during the period of twelve months prior to such taking, appropriation, or proceeding, and, in the event of the death of a pauper possessing money or property, the guardians may reimburse themselves the expenses of burial, as well as of maintenance during the preceding twelve months (*p*).

Desertion.

1209. Where a person runs away leaving a wife, or child, or children chargeable, the guardians may apply to two justices for a warrant or order to take and seize so much of the goods and chattels, and

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(*m*) Released Persons (Poor Law Relief) Act, 1907 (7 Edw. 7, c. 14).

(*n*) *Birkenhead Union Guardians* v. *Brookes* (1906), 95 L. T. 359; *Re Watson, Stamford Union* v. *Bartlett*, [1899] 1 Ch. 72.

(*o*) A judgment for damages for personal injuries is "a valuable security for money" (*West Ham Guardians* v. *Ovens* (1872), L. R. 8 Exch. 37).

(*p*) Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 16. Burial expenses are recoverable as relief (*ibid.*, s. 17). *Ibid.*, s. 16, does not cut down the common law right of guardians to recover six years' maintenance (*Re Clabbon (an Infant)*, [1904] 2 Ch. 465; see also *Wandsworth Union* v. *Worthington*, [1906] 1 K. B. 420). Guardians may, as creditors, obtain administration of the estate of a pauper who died chargeable (*Cleaver* v. *M'Kenna's Next of Kin* (1865), 35 L. J. (P. & M.) 91; *In the Goods of Sharland* (1871), 25 L. T. 574; and see *Windeatt* v. *Sharland* (1871), 23 L. T. 877), and may, in addition to the twelve months' maintenance, prove against the estate of a pauper for five years' maintenance, but as ordinary, not preferential, creditors (*Lambeth Guardians* v. *Bradshaw's Next of Kin* (1886), 57 L. T. 86; *Laver* v. *Botham & Sons*, [1895] 1 Q. B. 59). As to the basis of calculation of the cost of maintenance, see *Islington Guardians* v. *Biggenden* (1909), 101 L. T. 677. As to the recovery by guardians of unpaid wages due to a pauper, see title FACTORIES AND SHOPS, Vol. XIV., p. 517.

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receive so much of the annual rents and profits of the lands and tenements, of the runaway as such justices order or direct, for or towards the discharge of the parish or place where such wife, child or children are left in respect of the expenses incurred for their bringing up and support. On such an order being confirmed at the next quarter sessions, that court may authorise the guardians to sell or otherwise dispose of such goods and chattels, or so much of them as the court thinks fit, and to receive the rents and profits. The guardians must account to quarter sessions for any money so received (*q*).

Maintenance orders.

1210. The liability to maintain imposed by law (*r*) is enforced by means of maintenance orders made by justices in petty sessions having jurisdiction in the union or parish to which the poor person in respect of whom the question arises is chargeable. Such orders may be obtained by the guardians of such union or parish (*s*), and money due thereunder is recoverable before a court of summary jurisdiction as a civil debt, and not as a penalty (*t*). An order of justices for the payment of the money so due cannot be enforced by imprisonment in default of distress, unless it be proved that the person in default has since the date of the order to pay the arrears had the means to pay the sum in respect of which he has made default (*u*). There is no appeal to quarter sessions (*a*).

An order must follow the words of the statute (*b*), and must show that the person on whom it is made is of sufficient ability to make the required payment (*c*). The payment ordered must be a fixed weekly sum so long as the poor person remains unable to work, or until further order (*d*).

(*q*) Poor Relief (Deserted Wives and Children) Act, 1718 (5 Geo. 1, c. 8), ss. 1, 2. As to the form of the orders, see *Stable* v. *Dixon* (1805), 6 East, 163.

(*r*) See p. 573, *post*.

(*s*) Poor Law Amendment Act, 1848 (11 & 12 Vict. c. 110), s. 8; Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 25.

(*t*) See Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 36; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 6, 35; Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 18; and, for the law as to the recovery of civil debts, see title MAGISTRATES, Vol. XIX., p. 609. Bankruptcy does not protect against the consequence of disobedience (*Bancroft* v. *Mitchell* (1867), L. R. 2 Q. B. 549).

(*u*) *Re Gamble*, [1899] 1 Q. B. 305; and see title MAGISTRATES, Vol. XIX., pp. 604, 609.

(*a*) *R.* v. *London Justices, Ex parte Greenwich Union*, [1900] 1 Q. B. 438.

(*b*) It is not sufficient to say that the person is "poor" or "destitute" (*St. Andrew's Undershaft* (*Inhabitants*) v. *De Breta* (1701), 1 Ld. Raym. 699; *R.* v. *Gulley* (1715), Foley, Poor Laws, 47; *R.* v. *Litton* (1718), Cas. Sett. 85; *R.* v. *Pennoyer* (1726), 1 Bott's Poor Laws by Const, 6th ed., 433 [5th ed., 366]. It has been said that the order must also state that the person is actually chargeable to the union or parish; see *R.* v. *Tripping* (1718), 1 Bott's Poor Laws by Const, 6th ed., 430 [5th ed., 366].

(*c*) *R.* v. *Halifax* (1714), Cas. Sett. 33; *R.* v. *Dunn* (1714), 10 Mod. Rep. 221. It is for the justices to decide whether the defendant is of "sufficient ability" to relieve and maintain; see *Coulson* v. *Davidson* (1906), 96 L. T. 20.

(*d*) *Re Morten* (1844), 5 Q. B. 591; *R.* v. *Gulley, supra*; *Jenkins' Case* (1706), 2 Salk. 534.

SECT. 2. Recovery of the Cost of Relief.

Soldiers.

1211. A soldier of the regular forces (*e*) is as liable to contribute to the maintenance of his wife and of his children, legitimate and illegitimate, as is any other man, but such liability cannot be enforced in the ordinary way, nor can he be directly punished for the offence of deserting his wife and family, or any member thereof, or of leaving her or them chargeable. If an order is made against a soldier, or against a man who subsequently becomes a soldier, in respect of maintenance or relief, a copy of the order must be sent to a Secretary of State, and, in such a case, or if a Secretary of State is satisfied that a soldier has deserted or left in destitute circumstances, without reasonable cause, his wife or any of his legitimate children under fourteen years of age, the Secretary of State must order a portion, not exceeding 6*d.*, of the daily pay of a non-commissioned officer who is not below the rank of sergeant, and not exceeding 3*d.* of the daily pay of any other soldier, to be deducted from such daily pay, and applied, first, in the liquidation of the sum adjudged to be paid, and then towards the maintenance of such wife or children, in such manner as the Secretary of State thinks fit (*f*).

Seamen.

1212. If during the absence of a seaman on a voyage, his wife or any of his children or step-children become chargeable, the amount expended on their maintenance during such absence may be recovered from the shipowner out of the man's wages, up to a prescribed proportion of such wages (*g*).

Annuitants etc.

1213. If a pauper is entitled to any annuity or periodical payment, the trustee or other person bound to make payment thereof may pay, and may be compelled to pay, thereout to the guardians the cost of relief, provided that the guardians or the relieving officer have declared such relief to be given on loan (*h*). Expenses incurred in the relief of a pauper or pauper lunatic who is a member of a friendly society may in certain cases be paid out of any money payable by the society (*i*), but not if the pauper or pauper lunatic has a wife or other relative dependent upon him (*k*).

(*e*) As to the meaning of this expression, see Army Act (44 & 45 Vict. c. 58), s. 190. See also title ROYAL FORCES.

(*f*) Army Act (44 & 45 Vict. c. 58), s. 145, as amended by the Army (Annual) Act, 1883 (46 & 47 Vict. c. 6), s. 7, and the Army (Annual) Act, 1891 (54 & 55 Vict. c. 5), s. 7. For the service of process on a soldier, see Army Act (44 & 45 Vict. c. 58), s. 145 (3). As to deductions from pay, see also *ibid.*, s. 138; and, generally, see title ROYAL FORCES.

(*g*) See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 182. As to the relief of destitute lascars, see *ibid.*, s. 185; and, generally, see title SHIPPING AND NAVIGATION. As to the right of guardians to receive payment of army or naval pensions due to persons chargeable or liable to maintain chargeable persons, see Pensions Act, 1839 (2 & 3 Vict. c. 51).

(*h*) The guardians must account to the annuitant for any surplus (*Smith* v. *Islington Guardians* (1902), 66 J. P. 664, a county court case). As to relief on loan, see p. 566, *ante*.

(*i*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 23. The section does not apply if there is a dispute as to the pauper's title (*R.* v. *Richardson*, [1894] 2 Q. B. 323).

(*k*) See Poor Law Amendment Act, 1879 (42 & 43 Vict. c. 12), s. 1, and title FRIENDLY SOCIETIES, Vol. XV., p. 149, for the cases in which payments may be made to guardians. A trade union is not a benefit or

SECT. 2. Recovery of the Cost of Relief.

1214. If a bastard child for whose maintenance an order has been made by justices on the application of the mother becomes chargeable, the payments thereunder may be made to a relieving officer or other officer of the parish or union, and may be recovered by him (*l*).

Payments under affiliation orders.

SECT. 3.—*Liability to Maintain.*

Persons liable to maintain.

1215. The Statute of Elizabeth, which originated our system of poor relief, provides that the father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, must, at their own charges, relieve and maintain every such poor person (*m*). The liability imposed by the statute (*n*) only extends to blood relations (*o*), and only to the relations particularly enumerated (*p*); illegitimate children are not within its operation (*q*).

Husbands and fathers.

1216. A man who marries a woman who already has children, whether legitimate or illegitimate, is liable to maintain them as part of his family, until they attain the age of sixteen or the mother dies (*r*). Relief given to or on account of a wife, or of children

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friendly society (*Winder* v. *Kingston-upon-Hull Corporation for the Poor (Governors and Guardians)* (1888), 20 Q. B. D. 412); and it has been held by a London police magistrate that a trade union cannot be compelled to pay to the guardians the weekly sums which in the ordinary course would have been paid to a member if he had not become chargeable; see *St. Mary, Islington, Guardians* v. *Amalgamated Society of Engineers* (1902), 66 J. P. 665.

(*l*) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 7. An order under the section may be made although the mother is living and not incapacitated (*Jones* v. *Merthyr Tydfil Union Guardians* (1911), 105 L. T. 203). As to the right of the guardians to take proceedings against the putative father of a bastard child, see Bastardy Laws Amendment Act, 1873 (36 & 37 Vict. c. 9); Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 24; *Plymouth Guardians* v. *Gibbs*, [1903] 1 K. B. 177; and title BASTARDY, Vol. II., pp. 441 *et seq.*

(*m*) Poor Relief Act, 1601 (43 Eliz. c. 2), s. 6. This liability can only be enforced by means of the maintenance orders hereinbefore mentioned (see p. 571, *ante*). A relative liable to maintain cannot be compelled to take the poor person into his house and maintain him there (*R.* v. *Jones* (1710), Foley, Poor Laws, 41).

(*n*) Poor Relief Act, 1601 (43 Eliz. c. 2).

(*o*) See *R* v. *Munden* (1719), 1 Stra. 190 (man not liable for the maintenance of his mother-in-law); *R.* v. *Dempson* (1733), 2 Stra. 955 (son's wife).

(*p*) *R.* v. *Smith* (1826), 2 C. & P. 449; *R.* v. *Cornish* (1831), 2 B. & Ad. 498 (man not liable to maintain brother); *Maund* v. *Mason* (1874), L. R. 9 Q. B. 254 (grandchild not liable to maintain grandfather). A named relation is liable, even though the poor person has a nearer relation able to support him (*R.* v. *Joyce* (1707), 16 Vin. Abr. 423; *R.* v. *Cornish, supra*), and even though the guardians have obtained contributions towards the maintenance from another source; see *Cole* v. *Brown*, [1907] 2 K. B. 301. Children are liable to support their mother, even though she has married again (*Arrowsmith* v. *Dickenson* (1887), 20 Q. B. D. 252), or has committed adultery (*Re Constable* (1886), 31 Sol. Jo. 15).

(*q*) *R.* v. *Reve* (1631), 2 Bulst. 344; *Westminster City* v. *Gerrard* (1632), 2 Bulst. 346; and see title BASTARDY, Vol. II., pp. 438 *et seq.*

(*r*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 57.

SECT. 3. Liability to Maintain.

under the age of sixteen, not being blind or deaf and dumb, is considered as given to the husband of such wife, or to the father of such children, as the case may be (*s*).

When a married woman requires relief without her husband, an order may be made by justices upon the husband to make payments towards the cost of the relief of the wife (*t*).

If the husband of a woman is beyond the seas (*a*), or in the custody of the law, or in confinement in a licensed house or asylum as a lunatic or idiot, any relief given to such woman, or to her child or children, must be given to her in the same manner and subject to the same conditions as if she was a widow (*b*).

Wives and mothers.

1217. If the husband of a married woman having separate property becomes chargeable, a maintenance order may be made and enforced against her in respect of such separate property (*c*).

A married woman having separate property is subject to the same liability as a *feme sole* for the maintenance of her parent or parents (*d*), and to the same liability as her husband for the maintenance of her children and grandchildren (*e*).

Relief given to or on account of any child or children, under the age of sixteen, of any widow, is considered to be given to such widow (*f*).

Part VI.—Settlement.

SECT. 1.—*In General.*

Meaning of "settlement."

1218. By "settlement" is meant the right of a person to have, when occasion arises, the benefit of the poor laws in a particular parish or place (*g*). The right may be acquired by the act of the

(*s*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 56. As to refusing or neglecting to maintain, see p. 607, *post*. For the liability of parents to maintain their children, see title INFANTS AND CHILDREN, Vol. XVII., p. 114.

(*t*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 33. For the liability of husband and wife to maintain each other, see title HUSBAND AND WIFE, Vol. XVI., pp. 316 *et seq*. As to the enforcement of such orders, see the Summary Jurisdiction Acts, and title MAGISTRATES, Vol. XIX., p. 604. As to the liability of a putative father, see title BASTARDY, Vol. II., pp. 440 *et seq*. As to maintenance in an asylum, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 491. As to running away and deserting a family, see p. 610, *post*.

(*a*) The provision as to a woman whose husband is beyond the seas applies also to a married woman living separate from her husband (Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 18).

(*b*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 25.

(*c*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 20; Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 33.

(*d*) Married Women's Property Act, 1908 (8 Edw. 7, c. 27), s. 1. In consequence of this provision, *Pontypool Union* v. *Buck*, [1906] 2 K. B. 896, is not now good law.

(*e*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 21.

(*f*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 56; and see p. 591, *post*. For the liability of a woman for the maintenance of her illegitimate child, see title BASTARDY, Vol. II., p. 440.

(*g*) The law of poor law settlement and of removal (see p. 590, *post*) was

person, or may devolve upon him without any volition on his part. Once obtained, a settlement can only be lost by the person acquiring a settlement in some other parish or place. A man cannot have two settlements at the same point of time, but his right to a settlement may be fluctuating, and if he has, for example, the means of passing one night in one parish and another night in some other parish, then of the two his place of settlement will be the place where he happened to sleep the night before the happening of the event that led to the making of the order of removal (*h*).

an inevitable consequence of the adoption of the principle of parochial relief (see p. 523, *ante*). When each parish was made definitely responsible for the relief of the poor, and charged with the cost of setting the poor to work, the parish was directly concerned in the question of who were, and who were not, the poor whom it was to maintain or set to work, and to facilitate the answering of this question recourse was had to the old feudal idea whereby the labourer was deemed to be part of the soil he was born to cultivate. By analogy, the applicant for relief was deemed only entitled to receive it from the parish in which he was legally settled, and if from motives of humanity a stranger was relieved in some other parish, it was only temporary, and immediate steps could be taken to send him back to the place whence he originally came, and, for a further safeguard even against any prospective charge to a parish, the parish authorities were empowered to remove any newcomer to the parish where he properly belonged, unless he gave sufficient security for holding harmless the parish of his subsequent choice. Upon these fundamental ideas there gradually grew up the complicated and costly system of settlement and removal, which, though considerably modified by comparatively recent enactments, still remains a constant source of confusion and litigation. The present law of settlement and removal originated with the Poor Relief Act, 1662 (14 Car. 2, c. 12) (for earlier statutes, which are now repealed, on the subject, see stats. (1388) 12 Ric. 2, c. 7; (1495) 11 Hen. 7, c. 2; (1503) 19 Hen. 7, c. 12: and (1603) 1 Jac. 1, c. 7), which, after reciting that by reason of some defects in the law poor people were not restrained from going from one parish to another, and therefore do endeavour to settle themselves in those parishes where there is the best stock, the largest commons or wastes to build cottages, and the most woods for them to burn and destroy, and when they have consumed it then to another parish, and at last become rogues and vagabonds, to the great discouragement of parishes to provide stocks where it is liable to be devoured by strangers, proceeded to enact that it should be lawful, upon complaint made by the churchwardens or overseers of the poor of any parish, to any justice of peace, within forty days after any such person or persons coming so to settle as aforesaid in any tenement under the yearly value of £10, for any two justices of the peace, whereof one to be of the quorum of the division where any person or persons that are likely to be chargeable to the parish shall come to inhabit, by their warrant to remove and convey such person or persons to such parish where he or they were last legally settled, either as a native, householder, sojourner, apprentice, or servant, for the space of forty days at the least, unless he or they give sufficient security for the discharge of the said parish, to be allowed by the said justices. With the alterations effected by succeeding enactments, which are dealt with in the following pages, this provision remains the essential basis of the law now to be considered.

(*h*) *R.* v. *Knaresborough* (*Inhabitants*) (1851), 16 Q. B. 446, *per* Lord CAMPBELL, C.J., at p. 448; and see *Great Yarmouth Guardians* v. *Bethnal Green Guardians* (1907), 97 L. T. 440; *R.* v. *Norwood* (1867), L. R. 2 Q. B. 457; *R.* v. *Ringwood* (*Inhabitants*) (1813), 1 M. & S. 381; and *R.* v. *St. Mary, Lambeth* (*Inhabitants*) (1799), 8 Term Rep. 240; p. 585, *post*.

SECT. 1. **In General.**

Original settlements.

1219. Settlements are either original or derivative. An original settlement may be obtained by birth (*i*), by residence (*k*), by apprenticeship (*l*), by estate (*m*), by paying rent for premises (*n*), or by paying rates (*o*).

Derivative settlements.

1220. A settlement cannot be derived from another person, except by a wife from her husband, by a legitimate child under the age of sixteen from its father or widowed mother, and by an illegitimate child from its mother (*p*). Settlements obtained through these means are called derivative settlements.

(*i*) See p. 577, *post*.
(*k*) See p. 579, *post*.
(*l*) See p. 581, *post*.
(*m*) See p. 582, *post*.
(*n*) See p. 584, *post*.
(*o*) See p. 586, *post*.
(*p*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35, which provides that "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." The construction of this section has been the subject of many and conflicting decisions, but in 1889 the House of Lords considered the whole subject in three cases which were heard together, namely, *Reigate Union Guardians* v. *Croydon Union Guardians*, *Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians*, *Medway Union Guardians* v. *Bedminster Union Guardians* (1889), 14 App. Cas. 465, the decisions in which remain the controlling authority on the interpretation of the section. It was laid down, *per* Lord WATSON, at p. 484, that the effect of the section is (1) to reserve to married women, whether during marriage or in viduity, the same right to their husband's settlement which they had under the law existing when the Act was passed (see p. 587, *post*); (2) to fix absolutely the age of sixteen as the period of emancipation, in all questions regarding the settlement of legitimate children, as had already been done in the case of illegitimates (see p. 588, *post*); (3) to give to bastards the privilege enjoyed by lawful children of retaining their parentage settlement after emancipation until the acquisition of a new settlement (see p. 588, *post*); (4) in all cases where the parents' settlement was itself derivative, to throw children of either class as soon as they attain the age of sixteen upon their own birth settlement until they acquire another (see p. 577, *post*); (5) subject to these provisions and limitations, to reserve to children the same rights in relation to parentage settlements which they possessed under the then existing law (see p. 588, *post*); and (6) to abolish all other kinds and forms of derivative settlement. As to the retrospective operation of the section, see *Bath Union Guardians* v. *Berwick-on-Tweed Union Guardians*, [1892] 1 Q. B. 731; *Westbury-on-Severn* v. *Barrow-in-Furness* (1878), 3 Ex. D. 88; *Tenterden Union Guardians* v. *St. Mary, Islington, Guardians* (1878), 38 L. T. 485; the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 36; and *Brighton Parish Guardians* v. *Strand Union Guardians*, [1891] 2 Q. B. 156, C. A.

1221. Guardians may agree in writing under their hands, subject to the consent of the Local Government Board, that for the purposes of settlement all the parishes in a union shall be considered as one parish. When perfected, such an agreement is irrevocable, and the settlement of a poor person in any one of the parishes of the union is deemed to be a settlement in the union (*q*). Settlement in unions.

1222. An addition to a parish does not affect settlements already gained therein (*r*), and if after a settlement has been gained in a parish, the parish is divided into two or more parishes, so that each becomes a separate parish, the settlement gained in the old parish is not destroyed, but remains in the place where it was originally gained (*s*). Alteration of parish.

Where the alteration has been made pursuant to an order of the county council, confirmed by the Local Government Board, which contains clauses purporting to deal with settlements in the old parish, an objection to their legality cannot be entertained in proceedings commenced later than six months after the confirmation of the order (*t*).

1223. Every pauper lunatic who is chargeable to a union is, while he resides in an institution for lunatics, deemed for the purposes of his settlement to be resident in the union to which he is chargeable (*a*). Pauper lunatics.

SECT. 2.—*Settlement by Birth.*

1224. Every English-born person has a settlement, and that settlement is *primâ facie* the place of birth; but this birth settlement lasts only while the person is not shown to have acquired some other settlement (*b*). The moment it is shown that either the father or the mother has gained a settlement in England, the Duration of birth settlement.

(*q*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 33; as to the formalities connected with such an agreement, see *ibid.*

(*r*) *West Ham Union* v. *London County Council*, [1904] A. C. 40.

(*s*) *West Ham Union* v. *Edmonton Union*, [1908] A. C. 1, overruling *R.* v. *Tipton (Inhabitants)* (1842), 3 Q. B. 215, and *Dorking Union* v. *St. Saviour's Union*, [1898] 1 Q. B. 594, C. A. As to the effect of the division and alteration of parishes upon settlements, see also *Worcester Union Guardians* v. *Birmingham Union Guardians* (1887), 65 J. P. 771; *Calne Union* v. *St. Mary, Islington, Guardians* (1900), 69 L. J. (Q. B.) 400; *Preston Union* v. *Lewisham Union* (1904), 91 L. T. 498. For division and alteration of parishes, see p. 553, *ante*, and title LOCAL GOVERNMENT, Vol. XIX., pp. 237, 377.

(*t*) See *R.* v. *Middlesex Justices, Ex parte Walsall Union*, [1907] 2 K. B. 581, C. A.

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 286 (2). As to the settlement of a pauper lunatic, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 495.

(*b*) Although it is usual to call the settlement by birth the *primâ facie* settlement, it is as a matter of fact the weakest of all settlements (see *R.* v. *Wakefield (Inhabitants)* (1804), 5 East, 335, *per* LE BLANC, J., at p. 338), and it is only when all other attempts to find a settlement for the pauper have failed that the birth settlement can be resorted to. Proof, however, of a birth settlement is sufficient to throw on the other side the burden of establishing a later settlement, either by parentage or in some other way (Symons, Parish Settlements, 2nd ed., p. 106).

SEC T.2. Settlement by Birth.

settlement of the child is, as the case may be, that of the father or mother (*c*). But if the parents have no settlement, or if their place of settlement cannot be ascertained, then the child's birth settlement prevails, and continues until it obtains another settlement in some other manner (*d*).

Children.

1225. If a child under the age of sixteen has not acquired a settlement for itself, or, being a female, has not derived a settlement from her husband (*e*), and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent (*f*), such child or female is deemed to be settled in the parish in which he or she was born (*g*).

Exceptions to place of birth being place of settlement.

1226. There are certain exceptions to the general rule as to the place of birth being the place of settlement. A child born in a workhouse is, so far as settlement is concerned, deemed to be born in the district, parish, township, or hamlet, by which the mother was sent to, and on account of which the mother was received and maintained in, such house (*h*), and practically the same rule applies

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(*c*) See p. 588, *post*.

(*d*) See *Spitalfields* (*Inhabitants*) v. *St. Andrews, Holborn* (*Inhabitants*) (1700), Fortes. Rep. 307; *Cripplegate* v. *St. Saviour's* (1710), 2 Bott's Poor Laws by Const, 5th ed., p. 13; *R.* v. *Heaton Norris* (*Inhabitants*) (1796), 6 Term Rep. 653; *R.* v. *St. Nicholas, Leicester* (*Inhabitants*) (1824), 2 B. & C. 880; *R.* v. *St. Mary, Leicester* (*Inhabitants*) (1835), 3 Ad. & El. 644; *R.* v. *Preston* (*Inhabitants*) (1840), 12 Ad. & El. 822; *R.* v. *Watford* (*Inhabitants*) (1846), 9 Q. B. 626; *R.* v. *All Saints, Derby* (*Inhabitants*) (1849), 14 Q. B. 207; *R.* v. *Newchurch* (*Inhabitants*) (1862), 3 B. & S. 107.

(*e*) See p. 587, *post*.

(*f*) As to the extent to which a derivative settlement may be inquired into, see *Woodstock Union* v. *St. Pancras* (1878), 4 Q. B. D. 1.

(*g*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35. See *R.* v. *Bridgnorth Guardians* (1883), 11 Q. B. D. 314, C. A.; *Reigate Union Guardians* v. *Croydon Union Guardians, Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians, Medway Union Guardians* v. *Bedminster Union Guardians* (1889), 14 App. Cas. 465, *per* Lord WATSON, at p. 484. The section acts retrospectively (*Westbury-on-Severn* v. *Barrow-in-Furness* (1878), 3 Ex. D. 88; but compare *Tenterden Union Guardians* v. *St. Mary, Islington, Guardians* (1878), 38 L. T. 485; and see other cases cited in note (*p*), p. 576, *ante*). As the provision of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35, by which an illegitimate child retains the settlement of its mother until it acquires another settlement (see note (*p*), p. 576, *ante*), does not apply to an illegitimate child who had attained the age of sixteen before the passing of that Act, the previously existing law applies, and such a child is thrown back upon its birth settlement. The birthplace of an illegitimate child born before 14th August, 1834, the date of the passing of the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), was its place of settlement, for *ibid.*, s. 71, did not affect a previously acquired settlement, and as an illegitimate child was *nullius filius*, it had no father's or mother's settlement to take, and was perforce driven to its birth settlement, until it acquired another in its own right or by marriage.

(*h*) Poor Relief Act, 1814 (54 Geo. 3, c. 170), s. 3. The workhouse of a union is deemed to be in the parish to which each poor person therein relieved is or has been chargeable (Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 56). See p. 558, *ante*.

in the case of a child born in an asylum or hospital for lunatics where the mother is a patient (*i*).

A child born in a prison in which the mother is a prisoner, or in a lying-in hospital or certified hospital, does not thereby acquire a settlement in the place where the prison or hospital is situated (*k*).

A bastard born in a lying-in hospital does not acquire a settlement in the place where the hospital is situate, but follows the mother's settlement, and gains a settlement in the parish where the mother was last legally settled (*l*), but if the mother's settlement cannot be ascertained the child's settlement will be governed by the place of birth (*m*).

Where, by the fraud or collusion of a parish officer, a woman is wrongly removed or sent into a parish, where she is delivered of an illegitimate child, such child does not gain a settlement in the place of birth (*n*).

SECT. 3.—*Settlement by Residence.*

Residence for three years.

1227. Where any person (*o*) has resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable (*p*), he is deemed to be settled therein until he acquires a settlement in some other parish (*q*).

Nature of residence.

1228. The term of residence must have been completed since 15th August, 1876 (*r*), for the statute creating a settlement of this nature is not retrospective (*s*), and the residence must be in the same parish, and not merely in different parishes in the same union (*t*).

(*i*) Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 4. But see *R.* v. *Barnet Union Guardians* (1888), 58 L. T. 947, which, while apparently opposed to the statement in the text, seems not to have really dealt with the question as to the constructive birthplace.

(*k*) Poor Relief Act, 1814 (54 Geo. 3, c. 170), s. 2.

(*l*) Lying-in Hospitals Act, 1773 (13 Geo. 3, c. 82), s. 5. The expenses of removal of mother or child to the place of the mother's last settlement, being within twenty miles of the hospital, are payable by such place (*ibid.*, s. 6).

(*m*) *Ibid.*, s. 9; Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35.

(*n*) *R.* v. *Mattersey* (*Inhabitants*) (1832), 4 B. & Ad. 211; and compare *R.* v. *Astley* (1785), 4 Doug. (K. B.) 389.

(*o*) A deserted wife is a "person" within the meaning of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34, and can acquire a settlement of her own by the joint operation of that section and the Poor Removal Act, 1861 (24 & 25 Vict. c. 55), s. 3; see *Bethnal-Green Guardians* v. *Paddington Guardians*, [1912] 2 K. B. 335, and cases cited *ibid.*

(*p*) For the essentials to the status of irremovability, see p. 591, *post*.

(*q*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34. An order of removal in respect of a settlement acquired under this section cannot be made upon the uncorroborated evidence of the person to be removed (*ibid.*).

(*r*) The date of the passing of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61).

(*s*) *R.* v. *Ipswich Union* (1877), 2 Q. B. D. 269; *R.* v. *Brampton Union* (1878), 3 Q. B. D. 479; *R.* v. *Abergavenny Union* (1880), 6 Q. B. D. 31; *Sunderland Guardians* v. *Sussex* (*Clerk of the Peace*) (1881), 8 Q. B. D. 99.

(*t*) *Plomesgate Guardians* v. *West Ham Guardians* (1881), 6 Q. B. D. 570;

SECT. 3. Settlement by Residence.

The residence must have been for a continuous and complete period of three years, without any such interruption or break as would, under the law relating to irremovability, prevent the person attaining that status (*a*). Thus, poor law relief during the period (*b*), or absence on military service (*c*), will prevent the acquisition of the settlement (*d*). The residence must be actual residence; constructive residence, as by having a wife and children living in the place, is not sufficient (*e*). A mere status of irremovability does not of itself confer a settlement (*f*). Detention or confinement as a prisoner on any civil process or for contempt of court does not amount to residence in the place of detention so as to confer a settlement there (*g*).

Residence while under sixteen years of age may be sufficient (*h*), or may be added to residence over sixteen to make up the term of three years (*i*), if such residence has been under such circumstances as would suffice to constitute a status of irremovability (*k*).

Residence in charitable institutions.

1229. A person does not gain a settlement by reason of any residence in any house or other dwelling-place provided for the residence of such person by a charitable institution, while he is supported and maintained at the expense of the institution as an object of such charity (*l*).

Sunderland Guardians v. *Sussex* (*Clerk of the Peace*) (1881), 8 Q. B. D. 99; but see *Bristol Poor Incorporation* v. *Barton Regis Union* (1891), 56 J. P. 311.

(*a*) See p. 591, *post*.

(*b*) See *Dorchester Union Guardians* v. *Weymouth Union Guardians* (1885), 16 Q. B. D. 31; *St. Olave's Union* v. *Canterbury Union*, [1897] 1 Q. B. 682, C. A. (absent as a patient in a hospital).

(*c*) *Maidstone Union* v. *Newark Union* (1905), 69 J. P. 413.

(*d*) As to the effect of periodical short absences, see *Great Yarmouth Guardians* v. *Bethnal Green Guardians* (1907), 97 L. T. 440, where a railway guard travelling between London and Yarmouth, who slept some nights in London and some nights in Yarmouth, was held to be settled in Yarmouth; and see *Manchester Overseers* v. *Ormskirk Guardians* (1886), 16 Q. B. D. 723. Long absence is, of course, a break (*Totnes Union* v. *Cardiff Union* (1886), 51 J. P. 133).

(*e*) *West Ham Union* v. *Cardiff Union*, [1895] 1 Q. B. 766; and see *Maidstone Union* v. *Newark Union*, *supra*.

(*f*) Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 5; and see p. 591, *post*.

(*g*) Poor Relief Act, 1814 (54 Geo. 3, c. 170), s. 4.

(*h*) *Wolstanton and Burslem Union* v. *Northwich Union* (1882), 46 L. T. 528; and see p. 581, *post*.

(*i*) *Reigate Union Guardians* v. *Croydon Union Guardians*, *Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians*, *Medway Union Guardians* v. *Bedminster Union Guardians* (1889), 14 App. Cas. 465.

(*k*) *West Ham Union Guardians* v. *St. Matthew, Bethnal Green* (*Churchwardens*), [1894] A. C. 230.

(*l*) Poor Relief Act, 1814 (54 Geo. 3, c. 170), s. 6. In *Fulham Guardians* v. *Thanet Guardians* (1881), 7 Q. B. D. 539, C. A., BRETT, L.J., at p. 541. expressed an opinion that this section had been impliedly repealed by the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34 (see p. 579, *ante*), but it would seem that residence in a charitable institution does not of itself confer a settlement, but that under the Divided Parishes and Poor Law Amendment Act, 1876 (39 &

SECT. 3. Settlement by Residence.

1230. The age of the person is immaterial. A legitimate child under sixteen years of age can acquire a settlement by residence with its deserted mother in a parish from which such mother is irremovable (*m*). An illegitimate child under sixteen can acquire such a settlement, either by residence with its mother (*n*) or by residence elsewhere than with the mother (*o*). A pauper may acquire such a settlement (*p*).

Who may acquire a settlement by residence.

SECT. 4.—*Settlement by Apprenticeship.*

1231. A person who is bound apprentice (*q*) by any duly stamped deed, writing, or contract (*a*), and who has resided for forty days in a place in pursuance of his apprenticeship, gains a settlement in such place (*b*). The residence need not be for consecutive days, nor in any one year (*c*), nor in the place where the place of service is, nor where the master resides, but it must be residence in the character of an apprentice, and in some way be in furtherance of the object of the apprenticeship (*d*).

Residence under contract of apprenticeship.

Residence by indulgence, or merely for recreation, and having no connection with the service, will not suffice to confer a settlement (*e*).

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40 Vict. c. 61), s. 34 a new head of settlement was created, and that it is the irremovability and not the residence that gives such new settlement.

(*m*) *Kingston-upon-Hull Incorporation for the Poor* v. *Hackney Union*, [1911] 1 K. B. 748, C. A.; affirmed (1912), 28 T. L. R. 418, H. L.

(*n*) *West Ham Union* v. *Holbeach Union*, [1905] A. C. 450; *Fulham Parish* v. *Woolwich Union*, [1907] A. C. 255.

(*o*) *R* v. *Leeds Union* (1879), 4 Q. B. D. 323; *Braintree Union* v *Rochford Union* (1911), 81 L. J (K. B.) 251; see also *Salford Guardians* v. *Manchester Overseers* (1882), 10 Q. B. D. 172; *Reigate Union Guardians* v. *Croydon Union Guardians*, *Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians*, *Medway Union Guardians* v. *Bedminster Union Guardians* (1889), 14 App. Cas. 465; *Holborn Guardians* v. *Chertsey Guardians* (1885), 15 Q. B. D. 76, C. A.; and see p. 588, *post*

(*p*) *Wolstanton and Burslem Union* v. *Northwich Union* (1882), 46 L. T. 528.

(*q*) An articled clerk to a solicitor may acquire a settlement by apprenticeship (*St Pancras* v. *Clapham* (1860), 2 E. & E. 742).

(*a*) See *Woodstock Union* v. *Shipston-on-Stour Union* (1892), 57 J. P. 167.

(*b*) Poor Relief Act, 1691 (3 Will. & Mar c 11), s. 7; Apprentices (Settlement) Act, 1757 (31 Geo. 2, c. 11), s. 1. Residence under apprenticeship in an extra-parochial place does not confer a settlement (*Clerkenwell (Inhabitants)* v. *Bridewell* (1700), 1 Ld. Raym. 549). This form of settlement cannot be acquired in respect of apprenticeship to a turnpike keeper or collector (Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), s. 51), or in respect of apprenticeship to the sea service, or to a sea fisherman (Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 67). A parish apprentice cannot gain a settlement by virtue of his apprenticeship unless the directions of the Parish Apprentices Act, 1816 (56 Geo. 3, c. 139), have been complied with; see title MASTER AND SERVANT, Vol. XX., p. 80, note (*m*).

(*c*) *R.* v. *Aldstone* (*Inhabitants*) (1831), 2 B. & Ad. 207.

(*d*) See, as to the nature of the residence under the apprenticeship, *St. Bride's Parish* v. *St. Saviour's Parish* (1706), 2 Salk. 533; *R.* v. *Barmby-in-the-Marsh* (*Inhabitants*) (1806), 7 East, 381; *R.* v. *Barnsley* (*Inhabitants*) (1813), 1 M. & S. 377; *R.* v. *Barleston* (*Inhabitants*) (1822), 5 B. & Ald. 780; *R.* v. *Linkinhorne* (*Inhabitants*) (1832), 3 B. & Ad. 413; *R* v. *Banbury* (*Inhabitants*) (1832), 3 B. & Ad. 706; *R.* v. *Elswick* (*Inhabitants*) (1861), 3 E. & E. 437.

(*e*) *R.* v. *Ilkeston* (1825), 4 B. & C. 64; *R.* v. *Barton-upon-Irwell* (*Inhabitants*) (1863), 3 B. & S. 604. But where a master sent a sick apprentice

SECT. 5. Settlement by Estate

ten miles thereof (*c*): on ceasing to inhabit and becoming chargeable, the owner of such property is liable to be removed to the parish or place where he was last legally settled before the purchase and inhabitancy, or, in case he has, subsequently to such inhabitancy, gained a legal settlement in some other parish, then to such other parish (*d*).

By inhabitancy or residence "within ten miles" means within ten miles, as the crow flies, from the house in which the person actually resides to the boundary of the parish in which the estate is situate (*e*).

SECT. 6.—*Settlement by Renting and Rating.*

Inter-relation of these settlements.

1235. Though these forms of settlement are distinct, they are so inter-related that they may be treated together. If a renting settlement has been gained, the conditions fulfilled will also have conferred a rating settlement, and where a person has a settlement by estate it will often be found that he has also acquired a rating settlement in respect of the same property (*f*).

Settlement by renting.

1236. A person may acquire a settlement by renting property in a parish, if the following essentials are present:—(1) The tenement must consist of a separate and distinct dwelling-house and building, or of land, or of both (*g*); (2) it must be *bonâ fide* rented by such person, at and for the sum of £10 a year

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Belford Overseers (1863), 3 B. & S. 662), but money subsequently spent on the land cannot be taken into account (*R.* v. *Dunchurch* (*Inhabitants*) (1766), Burr. S. C. 553). The consideration mentioned in the deed is not conclusive, if in fact £30 or more was paid as purchase-money (see *R.* v. *Scammonden* (*Inhabitants*) (1789), 3 Term Rep. 474; *R.* v. *Cottingham* (*Inhabitants*) (1827), 7 B. & C. 603). The money will be deemed to be *bonâ fide* paid though a portion was borrowed on mortgage of the premises (*R.* v. *Tedford* (*Inhabitants*) (1735), Burr. S. C. 57; *R.* v. *Chailey* (*Inhabitants*) (1796), 6 Term Rep. 755).

(*c*) In order to sustain the settlement, the residence must continue up to the date of the adjudication order.

(*d*) Poor Relief Act, 1722 (9 Geo. 1, c. 7), s. 5; Poor Law Amendment Act 1834 (4 & 5 Will. 4, c. 76), s. 68. See *R.* v. *St. Giles in the Fields* (*Inhabitants*) (1842), 2 Q. B. 446; *R.* v. *Salford* (*Inhabitants*) (1764), Burr. S. C. 516. As to removal, see p. 590, *post*. Though the effect of the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 68, is to destroy the settlement of the purchaser, it would seem that such destruction does not affect the already acquired derivative settlement of his emancipated children (see *R.* v. *Hendon* (*Inhabitants*) (1842), 2 Q. B. 455), though it will prevent a wife or an unemancipated child acquiring a derivative settlement after the purchaser's settlement has been lost (*R.* v. *Llansaintffraid Glan Conway* (*Inhabitants*) (1853), 2 E. & B. 803).

(*e*) *R.* v. *Saffron Walden* (*Inhabitants*) (1846), 9 Q. B. 77. If the owner goes to reside beyond the ten miles limit, and so loses his settlement by estate, he may still retain a settlement by rating; see note (*f*), *infra*.

(*f*) See p. 582, *ante*, for settlement by estate. A person who ceases to reside within ten miles of the parish loses his settlement by estate therein (Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 68; and see the text, *supra*), but will still retain any renting or rating settlement (*R.* v. *Keynsham Union* (1885), 49 J. P. 308); and see p. 586, *post*.

(*g*) Poor Relief (Settlement) Act, 1825 (6 Geo. 4, c. 57), s. 2. The words

at the least, and for the term of one whole year at the least (*h*); (3) the person himself must have actually occupied under such yearly hiring for a year at least, and must have paid rent to the amount of £10 for at least a whole year (*i*); (4) he must have been assessed to the poor rate, and have paid the same, in respect of such tenement, for at least a year (*k*); and (5) he must personally have resided in the parish for forty days (*l*).

Nature of tenancy.

1237. The renting need not necessarily be under one agreement or from the same landlord (*m*), so long as there is an exclusive tenancy for a whole year of a distinct holding (*n*). The occupation must be uninterrupted and of the actual tenement, not merely of a part. Where the tenant has let off part of the premises but occupies the remainder, he does not gain a settlement (*o*).

Double tenancies.

1238. If a man is the tenant of premises of sufficient value in each of two or more parishes, and in respect of each has fulfilled the necessary conditions, he will be deemed to be settled in the parish in which he last spent the night (*p*).

"separate and distinct" do not apply to land (*R.* v. *St. Lawrence, Appleby (Inhabitants)* (1845), 6 Q. B. 842; and see notes (*m*), (*n*), *infra*.

(*h*) Poor Relief (Settlement) Act, 1825 (6 Geo. 4, c. 57), s. 2; and see Poor Removal Act, 1795 (35 Geo. 3, c. 101), s. 4. The rent may be paid weekly, monthly, quarterly or yearly, so long as there is a letting for a year; see *R.* v. *Herstmonceaux (Inhabitants)* (1828), 7 B. & C. 551; *Paddington (Churchwardens)* v. *Willesden (Churchwardens)* (1863), 7 L. T. 784; *R.* v. *St. Giles Without, Cripplegate (Inhabitants)* (1863), 4 B. & S. 509; *Hastings Union Guardians* v. *St. James, Clerkenwell, Guardians* (1865), 6 B. & S. 914; *R.* v. *Norwich Incorporation Guardians* (1874), 38 J. P. 677.

(*i*) Poor Relief (Settlement) Act, 1831 (1 Will. 4, c. 18), s. 1. If the yearly rent exceeds £10, payment up to £10 is sufficient (*ibid.*, s. 2). And if the total rent is in respect of land in more than one parish, it will be enough if on apportionment there is £10 a year paid for what is in the parish concerned (*R.* v. *Pickering (Inhabitants)* (1831), 2 B. & Ad. 267). The rent must be paid by the hirer, not by a third person (see *R.* v. *Pakefield (Inhabitants)* (1836), 4 Ad. & El. 612), and not after his death (*R.* v. *Carshalton (Inhabitants)* (1826), 6 B. & C. 93).

(*k*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 66; see *R.* v. *Husthwaite (Inhabitants)* (1852), 18 Q. B. 447; *R.* v. *St. Anne, Westminster (Inhabitants)* (1860), 2 E. & E. 485.

(*l*) Poor Relief Act, 1662 (14 Car. 2, c. 12).

(*m*) *R.* v. *Macclesfield (Inhabitants)* (1831), 2 B. & Ad. 870; *R.* v. *Tadcaster (Inhabitants)* (1833), 4 B. & Ad. 703. But occupation under successive agreements is not sufficient (*R.* v. *Banbury (Inhabitants)* (1834), 1 Ad. & El. 136).

(*n*) As to what amounts to a distinct dwelling-house or building, see cases cited in note (*g*), p. 584, *ante*; *R.* v. *Great and Little Usworth and North Biddick (Inhabitants)* (1836), 5 Ad. & El. 261; *R.* v. *Elswick (Inhabitants)* (1860), 24 J. P. 787; as to land, see note (*g*), p. 584, *ante*.

(*o*) *R.* v. *St. Nicholas, Rochester (Inhabitants)* (1833), 5 B. & Ad. 219; *R.* v. *St. Nicholas, Colchester (Inhabitants)* (1835), 2 Ad. & El. 599; *R.* v. *Berkswell (Inhabitants)* (1837), 6 Ad. & El. 282; *R.* v. *Pakefield (Inhabitants)* (1836), 4 Ad. & El. 612. But merely letting out beds for the night does not prevent the tenant being in occupation (*R.* v. *St. Giles-in-the-Fields (Inhabitants)* (1836), 4 Ad. & El. 495).

(*p*) *R.* v. *St. Mary, Lambeth (Inhabitants)* (1799), 8 Term Rep. 240; *R.*

SECT. 6. **Settlement by Renting and Rating.**

1239. The renting or payment of rates, as the case may be, must be by the person himself. Persons occupying rent free, by reason of their employment or office, *e.g.*, railway servants who reside in houses provided by the company, hospital doctors living in the hospital, workhouse masters and matrons, ministers living in houses hired by the officers of the church, servants living in lodges or estate cottages, and the like, do not obtain settlements in respect of renting or rating (*q*).

Service occupiers.

Toll-keepers.

1240. No gate-keeper or toll-keeper of any turnpike road or navigation, or person renting the tolls and residing in any toll-house of any turnpike road or navigation, and no apprentice or servant of any such collector or person, thereby gains any settlement in any district, parish, township, or hamlet (*r*).

Parish lands; Crown lands.

1241. A settlement cannot be gained by hiring, occupying, or paying rates in respect of land let out for the employment of the poor (*s*) or of Crown land (*t*).

Settlement by rating.

1242. A settlement may be acquired by a person paying the "public taxes or levies" (*a*) in respect of property of the yearly value of at least £10, of which he is the owner (*b*), or in respect of property rented by him under the conditions stated above as regards settlement by renting (*c*). In either case he must have resided for forty days in the parish in which the property is situated, after having paid such rates (*d*).

If the person paying the rates is the owner of the property, it is not necessary that he should actually occupy the property (*e*), but if he is not the owner he must have occupied the tenement or a part of it for a whole year (*f*).

Meaning of "public taxes or levies."

The expression "public taxes or levies" is generally regarded as being synonymous with the term "parochial rates" (*g*), but the settlement may be acquired by the payment of other charges than

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v. *Ringwood* (*Inhabitants*) (1813), 1 M. & S. 381; and compare cases cited p. 575, note (*h*), *ante*.

(*q*) See *R.* v. *Tiverton Overseers* (1861), 3 E. & E. 555; and see note (*g*), p. 592, *post*.

(*r*) Poor Relief Act, 1814 (54 Geo. 3 c. 170), s. 5; Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), s. 51.

(*s*) Poor Relief Act, 1831 (1 & 2 Will. 4, c. 42), s. 5.

(*t*) Crown Lands Allotments Act, 1831 (1 & 2 Will. 4, c. 59), s. 2.

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

(*b*) Poor Relief Act, 1691 (3 Will. & Mar. c. 11), s. 5; Poor Relief (Settlement) Act, 1825 (6 Geo. 4, c. 57), s. 2.

(*c*) See p. 584, *ante*.

(*d*) Poor Relief Act, 1662 (14 Car. 2, c. 12); *R.* v. *Ringstead* (*Inhabitants*) (1829), 9 B. & C. 218.

(*e*) *Gainsborough Union Guardians* v. *Worksop Union Guardians* (1873), 37 J. P. 293.

(*f*) *R.* v. *Westbury on Trym* (*Inhabitants*) (1857), 7 E. & B. 444. If a tenant, who is actually rated and pays the rate, has underlet a part of the premises, it would seem that he is not precluded from acquiring a settlement (*R.* v. *Stoke Damarel* (*Inhabitants*) (1837), 6 Ad. & El. 308; *R.* v. *Brighthelmstone* (*Inhabitants*) (1841), 1 Q. B. 674; *R.* v. *St. Giles in the Fields* (*Inhabitants*) (1857), 7 E. & B. 205.

(*g*) See *R.* v. *East Teignmouth* (*Inhabitants*) (1830), 1 B. & Ad. 244.

the poor rate (*h*), *e.g.*, of land tax (*i*), property tax (*k*), church rate (*l*), an improvement rate (*m*), or of a borough watch rate (*n*). A settlement cannot be acquired by payment only of a rate assessed for the scavenging or repairs of the highway (*o*).

SECT. 7.—*Settlement by Marriage.*

Wife's settlement.

1243. Upon marriage a woman takes her husband's settlement, and continues to take any new settlement with him until he dies (*p*). After his death she retains his last settlement (*q*) until she acquires a new one, either in her own right or by remarriage (*r*). If the husband has no settlement of his own, or his settlement cannot be ascertained, the wife retains the settlement, whether original or derivative, she had before marriage (*s*). A wife, unless deserted by her husband, cannot acquire a settlement in her own right (*t*),

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(*h*) *R.* v. *St. Mary Kallendar* (*Inhabitants*) (1839), 9 Ad. & El. 626.

(*i*) *R.* v. *Bramley* (*Inhabitants*) (1736), Burr. 75; *R.* v. *East Teignmouth* (*Inhabitants*) (1830), 1 B. & Ad. 244.

(*k*) *St. George, Hanover Square* v. *Cambridge Union* (1867), L. R. 3 Q. B. 1.

(*l*) *R.* v. *St. Bees* (*Inhabitants*) (1808), 9 East, 203.

(*m*) *R.* v. *St. Thomas* (1870), L. R. 5 Q. B. 371.

(*n*) *Everton* v. *South Stoneham* (1860), 2 E. & E. 771. But not a ward watch rate (*R.* v. *Christ Church, London* (*Inhabitants*) (1828), 8 B. & C. 660).

(*o*) Poor Relief Act, 1772 (9 Geo. 1, c. 7), s. 6.

(*p*) *St. Giles, Reading* v. *Eversley Blackwater* (1724), 1 Stra. 580; *R.* v. *Hinxworth* (*Inhabitants*) (1778), Cald. Mag. Cas. 42. This derivative settlement was preserved by the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35; see p. 576, *ante*.

(*q*) *Reigate Union Guardians* v. *Croydon Union Guardians*, *Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians*, *Medway Union Guardians* v. *Bedminster Union Guardians* (1889), 14 App. Cas. 465, overruling *Maidstone Union Guardians* v. *Holborn Union Guardians* (1886), 17 Q. B. D. 817, and *Kingsbridge Union Guardians* v. *East Stonehouse Union Guardians* (1887), 18 Q. B. D. 528.

(*r*) A widow cannot complete the qualification for a settlement already commenced by her husband, *e.g.*, where a tenant dies before acquiring a settlement by residence, his widow cannot perfect the settlement by continuing to reside there. But she can live in the tenement herself, and so begin to acquire a right in her own behalf; see *R.* v. *Crayford* (*Inhabitants*) (1826), 9 Dow. & Ry. (K. B.) 80.

(*s*) A woman's settlement is not destroyed by marriage, but only by the fact of her acquiring a new settlement under her husband. If she does not do this, her maiden settlement still survives, and she may be removed there if occasion arises (see *Dorchester Union Guardians* v. *Poplar Union Guardians* (1888), 21 Q. B. D. 88, C. A.; *Plymouth Union* v. *Axminster Union*, [1898] A. C. 586; *R.* v. *St. Botolph's Without, Bishopsgate* (1755), Burr. S. C. 367; *R.* v. *Woodsford* (*Inhabitants*) (1783), 2 Bott's Poor Laws by Const, 5th ed., 86; *R.* v. *Ryton* (*Inhabitants*) (1778), Cald. Mag. Cas. 39). As to when removal may be ordered, and the necessity for the husband's consent, see p. 594, *post*.

(*t*) *R.* v. *Aythorp Rooding* (*Inhabitants*) (1756), Burr. S. C. 412; *Berkhampstead* v. *St. Mary, Northchurch* (1735), 2 Bott's Poor Laws by Const, 5th ed., 25, cited in 1 Nolan, Poor Laws, 4th ed., 291, *per* Lord HARDWICKE, C.J.; *R.* v. *Brington* (1827), 7 B. & C. 546; *Reigate Union Guardians* v. *Croydon Union Guardians*, *Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians*, *Medway Union Guardians* v. *Bedminster Union Guardians*, *supra*, *per* Lord HALSBURY, L.C., at p. 479, and *per* Lord WATSON, at p. 482; *Rutherglen Parish Council* v. *Glasgow Parish Council*, [1902] A. C. 360. As to the right of a deserted wife to acquire a settlement see note (*o*), p. 579, *ante*.

SECT. 7. Settlement by Marriage.

though under certain circumstances she may acquire a status of irremovability, which for some purposes amounts to practically the same thing (*a*).

A marriage must be a valid one in order to confer a settlement (*b*), but if it be valid, it matters not how it was procured (*c*).

SECT. 8.—*Settlement by Parentage.*

Children under sixteen.

1244. Every legitimate child up to the age of sixteen takes the settlement of its father, but if the father dies while the child is under sixteen, and the mother, being a widow, acquires a settlement in her own right (*d*) before the child attains that age, or if the deceased father had no settlement, the child takes the settlement of its widowed mother up to the age of sixteen (*e*). In either case, whether it takes the settlement of the father or of the mother, it retains the settlement so taken until it acquires another (*f*).

When, however, after the death of the father, the widow does not acquire a settlement, a child under sixteen will take the father's settlement, and not the mother's maiden settlement (*g*), unless the father's settlement cannot be ascertained, when it may take the mother's settlement (*h*).

A derivative settlement can only be acquired by a child while under sixteen, and is not affected by any settlement acquired by the parent after the child has attained sixteen. Whatever settlement the child has on the day before it attains sixteen it retains until it acquires another in its own right (*i*).

A bastard child has and follows the settlement of the mother (*k*) until it attains the age of sixteen or acquires a settlement in its

(*a*) See p. 591, *post*.

(*b*) *R.* v. *Brighton* (*Inhabitants*) (1861), 1 B. & S. 447.

(*c*) *R.* v. *Birmingham* (*Inhabitants*) (1829), 8 B. & C. 29.

(*d*) A legitimate child under sixteen will not take a settlement derived by its mother by virtue of a second marriage (*Keynsham Union* v. *Bedminster Union* (1878), 3 Q. B. D. 344; *Llanelly Union Guardians* v. *Neath Union Guardians*, [1893] 2 Q. B. 38).

(*e*) A child under sixteen takes its widowed mother's settlement in preference to its birth settlement (*Hollingbourn Guardians* v. *West Ham Guardians* (1881), 6 Q. B. D. 580).

(*f*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35. The fact that a child has a derivative settlement under this section does not prevent it acquiring a settlement by residence under *ibid.*, s. 34 (see p. 579, *ante*; *Wolstanton and Burslem Union* v. *Northwich Union* (1882), 46 L. T. 528).

(*g*) *Reigate Union Guardians* v. *Croydon Union Guardians, Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians, Medway Union Guardians* v. *Bedminster Union Guardians* (1889), 14 App. Cas. 465.

(*h*) *West Derby Union Guardians* v. *Atcham Union Guardians* (1889), 24 Q. B. D. 117, C. A.

(*i*) *Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians* (1888), 20 Q. B. D. 597, C. A., *per* LOPES, L.J., at p. 604: affirmed (1889), 14 App. Cas. 465, see at p. 489.

(*k*) This includes, besides any settlement acquired by the mother in her own right, the settlement of any husband whom she may afterwards marry (*R.* v. *St. Mary, Newington* (*Inhabitants*) (1843), 4 Q. B. 581; *Reigate Union Guardians* v. *Croydon Union Guardians, Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians, Medway Union Guardians* v. *Bedminster Union Guardians, supra*; *Llanelly Union Guardians* v. *Neath Union Guardians, supra*).

own right (*l*). If any child, legitimate or illegitimate, has not acquired a settlement for itself, or being a female has not gained a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, the child is deemed to be settled in the parish of its birth (*m*).

SECT. 8. **Settlement by Parentage.**

1245. The age of sixteen is the age of emancipation; on attaining that age a child ceases to follow its parents' settlement, and becomes capable of acquiring a settlement in its own right or of taking the benefit of a settlement it may have acquired before attaining that age (*n*). Such a settlement may be acquired in any of the methods discussed in this article, but until such acquirement the child either retains the parental settlement, if that be known and is not derivative (*o*), or is thrown back to its birth settlement (*p*).

Children over sixteen.

SECT. 9.—*Settlement by Estoppel.*

1246. When justices have made an order adjudging a person to

Settlement by estoppel.

(*l*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 71; Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35; see *Tenterden Union Guardians* v. *St. Mary, Islington, Guardians* (1878), 38 L. T. 485. An illegitimate child born before 1834 did not derive a settlement, and so kept its birth settlement (*R.* v. *St. Nicholas, Leicester (Inhabitants)* (1824), 2 B. & C. 889). A child under sixteen is capable of acquiring a settlement in its own right (*Fulham Parish* v. *Woolwich Union*, [1907] A. C. 255; *West Ham Union* v. *Holbeach Union*, [1905] A.C. 450; *R.* v. *Elvet Inhabitants* (1859), 2 E. & E. 266; *Reigate Union Guardians* v. *Croydon Union Guardians, Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians, Medway Union Guardians* v. *Bedminster Union Guardians* (1889), 14 App. Cas. 465.

(*m*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35. This part of s. 35 has no application to children under sixteen (*Reigate Union Guardians* v. *Croydon Union Guardians, Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians, Medway Union Guardians* v. *Bedminster Union Guardians, supra, per* Lord WATSON, at p. 484), and does not prohibit inquiry into the derivative settlement of the parent when the child is under sixteen at the date of the inquiry (*West Derby Union Guardians* v. *Atcham Union Guardians* (1889), 24 Q. B. D. 117, C. A.).

(*n*) *Reigate Union Guardians* v. *Croydon Union Guardians, Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians, Medway Union Guardians* v. *Bedminster Union Guardians, supra, per* Lord WATSON, at p. 484. As to the power of an unemancipated child to acquire a settlement, see note (*l*), *supra*,

(*o*) See *West Ham Union* v. *Holbeach Union*, [1905] A. C. 450. Under the decision in *Reigate Union Guardians* v. *Croydon Union Guardians, Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians, Medway Union Guardians* v. *Bedminster Union Guardians, supra*, an illegitimate child does not necessarily revert to its birth settlement; it may retain the mother's settlement until it acquires a new settlement. *Bodenham Overseers* v. *St. Andrews, Worcester, Overseers* (1853), 1 E. & B. 465, must be regarded as not now law in so far as it decided to the contrary in accordance with the then existing law. In *Reigate Union Guardians* v. *Croydon Union Guardians, Highworth and Swindon Union Guardians* v. *Westbury-on-Severn Union Guardians, Medway Union Guardians* v. *Bedminster Union Guardians, supra*, Lord MACNAGHTEN, in the course of his judgment, said that the object of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35, was to get rid of the decision in *Bodenham Overseers* v. *St. Andrews, Worcester, Overseers, supra*.

(*p*) *Plymouth Union* v. *Axminster Union*, [1898] A. C. 586, H. L.

SECT. 9. **Settlement by Estoppel.**

be settled in a certain parish, and that order is not appealed from within the prescribed time, or is confirmed on appeal, the order is final and conclusive as against the world as to the place of settlement, and the person remains settled in such place until he acquires a new settlement (*q*). It matters not that the order can be shown to have been made in error, so long as it was competent for the justices to make it (*r*). Such a settlement is called a settlement by estoppel.

An abandoned order (*a*), however, does not give rise to settlement by estoppel, whether the abandonment was made without an appeal being entered, or on the appeal coming on for hearing (*b*).

Relief as evidence of settlement.

1247. A settlement is not necessarily acquired by the pauper being relieved in a particular parish or union, but the fact of such relief having been given may be evidence that the pauper is settled in such parish or union, or may even amount to an admission by the guardians of such settlement (*c*).

Part VII.—Removal.

SECT. 1.—*In General.*

When removal order may be made.

1248. If a poor person becomes actually chargeable to a particular parish (*d*) or place in which he is not legally settled, the poor law authority of that parish or place may apply to the justices for an order for the removal of such poor person to the place of his or her last legal settlement (*e*), but such an order cannot be made if the poor person has no place of settlement, *e.g.*, a foreigner just arrived in this country (*f*), or is exempt by statute from removal, and has so acquired a status of irremovability (*g*).

Chargeability.

1249. A person actually in receipt of relief, if not obtained or given fraudulently or by mistake, is actually chargeable to the parish providing the relief, even though he has sufficient property

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(*q*) See *Uxbridge Union* v. *Winchester Union* (1904), 91 L. T. 533; *R.* v. *Catterall* (*Township*) (1817), 6 M. & S. 83. As to the acquirement of a new settlement defeating a settlement by estoppel, see *Rochford Guardians* v. *Chelsea Guardians* (1911), 75 J. P. (Journal) 521.

(*r*) *R.* v. *Chilverscoton* (*Inhabitants*) (1799), 8 Term Rep. 178.

(*a*) See p. 598, *post*.

(*b*) *R.* v. *Diddlebury* (*Inhabitants*) (1810), 12 East, 359; *R.* v. *Landkey* (*Inhabitants*) (1847), 9 Q. B. 905.

(*c*) See *R.* v. *Coleorton* (*Inhabitants*) (1830), 1 B. & Ad. 25; *R.* v. *St. Giles-in-the-Fields* (*Inhabitants*) (1844), 13 L. J. (M. C.) 89; *R.* v. *Lilleshall* (*Inhabitants*) (1845), 7 Q. B. 158; *R.* v. *Bradford* (*Inhabitants*) (1846), 8 Q. B. 571, n.; *R.* v. *Little Marlow* (*Inhabitants*) (1847), 10 Q. B. 223.

(*d*) For the purpose of removal the expression "parish" includes incorporated parishes (*R.* v. *Forncett St. Mary* (*Inhabitants*) (1849), 12 Q. B. 160; *Machynlleth* v. *Pool* (1869), L. R. 4 Q. B. 592; *Bristol Incorporation of the Poor* (*Guardians*) v. *Barton Regis Union Guardians* (1891), 66 L. T. 190), and a union (*R.* v. *Bolton-le-Sands* (*Inhabitants*) (1865), 13 L. T. 523).

(*e*) Poor Relief Act, 1662 (14 Car. 2, c. 12), s. 1, as altered by the Poor Removal Act, 1795 (35 Geo. 3, c. 101), s. 1; and see *R.* v. *Ampthill* (*Inhabitants*) (1824), 2 B. & C. 847, *per* BAILEY, J., at p. 853.

(*f*) As to the expulsion of undesirable aliens, see title ALIENS, Vol. I., p. 323.

(*g*) See p. 591, *post*.

for his maintenance (*h*). For the purposes of chargeability, relief given to or on account of a wife, or to or on account of any child or children under the age of sixteen years, not being blind or deaf and dumb, is deemed to be given to the husband or the father, as the case may be (*i*). Relief given to an illegitimate child under the age of sixteen years is deemed to be given to the mother (*k*). Relief given to a child over sixteen years of age, whether legitimate or illegitimate, and even though living with the parent, is not relief to the parent (*l*).

SECT. 1. In General.

1250. A person convicted of felony, or who is determined by justices to be a person of evil fame or a reputed thief, and is not able to give a satisfactory account of himself, or of his way of living, is considered to be actually chargeable to the parish in which he resides, though not in fact in receipt of relief, and may be removed to the parish of his last legal settlement (*m*), and the same applies to a person convicted under the Vagrancy Act, 1824 (*n*), as an idle and disorderly person (*o*) or as a rogue and vagabond (*p*).

Felons and vagrants.

1251. Boards of guardians may consent, under their common seal, to receive a pauper without an order of removal, and in such case the guardians seeking to remove the pauper may do so without an order (*q*).

Removal without order

SECT. 2.—*Irremovability.*

1252. A man cannot be removed from a parish in which he has an estate (*r*), nor can his wife (*s*). Visitors, casuals, and wayfarers (*t*) who become chargeable cannot be removed, unless it be shown that they came to the parish with an intention of residing there (*a*). Temporary sickness, even in the case of a resident, is not

When the status attaches.

(*h*) *R.* v. *Ampthill* (*Inhabitants*) (1824), 2 B. & C. 847; *R.* v. *Bedingham* (*Inhabitants*) (1844), 5 Q. B. 653.

(*i*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 56; and see, further, p. 574, *ante*.

(*k*) *Ibid.*, s. 71.

(*l*) *R.* v. *St. Mary, Islington* (1862), 3 B. & S. 46.

(*m*) Poor Removal Act, 1795 (35 Geo. 3, c. 101), s. 5.

(*n*) 5 Geo. 4, c. 83.

(*o*) See p. 607, *post*.

(*p*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 20; see p. 610, *post*. As to the chargeability of released prisoners under the Released Persons (Poor Law Relief) Act, 1907 (7 Edw. 7, c. 14), see p. 569, *ante*. As to a certificate of chargeability, and its admission in evidence, see Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s 69; Poor Law Amendment Act, 1848 (11 & 12 Vict. c. 110), s. 11. As to the chargeability of pauper lunatics, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 489 *et seq.*

(*q*) Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 6.

(*r*) *R.* v. *Matlock* (*Inhabitants*) (1834), 1 Ad. & El. 124; and see p. 582, *ante*.

(*s*) *R.* v. *Aythrop Rooding* (*Inhabitants*) (1756), Burr. S. C. 412; *R.* v. *Leeds* (*Inhabitants*) (1764), Burr. S. C. 524.

(*t*) See p. 567, *ante*.

(*a*) See Poor Relief Act, 1662 (14 Car. 2, c. 12), s. 1; *R.* v. *St. James, Bury St. Edmunds* (*Inhabitants*) (1808), 10 East, 25; *R.* v. *St. Lawrence, Ludlow* (*Inhabitants*) (1821), 4 B. & Ald. 660; *Tomlinson* v. *Bentall* (1826), 5 B. & C. 738; *R.* v. *Rotherham* (*Inhabitants*) (1842), 3 Q. B. 776. An intention to reside temporarily is sufficient to found a removal order (*R.* v. *Woolpit* (*Inhabitants*) (1835), 4 Ad. & El. 205).

SECT. 2. Irremovability.

a ground of removal (*b*). But if a visitor remains chargeable after he is so restored as to be able to leave the parish if he wished, he becomes removable (*c*). Exemption from liability to be removed does not confer any settlement (*d*).

Residence for one year.

1253. No person can be removed, nor can a warrant be granted for removal of a person, from any parish or from any part of a union (*e*), in which such person has resided for one year next before the application for the warrant (*f*). For poor law purposes "resided" means slept in the place, or having a sleeping place therein as an inhabitant (*g*), and not as mere visitor (*h*). The one year's residence must be continuous; if there is a break of residence the irremovability ceases, and the period of residence must start afresh (*i*). A temporary absence, with an intention to return, will not necessarily break the residence, but leaving for an indefinite time will generally constitute a break (*k*), though not if caused by the fraud or improper action of the

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(*b*) Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 4, which provides that a warrant cannot be granted for the removal of a person who has become chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant state therein that they are satisfied that the sickness or accident will produce permanent disability (see *R.* v. *Prior's Hardwick* (*Inhabitants*) (1849), 12 Q. B. 168; *R.* v. *Halifax* (*Inhabitants*) (1848), 12 Q. B. 111). As to what is included in the expressions "sickness," "accident," and "permanent disability," see *R.* v. *St. George, Middlesex* (*Inhabitants*) (1862), 2 B. & S. 317; *R.* v. *Whittlesey Overseers* (1863), 3 B. & S. 432; *R.* v. *Huddersfield* (*Inhabitants*) (1857), 7 E. & B. 794; *R.* v. *Bucknell* (*Inhabitants*) (1854), 3 E. & B. 587.

(*c*) *R.* v. *Cuckfield* (*Inhabitants*) (1855), 5 E. & B. 523.

(*d*) Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 5. But see, as to the acquirement of a settlement by residence, Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34, and p. 579, *ante*.

(*e*) The word "parish" includes any parish, city, borough, town, township, liberty, precinct, vill, village, hamlet, tithing, chapelry, or any other place, or division or district of a place, maintaining its own poor, whether parochial or extra-parochial; and the word "union" includes any number of parishes incorporated for the relief and maintenance of the poor under any local Act (Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 109).

(*f*) Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1, as altered by the Poor Removal Act, 1861 (24 & 25 Vict. c. 55), s. 1, and the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 8. As to the application of this provision to a married woman, see *Tewkesbury Union* v. *Birmingham Union*, [1904] 2 K. B. 395.

(*g*) See *Blackwell* v. *England* (1857), 8 E. & B. 541; *R.* v. *St. Leonard, Shoreditch* (1865), L. R. 1 Q. B. 21. As to the constructive residence of a sailor by reason of his wife's residence, see *West Ham Union* v. *Cardiff Union*, [1895] 1 Q. B. 766; and in case of a doctor residing in an asylum, see *R.* v. *Norwood* (1867), L. R. 2 Q. B. 457; and see p. 586, *ante*.

(*h*) See *R.* v. *Stepney Union Guardians* (1885), 52 L. T. 959.

(*i*) *R.* v. *St. Anne, Blackfriars* (*Inhabitants*) (1853), 2 E. & B. 441; *R.* v. *St. Mary Arches, Exeter* (*Inhabitants*) (1862), 1 B. & S. 890.

(*k*) See *R.* v. *Tacolnestone* (*Inhabitants*) (1849). 12 Q. B. 157 (seeking employment); *R.* v. *Llanelly* (*Inhabitants*) (1851), 17 Q. B. 40; *R.* v. *Stapleton* (*Inhabitants*) (1853), 1 E. & B. 766 (absence under contract); *R.* v. *Brighthelmston* (*Directors of the Poor*) (1855), 4 E. & B. 236 (intention to return on completion of service); *Wellington Overseers* v. *Whitchurch Overseers* (1863), 4 B. & S. 100 (remote return); *R.* v. *Stourbridge Union Guardians* (1865), 29 J. P. 502 (conditional return); *R.* v. *Glossop* (1866), L. R. 1 Q. B. 227 (domestic servant); *R.* v. *Whitby* (1870), L. R. 5 Q. B. 325 (leaving must be voluntary); *R.* v. *St. Ives* (1872),

parish authorities (*l*). The making of a removal order against the pauper does not constitute a break of residence, unless he is actually removed under the order (*m*). If a person becomes chargeable in any parish comprised in a union, not being the parish of his settlement, the period of residence in the settlement parish, if in the same union, must not be excluded in computing the time of residence required to render him exempt from removal (*n*).

How the year is computed.

1254. In computing the period of one year there must be excluded the time during which the person has been in prison (*o*); or serving as a soldier, marine or sailor (*p*); or residing as an in-pensioner in Greenwich or Chelsea Hospitals; or confined in a lunatic asylum or house duly licensed or hospital registered for the reception of lunatics (*q*); or residing (*r*) as a patient in a hospital (*s*); or during which such person has received relief from any parish (*t*), or has been

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L. R. 7 Q. B. 467 (pauper leaving union); *Knaresborough Union* v. *Pateley Bridge Union* (1871), 25 L. T. 590 (right to return); *Guildford Union* v. *St. Olave's Union* (1872), 25 L. T. 803 (pauper); *R.* v. *Worcester Union* (1874), L. R. 9 Q. B. 340 (pauper obtaining work); *Newark Union* v. *Glanford Brigg* (1876), 2 Q. B. D. 522 (unintentional removal); *Manchester Overseers* v. *Ormskirk Overseers* (1886), 16 Q. B. D. 723; *Totnes Union* v. *Cardiff Union* (1886), 51 J. P. 133; *Hendon Union* v. *Hampstead Guardians* (1893), 62 L. J. (M. C.) 170 (child removing with parent); *Cambridge Union* v. *Edmonton Union*, [1900] 2 Q. B. 111; *Tendring Union* v. *Ipswich Union* (1903), 67 J. P. 304; *Plymouth Incorporation* v. *Poplar Guardians* (1908), 72 J. P. 72.

(*l*) *R.* v. *St. Marylebone* (*Inhabitants*) (1851), 16 Q. B. 299; *West Ham Union Guardians* v. *Poplar Union Guardians* (1902), 66 J. P. 504.

(*m*) See *R.* v. *Hendon* (*Inhabitants*) (1863), 8 L. T. 276; and compare *R.* v. *Halifax* (*Inhabitants*) (1848), 12 Q. B. 111; *R.* v. *Seend* (*Inhabitants*) (1848), 12 Q. B. 133.

(*n*) Poor Removal Act, 1864 (27 & 28 Vict. c. 105), s. 1. The effect of this section, combined with the Poor Removal Act, 1861 (24 & 25 Vict. c. 55), s. 1, is that a pauper cannot be removed from his parish of residence to his parish of settlement, if both are within the same union, so long as he resided for a sufficient time in the union, though in different parishes (*R.* v. *Bolton-le-Sands* (*Inhabitants*) (1866), 13 L. T. 523).

(*o*) Or detained in or absent under licence from a State inebriate reformatory or a certified inebriate reformatory (Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 22). As to prisoners, see *R.* v. *Pott Shrigley* (*Inhabitants*) (1848), 12 Q. B. 143; *R.* v. *Holbeck Overseers* (1851), 16 Q. B. 404; *Hartfield* v. *Rotherfield* (1852), 17 Q. B. 746; *R.* v. *Potterhanworth* (*Inhabitants*) (1858), 1 E. & E. 262.

(*p*) See *Easton Overseers* v. *St. Mary, Marlborough, Overseers* (1867), L. R. 2 Q. B. 128; *Horton Overseers* v. *Leeds Overseers* (1855), 5 E. & B. 595 (militiaman).

(*q*) See generally title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 474 *et seq.*

(*r*) See *St. Olave's Union* v. *Canterbury Union*, [1897] 1 Q. B. 682, C. A.; *Dorchester Union Guardians* v. *Weymouth Union Guardians* (1885), 16 Q. B. D. 31.

(*s*) A home for epileptics has been held to be a hospital (*Ormskirk Union* v. *Chorlton Union*, [1903] 2 K. B. 498, C. A.); also, by quarter sessions, a seaside home (*Christchurch Union Guardians* v. *St. Mary, Islington, Guardians* (1906), 70 J. P. 247).

(*t*) As relief to wife or to children under sixteen is relief to the husband or parent (see pp. 574, 590, 591, *ante*), the period during which such relief has been given must be excluded in calculating the period of residence (*Ipswich Union Guardians* v. *West Ham Union Guardians* (1887),

SECT. 2. Irremovability.

wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside, not being a *bonâ fide* charitable gift (*u*); the time during which a child is detained in a certified school (*a*); and the time during which a person is detained in a retreat under the Habitual Drunkards Act, 1879 (*b*).

Lunatics.

1255. The removal of a lunatic pauper to an asylum, licensed house, or registered hospital, or of a pauper, otherwise than under a removal order, from his place of abode to the workhouse of the union, is not an interruption of his residence, but the time spent in the asylum, licensed house, hospital, or workhouse, and the time during which the person is relieved at the charge of the common fund of the union, must be wholly excluded from the computation of the time of residence which will exempt a poor person from being removed (*c*).

Removal of wife and children.

1256. When a person has a wife or children (*d*) who have no other settlement than his or her own, such wife and children are removable when he or she is removable, and are not removable when he or she is not removable (*e*), either by reason of having acquired a settlement or a status of irremovability (*f*). As a general rule, a removal order cannot operate to part husband and wife who are living together, unless both consent (*g*).

Widows.

1257. A widow cannot be removed from the parish in which she resided with her husband (*h*) at the time of his death, for twelve

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20 Q. B. D. 407). But relief to a parent on account of a child may also be considered as relief to the child (*R.* v. *Shavington-cum-Gresley Overseers* (1851), 15 J. P. 499).

(*u*) Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1. The effect of the provision is that the specified periods are to be excluded both in computing whether the person has resided for one year altogether in the parish, and also whether he has resided there for one year before the application for the removal order (*Hartfield* v. *Rotherfield* (1852), 17 Q. B. 746; *R.* v. *St. Andrew, Holborn* (1852), 17 Q. B. 746, 753; and see *West Ham Union* v. *Poplar Union* (1906), 70 J. P. 255). As to maintenance by rate or subscription, see *Fulham Guardians* v. *Thanet Guardians* (1881), 7 Q. B. D. 539, C. A.

(*a*) Children Act, 1908 (8 Edw. 7, c. 67), s. 89. See title EDUCATION, Vol. XII., pp. 71 *et seq.*

(*b*) 42 & 43 Vict. c. 19, s. 32. See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 417; INTOXICATING LIQUORS, Vol. XVIII., pp. 163, 170.

(*c*) Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 4; and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 495 *et seq.*

(*d*) "Children" includes illegitimate children (*Braintree Union* v. *Rochford Union* (1911), 106 L. T. 69).

(*e*) Poor Removal Act, 1848 (11 & 12 Vict. c. 111), s. 1.

(*f*) See *R.* v. *St. Ebbe's* (*Inhabitants*) (1848), 12 Q. B. 137; *R.* v. *All Saints, Derby* (*Inhabitants*) (1849), 14 Q. B. 207; *Much Hoole Overseers* v. *Preston Overseers* (1851), 17 Q. B. 548; *R.* v. *East Stonehouse* (*Inhabitants*) (1854), 3 E. & B. 596.

(*g*) See *R.* v. *St. Mary, Beverley* (*Inhabitants*) (1830), 1 B. & Ad. 201; *R.* v. *Stagumber* (*Inhabitants*) (1839), 9 Ad. & El. 622; *R.* v. *Leeds* (*Inhabitants*) (1844), 5 Q. B. 916. As to the right of *consortium*, see title HUSBAND AND WIFE, Vol. XVI., p. 318. But the consent of a lunatic does not appear to be necessary; see *R.* v. *Preston Guardians* (1883), 11 Q. B. D. 113.

(*h*) As to residence together, see *R.* v. *East Stonehouse* (*Inhabitants*) (1855), 4 E. & B. 901; *R.* v. *St. Marylebone* (*Inhabitants*) (1851), 16 Q. B. 299.

calendar months next after his death, if she so long continue a widow (*i*).

Deserted wives.

1258. A woman deserted by her husband who, after his desertion, resides for one year in such a manner as would, if she were a widow, render her exempt from removal, may not be removed from the parish where she is resident, unless her husband returns to cohabit with her (*j*).

Children under sixteen

1259. A child under the age of sixteen years, whether legitimate or illegitimate, who resides with his or her father or mother, step-father or step-mother (*k*), or reputed father, cannot be removed from the parish of such residence in any case where the parent or other such person cannot lawfully be removed (*l*); a child, however, is removable when its parent is removable (*m*).

Orphans

1260. If a child under the age of sixteen years residing with its surviving parent is left an orphan, and such parent has at the time of death acquired an exemption from removal by reason of a continued residence, the orphan, if not otherwise irremovable, is exempt from removal in the manner, and to the extent, as if it had then acquired for itself an exemption by residence (*n*).

Young children.

1261. A child under the age of seven years which is residing with its mother cannot be removed from her, even with the mother's consent (*o*). This rule applies whether the child is legitimate or illegitimate (*p*). But if continuance with the mother is rendered impossible by the latter being sent to prison or to a reformatory (*q*), or will be dangerous to the child, as where the mother becomes insane (*r*), a child under seven may be removed to its place of settlement without the mother.

(*i*) Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 2.

(*j*) Poor Removal Act, 1861 (24 & 25 Vict. c. 55), s. 3, as altered by the Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), s. 17. For what amounts to desertion, see *R.* v. *St. Mary, Islington* (1870), L. R. 5 Q. B. 445; *R.* v. *Maidstone Union* (1879), 5 Q. B. D. 31; *R.* v. *Cookham Union* (1882), 9 Q. B. D. 522; *Southwark Union* v. *City of London Union*, [1906] 2 K. B. 112, C. A.; *Bristol Union Guardians* v. *Paddington Guardians* (1906), 70 J. P. 447; *Eastbourne Guardians* v. *Croydon Union*, [1910] 2 K. B. 16. A deserted wife may acquire a settlement by reason of her status of irremovability (*Bethnal-Green Guardians* v. *Paddington Guardians*, [1912] 2 K. B. 335; and see note (*o*), p. 579, *ante*).

(*k*) Step-children are members of a man's family, and he is bound to maintain them: see Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 57, and p. 573, *ante*.

(*l*) Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 3. See *Kingston-upon-Hull Incorporation for the Poor* v. *Hackney Union*, [1911] 1 K. B. 748, C. A.; *Fulham Parish* v. *Woolwich Union*, [1907] A. C. 255; *Maidstone Union* v. *Wandsworth Union* (1906), 70 J. P. 403; *West Ham Union* v. *Holbeach Union*, [1905] A. C. 450.

(*m*) Poor Removal Act, 1848 (11 & 12 Vict. c. 111), s. 1; see p. 594, *ante*.

(*n*) Poor Removal Act, 1861 (24 & 25 Vict. c. 55), s. 2. For exemption by residence, see p. 592, *ante*.

(*o*) *R.* v. *Birmingham* (*Inhabitants*) (1843), 5 Q. B. 210.

(*p*) *Cripplegate* v. *St. Saviour's* (1710), 2 Bott's Poor Laws by Const., 5th ed., 13.

(*q*) *R.* v. *St. Clement Danes* (*Inhabitants*) (1862), 3 B. & S. 143; and see *R.* v. *Combs* (*Inhabitants*) (1856), 5 E. & B. 892.

(*r*) *R.* v. *Barnet Union Guardians* (1888), 58 L. T. 947.

SECT. 2. Irremovability.

1262. As a general rule, a child reaches the age of emancipation at sixteen, and may then acquire a status of irremovability, or be removed, without reference to the status of its parent (*s*).

Children over sixteen.

1263. The alteration of a union by the addition or subtraction of a parish or part of a parish does not affect the status of irremovability acquired by any person in the added or separated parish (*t*).

Effect of alteration of union.

SECT. 3.—*Removal Orders.*

SUB-SECT. 1.—*The Order.*

Obtained by relieving guardians.

1264. For the purposes of relief, settlement, and removal the workhouse of any union or parish is considered as being situated in the parish to which the poor person concerned is or has been chargeable (*a*), and since all relief is now charged upon the common fund of the union (*b*), removal orders are obtained by the guardians of the union or parish to which the pauper is chargeable, and are addressed to the guardians of the union in which the pauper was last settled (*c*).

By whom orders are made.

1265. A removal order may be made by two justices acting together (*d*), by a metropolitan police magistrate (*e*), and by a stipendiary magistrate (*f*), after an examination of the pauper, and of such other witnesses as may be necessary to prove the pauper's settlement (*g*). If, however, a pauper is by age, illness, or infirmity, unable to be brought up to petty sessions to be examined as to his settlement, the examination may be made by a single justice, who may report to petty sessions, and such report may be acted upon as if the pauper had appeared before two justices (*h*).

(*s*) See p. 589, *ante*. See, however, *Mitford and Launditch Union Guardians* v. *Wayland Union Guardians* (1890), 25 Q. B. D. 164, C. A., where Lord ESHER, M.R., at p. 170, said that the object of the Poor Removal Act, 1848 (9 & 10 Vict. c. 66), s. 1, was to prevent the separation of families so long as the family continued to be one family living together, whether the children were under or over sixteen.

(*t*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 34; see p. 577, *ante*.

(*a*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 56.

(*b*) See p. 549, *ante*.

(*c*) See Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), ss. 1—3, and Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 24. As to the power of guardians of a parish to apply for a removal order with the consent of the Local Government Board, see Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 25. In applying for removal from metropolitan parishes, regard must be had to any private Act relating to the particular parish. Guardians may obtain production of parish books etc. for removal purposes; see Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 5.

(*d*) Poor Relief Act, 1662 (14 Car. 2, c. 12), s. 1; Poor Removal Act, 1795 (35 Geo. 3, c. 101), s. 1.

(*e*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 14.

(*f*) Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 1.

(*g*) It is usual to examine the pauper, but it is not absolutely necessary (*R.* v. *Everdon (Inhabitants)* (1807), 9 East, 101). As to process for bringing up a pauper or witnesses for examination, see Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 70.

(*h*) Poor (Settlement and Removal) Act, 1809 (49 Geo. 3, c. 124), s. 4.

Examination of prisoners.

1266. If a prisoner, or a person in custody under a warrant of commitment, has a wife or child, a justice may examine such prisoner or person upon oath touching the place of his or her last legal settlement. The examination must be taken down in writing, and be signed by the justice, and is then receivable in evidence as to such settlement before any justices, for the purpose of any order of removal, but for so long only as the person so examined continues a prisoner (*i*).

Inquiry in case of criminal lunatic.

1267. If a person is apprehended under circumstances that denote a derangement of mind and a purpose of committing some indictable crime, he may be ordered by justices to be conveyed to the county lunatic asylum, or to some hospital or place for the reception of insane persons, and such justices may inquire into the place of the last legal settlement of such person, and make an order upon the union of settlement to pay for his maintenance in the asylum or other place (*k*).

What must be proved.

1268. The examination must show that the pauper is then residing in the applicants' union and is actually chargeable thereto (*l*), and that he is settled in a parish in the union to which he is to be removed (*m*).

Depositions.

1269. The depositions on which an order for removal is made must be retained by the clerk to the justices, who must furnish a copy to the guardians of the parish to which removal is ordered, on application and payment of the prescribed fee of 2*d.* a folio (*n*).

The removal order.

1270. If satisfied of the truth of the applicants' statements, the justices or magistrate may make an order for the removal of the pauper (*o*). The order must show that the justices or magistrate had jurisdiction (*p*), and must be under the hand and seal of the several justices or the magistrate making it (*q*).

(*i*) Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 28.

(*k*) Criminal Lunatics Act, 1838 (1 & 2 Vict. c. 14), s. 2. For the removal of pauper lunatics in general, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 495 *et seq.*

(*l*) *R.* v. *St. Paul, Covent Garden* (*Inhabitants*) (1847), 7 Q. B. 533; *R.* v. *Black Callerton* (*Inhabitants*) (1839), 10 Ad. & El. 679.

(*m*) The settlement must be fully proved; see *R.* v. *West Riding of Yorkshire Justices* (1842), 2 Q. B. 505. For form of examination, see Archbold, Poor Law, 15th ed., p. 656.

(*n*) Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), s. 3.

(*o*) Mandamus does not lie to compel justices to make an order (*R.* v. *Rogers* (1843), 12 L. J. (M. C.) 50).

(*p*) See *R.* v. *Chilverscoton* (*Inhabitants*) (1799), 8 Term Rep. 178; *R.* v. *Casterton* (*Inhabitants*) (1844), 6 Q. B. 507; *R.* v. *St. Giles in the Fields* (*Inhabitants*) (1846), 7 Q. B. 529; *R.* v. *Stockton* (*Inhabitants*) (1845), 7 Q. B. 520; *R.* v. *Hammersmith* (*Inhabitants*) (1848), 11 Q. B. 391; *R.* v. *Halifax* (*Inhabitants*) (1848), 12 Q. B. 111. Where a union extends into several distinct jurisdictions, every matter, act, charge, or complaint by which the guardians thereof are affected, or in which they have any interest, is deemed, for the purpose of jurisdiction, to arise or exist equally throughout the union (Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 27).

(*q*) An impressed seal etc. is sufficient (*R.* v. *St. Paul, Covent Garden*

SECT. 3. **Removal Orders.**

Abandoning order.

1271. Guardians who have obtained an order for removal may abandon it, whether an appeal is pending or not, by notice in writing to the guardians of the parish to which removal is ordered. On abandonment the order becomes entirely null and void, and the guardians obtaining it must pay to the other side any costs properly incurred by the latter by reason of the order, such costs to be taxed, out of court if necessary, by the officer of the court before whom an appeal might have been brought (*r*).

Suspending order.

1272. Justices may suspend the execution of a removal order in the case of a sick or infirm person until satisfied that it can be executed safely; but the continuance in the place of such person owing to the suspension will not count towards the acquirement of a settlement therein, and the charges incurred during the period of suspension will be payable by the union to which removal is ordered (*s*). The justice or justices who subsequently direct the enforcement of a suspended removal order need not be the suspending justice or justices (*t*).

Where the execution of a removal order is suspended during the dangerous illness or other infirmity of a person directed to be removed, it is also suspended for the same period with respect to every other person named therein who was actually of the household or family of such sick or infirm person at the time of the making of the order of removal (*a*).

The order for suspension must be indorsed on the order for removal, and a copy of the indorsed order, together with a notice of chargeability and a statement of the grounds of removal, must

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(*Inhabitants*) (1845), 7 Q. B. 232). For forms of order of removal, see Poor Removal Act, 1845 (8 & 9 Vict. c. 117), Sched. C; Poor Removal Act, 1863 (26 & 27 Vict. c. 89), Scheds.; Archbold, Poor Law, 15th ed., p. 669; Davey, Poor Law Settlement and Removal, p. 156.

(*r*) Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), s. 8. The costs may be taxed out of sessions (*R.* v. *Westmoreland Justices* (1843), 12 L. J. (M. C.) 113). As to appeals, see p. 602, *post*. For form of notice of abandonment, see Archbold, Poor Law, 15th ed., p. 672; Davey, Poor Law Settlement and Removal, p. 158.

(*s*) Poor Removal Act, 1795 (35 Geo. 3, c. 101), s. 2; Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 26; see p. 599, *post*. As to interim payments, see Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 8. The guardians in whose favour a suspended order has been made may send a quarterly account to the guardians of the union upon which it was made of the costs incurred in the maintenance of the pauper and his family, and in default of payment may recover the amount in the county court (Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 26). An order for costs of maintenance under a suspended order cannot be made *ex parte* (*R.* v. *Wilkinson*, [1891] 1 Q. B. 722). As to acquiring status of irremovability during suspension, see *R.* v. *St. John's, Hackney* (*Inhabitants*) (1835), 2 Ad. & El. 548; *R.* v. *Chagford* (*Inhabitants*) (1821), 4 B. & Ald. 235.

(*t*) Poor (Settlement and Removal) Act, 1809 (49 Geo. 3, c. 124), s. 1. For form of permission to remove, see Archbold, Poor Law, 15th ed., p. 677.

(*u*) Poor (Settlement and Removal) Act, 1809 (49 Geo. 3, c. 124), s. 3. The law as to sending and service of copies of removal orders (see p. 599, *post*). applies to suspended orders (Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), s. 10).

be sent to the guardians of the other union, as in ordinary cases, within ten days (*b*).

The time for appealing against a suspended order is computed from the service of the order, and not from the time of making the removal under the order (*c*).

Notice of chargeability

1273. A poor person cannot be removed under a removal order until twenty-one days after a notice in writing of his chargeability, accompanied by a copy of the order of removal, and by a statement in writing, signed by three guardians, of the grounds of removal, has been sent by post or otherwise by the removing union to the union to which removal is directed. The guardians of the latter union may, however, agree to receive the pauper under the order before the expiration of the twenty-one days. If within the twenty-one days notice of appeal against the removal order is given, the removal cannot be made until after the time for prosecuting the appeal has expired, or until after the final determination of such appeal (*d*). If depositions have been applied for, the poor person cannot be removed under the order until the expiration of the further period of fourteen days allowed for notice of appeal (*e*).

Cost of maintenance.

1274. The union to which a poor person whose settlement was in question is admitted or finally adjudged to belong is chargeable with and liable to pay the cost and expense of the relief and maintenance of such poor person, but no relief given under a suspended order (*f*) is recoverable unless notice of that order has been given within ten days of the making thereof to the union to which it is directed (*g*).

Authentication and service of notices.

1275. Notices and other documents required to be given by guardians in connection with removal orders will be sufficiently authenticated if signed by their clerk in their name, and will be duly served if handed to the clerk of the other union, or left at his office, or sent by post to him at his office (*h*).

(*b*) See Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 79, 84; Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), ss. 10; see the text, *infra*. For form of suspension order, see Archbold, Poor Law, 15th ed., p. 674.

(*c*) Poor (Settlement and Removal) Act, 1809 (49 Geo. 3, c. 124), s. 2; see *R.* v. *Chedgrave (Inhabitants)* (1859), 12 Q. B. 206; *R.* v. *Alnwick (Inhabitants)* (1821), 5 B. & Ald. 184. As to appeals generally, see p. 602, *post*.

(*d*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 79, as amended by Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), ss. 1, 2; and see *ibid.*, s. 9.

(*e*) Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), s. 9. For form of notice of chargeability and grounds of removal, see Archbold, Poor Law, 15th ed., p. 685.

(*f*) See p. 598, *ante*.

(*g*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 84. For the recovery of expenses in the case of a pauper lunatic, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 488 *et seq.*, and *R.* v. *Hatherton (Lord), Ex parte Ormskirk Union*, [1912] 1 K. B. 616, C. A.

(*h*) Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 4; and see Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 10.

SECT. 8. **Removal Orders.**

SUB-SECT. 2.—*The Removal.*

(i.) *In England.*

To whom pauper to be delivered.

1276. A pauper who has been ordered to be removed may be delivered to the master or to any officer of the workhouse of the union or parish in which his settlement has been adjudicated (*i*). Persons may be employed to conduct the pauper to his destination (*k*), and the Local Government Board may by order prescribe the extent to which guardians may pay the expenses of removing paupers from one place to another in England and charge the expenses to the common fund of the union, or other like fund under their control (*l*).

Deserting pauper.

1277. A person employed to execute a removal warrant who wilfully deserts any person therein mentioned, before he or she has been conveyed to the place of destination, is guilty of a misdemeanour: and punishable with a fine not exceeding £10, and in default of payment imprisonment for not exceeding three months (*m*).

Refusal to receive pauper.

1278. A workhouse master who refuses to receive the person named in a warrant of removal is subject to a penalty of £10 for each case of refusal. In England, the penalty may be recovered by the person applying for the warrant, by action in any county court or other court of competent jurisdiction in the place where the master is resident at the time the action is brought (*n*). A mandamus does not lie to compel guardians or officers to receive a removed pauper (*o*).

Unlawful removal.

1279. An officer of a parish or union (*p*) who unlawfully removes a poor person, or procures it to be done, or improperly induces a poor person to depart from the parish, in consequence whereof such poor person becomes chargeable to some other parish, may, on summary conviction (*q*), be fined any sum not less than 40*s.* and not exceeding £5 (*r*).

(*i*) Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 7; Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 2. As to demand for costs of maintenance, see Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 13.

(*k*) See Poor Relief Act, 1814 (54 Geo. 3, c. 170), s. 10.

(*l*) Paupers Conveyance (Expenses) Act, 1870 (33 & 34 Vict. c. 48), s. 1; see Paupers' Conveyance (Expenses) Order, 7th February, 1898 (Stat. R. & O. Rev., Vol. X., Poor, England, p. 231), which is expressly preserved by the Relief Regulation Order, 1911.

(*m*) Poor Removal Act, 1863 (26 & 27 Vict. c. 89), s. 4.

(*n*) Poor Removal Act, 1862 (25 & 26 Vict. c. 113), s. 5. See also Poor Relief Act, 1691 (3 Will. & Mar. c. 11), s. 9, which imposed a penalty of £5 upon churchwardens or overseers refusing to receive a removed pauper.

(*o*) *Ex parte Downton Overseers* (1858), 8 E. & B. 856.

(*p*) Including an overseer (Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 11).

(*q*) For venue, see *ibid.*

(*r*) Poor Law Removal Act, 1846 (9 & 10 Vict. c. 66), s. 6. The penalty is applied in aid of the poor rate of the parish to which the poor person became chargeable in consequence of the improper action of the officer (Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 11).

1280. A removed pauper who returns and becomes chargeable to the union from which he was removed within the period of twelve months from such removal, without the consent of the guardians who procured his removal, may be dealt with as an idle and disorderly person (*s*). Return of pauper after removal.

(ii.) *Out of England.*

1281. If any person born in Scotland or Ireland, or in the Isle of Man, Scilly Isles, Jersey, or Guernsey (*t*), who has not acquired a settlement in England, becomes chargeable in England, by reason of relief given to himself or herself, or to his wife, or to any legitimate or bastard child, such person, his wife, and any child so chargeable, may be removed to the country or island of birth by an order of justices (*u*). The removal will be at the expense of the union or parish obtaining the order (*a*), though in certain cases recoupment may be had from the county rate or borough fund (*b*). When removal may be ordered.

A person who has resided continuously for five years in England cannot be removed to Ireland (*c*), and no person can be held to have acquired a settlement in any parish in Scotland by residence therein for less than three years (*d*).

1282. A guardian, relieving officer, or overseer may take and convey before a court of petty sessions, without summons or warrant, any poor person who has become chargeable, and who he has reason to believe is liable to be removed from England, and the court may proceed to determine the matter (*e*). How order obtained.

1283. A warrant for removal from England to Ireland or Scotland can only be granted by a court of petty sessions, stipendiary or metropolitan police magistrate sitting in court (*f*), and the justices or magistrate must be satisfied by personal inspection or inquiry that every person who is proposed to be removed by the warrant is in such a state of health as not to be liable to suffer bodily or mental injury by the removal. Application for the warrant must be made by the relieving officer or other officer of the guardians of the union or parish where the person has become chargeable, and the warrant must contain the name and reputed age of every person to Removal to Ireland or Scotland.

(*s*) Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 7; and see p. 607, *post*.

(*t*) As to the dependency of the smaller Channel Islands upon Jersey or Guernsey, see title DEPENDENCIES AND COLONIES, Vol. X., p. 576.

(*u*) Poor Removal Act, 1845 (8 & 9 Vict. c. 117), s. 2. As to the right of an Irish board of guardians to object to a removal order, see Poor Removal Act, 1863 (26 & 27 Vict. c. 89), s. 7. As to the removal to England of English-born persons becoming chargeable in Scotland, see Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83), and Poor Law (Scotland) Act, 1898 (61 & 62 Vict. c. 21).

(*a*) Poor Removal Act, 1845 (8 & 9 Vict. c. 117), s. 2.

(*b*) See *ibid.*, s. 5.

(*c*) Poor Removal Act, 1900 (63 & 64 Vict. c. 23), s. 1.

(*d*) See Poor Law (Scotland) Act, 1898 (61 & 62 Vict. c. 21), s. 1.

(*e*) Poor Removal Act, 1847 (10 & 11 Vict. c. 33), s. 1. The guardian etc. so acting has all the powers of a constable (*ibid.*, s. 3).

(*f*) Poor Removal Act, 1862 (25 & 26 Vict. c. 113), s. 1; Poor Removal (No. 2) Act, 1861 (24 & 25 Vict. c. 76), s. 1.

SECT. 3. Removal Orders.

be removed thereunder, the name of the place in Scotland or Ireland where the court finds such person to have been born or to have last resided for the space of five years in the case of removal to Scotland or for three years in the case of removal to Ireland, and a statement as to the examination as to the state of health. The warrant must be addressed to the party applying for it, and to the parochial board, or poor inspector, or the guardians, as the case may be, of the union or parish to which removal is directed, and a copy of the warrant must be given, by and at the cost of the person applying for it, to the person or the head of the family about to be removed thereunder (*g*). A copy must be sent by post by the guardians obtaining the warrant to the poor inspector, or the clerk of the guardians of the union to which removal is ordered, as the case may be, and also a copy of the depositions, if applied for within three months from the date of the warrant (*h*).

Removal by consent.

1284. In the case of a native of Ireland who has been absent from that country for less than a year, he may consent and may then be removed to some place other than that as above described; and in any case where the place of birth or continued residence cannot be ascertained, removal may be ordered to the most convenient port in Ireland or port or parish in Scotland (*i*).

Women and children.

1285. A woman or a child under fourteen must not be removed as a deck passenger from England to Scotland or Ireland between 1st October and 31st March (*k*).

SUB-SECT. 3.—*Appeals.*

(i.) *To Quarter Sessions.*

Who may appeal.

1286. A person or persons aggrieved by the making of a removal order or order of settlement may appeal to the next practicable general quarter sessions for the county, riding, division, city, or town from which the person was removed or in which he is adjudged to be settled (*l*). By person aggrieved is meant either the

(*g*) Poor Removal (No. 2) Act, 1861 (24 & 25 Vict. c. 76), ss. 1, 2; Poor Removal Act, 1862 (25 & 26 Vict. c. 113), ss. 1, 2.

(*h*) Poor Removal (No. 2) Act, 1861 (24 & 25 Vict. c. 76), s. 3; Poor Removal Act, 1862 (25 & 26 Vict. c. 113), s. 3.

(*i*) Poor Removal (No. 2) Act, 1861 (24 & 25 Vict. c. 76), s. 2; Poor Removal Act, 1862 (25 & 26 Vict. c. 113), s. 2.

(*k*) Poor Removal (No. 2) Act, 1861 (24 & 25 Vict. c. 76), s. 6; Poor Removal Act, 1862 (25 & 26 Vict. c. 113), s. 7. Penalty not exceeding £5 on summary conviction. The offence is deemed to have been committed at the port of landing (Poor Removal Act, 1863 (26 & 27 Vict. c. 89), s. 5).

(*l*) Poor Relief Act, 1662 (14 Car. 2, c. 12), s. 2; Poor Relief Act, 1691 (3 Will. & Mar. c. 11), s. 8; stat. (1696) 8 & 9 Will. 3, c. 30), s. 6; Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), s. 9. Appeals from orders of removal are not governed by the procedure laid down by the Summary Jurisdiction Acts (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 35; see title MAGISTRATES, Vol. XIX., p. 611; and see *R.* v. *Somersetshire Justices* (1889), 22 Q. B. D. 625). In a place not having quarter sessions, but only general sessions, the appeal lies to the general sessions (*R.* v. *Carmarthen Justices* (1821), 4 B. & Ald. 291), and where there are both quarter and general sessions, as in London and Middlesex, the appeal is to the quarter sessions (*R.* v. *Middlesex Justices* (1843), 4 Q. B. 807). In quarter sessions boroughs the recorder has

pauper (*m*) or the guardians of the union or parish to which removal has been ordered (*n*). An individual parishioner or rate-payer cannot appeal (*o*).

Union in several jurisdictions.

1287. Where a union extends into several distinct jurisdictions, the appeal is governed by the jurisdiction of the justices who made the order (*p*).

Time for appeal.

1288. The appeal must be to the next practicable quarter or general sessions after service of the order for removal, which means the next sessions the date of which allows for due observance of the requirements as to notice of appeal laid down by statute or by the practice of the particular sessions to which the appeal is to be taken (*q*).

Notice of appeal.

1289. Notice of appeal must be given within twenty-one days after service of the notice of chargeability and of the statement of the grounds of removal (*r*), unless within such period of twenty-one days a copy of the depositions has been applied for, when a further period of fourteen days after the sending of the copy is allowed (*s*). The length of the notice of appeal varies from six to twenty-eight days according to the practice of the sessions to which the appeal is taken (*t*). But objection on the ground of a short notice may be waived (*a*).

Access to pauper.

1290. If notice of appeal is given, the guardians of the appellant union, their solicitor, and authorised agents, must be given free access, at proper times, to the poor person concerned, for the purpose of examining him as to his settlement, and may be permitted to remove him, at their expense, for the purpose of examination and for such time as may be necessary (*b*).

Statement of grounds of appeal.

1291. The appellants must, either with the notice of appeal, or fourteen days at least before the first day of the sessions at which

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exclusive jurisdiction to hear appeals from removal orders made by the borough justices (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 165; *R.* v. *Suffolk Justices* (1841), 2 Q. B. 85; *R.* v. *St. Edmund's, Salisbury* (*Inhabitants*) (1841), 2 Q. B. 72).

(*m*) *R.* v. *Hartfield* (*Inhabitants*) (1692), Carth. 222.

(*n*) Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 3; Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 25.

(*o*) *R.* v. *Colbeck* (1840), 12 Ad. & El. 161.

(*p*) See Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 27; *R.* v. *Staffordshire Justices* (1872), L. R. 7 Q. B. 288.

(*q*) For cases as to what constitutes the next practicable sessions, see *R.* v. *Surrey Justices* (1813), 1 M. & S. 479; *R.* v. *Surrey Justices* (1845), 3 Dow. & L. 343; *R.* v. *Peterborough Justices* (1857), 7 E. & B. 643; *R.* v. *West Riding of Yorkshire Justices* (1858), E. B. & E. 713; *R.* v. *Skircoat* (*Inhabitants*) (1859), 2 E. & E. 185; *R.* v. *Sussex Justices* (1865), 4 B. & S. 966, Ex. Ch.; *R.* v. *Derbyshire Justices* (1871), 35 J. P. 663.

(*r*) See p. 599, *ante*.

(*s*) Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), s. 9; see also Poor Relief Act, 1722 (9 Geo. 1, c. 7), s. 8.

(*t*) See *R.* v. *Sussex Justices*, *supra*; *R.* v. *Derby* (*Recorder*) (1850), 20 L. J. (M. C.) 44.

(*a*) See *R.* v. *Wickenby* (*Inhabitants*) (1852), 16 J. P. 583; *R.* v. *Hertfordshire Justices* (1833), 4 B. & Ad. 561.

(*b*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 80.

SECT. 3. Removal Orders.

the appeal is intended to be tried, send or deliver to the respondents a written statement of the grounds of the appeal. This is a condition precedent to the hearing of the appeal. At the hearing neither party can go into or give evidence of any other grounds of removal or of appeal than such as are set forth in the aforesaid order or statement (*c*). The statement may be sent by post (*d*). It may object that the procedure prescribed has not been followed, that the order of removal or notice of chargeability is bad, specifying the defect (*e*), and it should traverse any statement in the ground of removal that is not admitted (*f*), and set up any matters on which the appellants intend to rely (*g*).

A statement of frivolous or vexatious grounds of removal or of appeal may cause the offending party to be mulcted in costs (*h*).

Objections.

1292. Objections of defect in form of the statement of grounds of removal or of appeal must not be allowed unless the court is of opinion that the alleged ground is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and to prepare for trial, and even when the court considers that an objection ought to prevail it may amend the defect, upon such terms as to costs and postponement of trial as appears just and reasonable (*i*). Such amendment may extend to the addition of an entirely new ground of appeal, and the decision of the court thereon is final (*k*).

Abandonment of appeal.

1293. An appeal may be abandoned in the same way as a removal order (*l*). On abandonment the respondents may apply to sessions for their costs (*m*).

(*c*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 81; Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), ss. 1, 2.

(*d*) Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 10.

(*e*) See *R.* v. *St. Anne, Westminster* (*Inhabitants*) (1846), 7 Q. B. 241.

(*f*) *R.* v. *Hockworthy* (*Inhabitants*) (1837), 7 Ad. & El. 492; *R.* v. *St. John, Margate* (*Inhabitants*) (1841), 1 Q. B. 252; *R.* v. *Bedingham* (*Inhabitants*) (1844), 5 Q. B. 653; *R.* v. *Latchford* (*Inhabitants*) (1844), 6 Q. B. 567; *R.* v. *Ellesmere* (*Inhabitants*) (1849), 12 Q. B. 19. If a removal order is made on the ground that the poor person was born in the parish to which removal is sought, the onus of proving that another settlement had been acquired is upon the objecting parish (*Headington Union Guardians* v. *Ipswich Union Guardians* (1890), 25 Q. B. D. 143, C. A.). If the adjudicated settlement is not denied in the statement of grounds of appeal, the respondents need not prove it (*R.* v. *Hockworthy* (*Inhabitants*), *supra*).

(*g*) See generally, as to grounds of appeal, Archbold, Poor Law, 15th ed., pp. 704—716. For form of notice and grounds of appeal, see *ibid.*, p. 717.

(*h*) Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), s. 5.

(*i*) *Ibid.*, s. 4. See also, as to amendment, Quarter Sessions Appeal Act, 1731 (5 Geo. 2, c. 19).

(*k*) *R.* v. *Ruyton of the Eleven Towns* (*Inhabitants*) (1861), 1 B. & S. 534; *R.* v. *Llangenny* (*Inhabitants*) (1863), 4 B. & S. 311; *Cheltenham Union Guardians* v. *Birmingham Guardians* (1874), 30 L. T. 702.

(*l*) See p. 598, *ante*.

(*m*) Stat. (1696) 8 & 9 Will. 3, c. 30, s. 3; *R.* v. *Montgomeryshire Justices* (1868), 33 J. P. 6; *R.* v. *Leeds* (*Recorder*) (1861), 3 E. & E. 561; *R.* v. *Over* (*Inhabitants*) (1849), 14 Q. B. 425.

The hearing.

1294. The proceedings at the hearing of the appeal are regulated by the practice of the particular sessions, and by the grounds for the appeal. The respondents have the right to begin, unless the whole of the respondents' case is admitted, or deemed to be admitted, by the grounds of appeal, in which case the appellants begin (*n*). The respondents may call other witnesses than those examined before the justices, and are not obliged to call those who were so examined (*o*).

Judgment.

1295. The decision of the court upon the hearing of an appeal against an order of removal, whether upon the sufficiency and effect of the statement of the grounds of removal and of appeal, and of the notice of chargeability, and of the copy or counterpart of the order of removal sent to the appellants, or upon any question of amendment, is final, and cannot be reviewed by *certiorari*, mandamus or otherwise (*p*). In respect of other matters, judgment may be given subject to a case stated for the consideration of the High Court upon a point of law (*q*).

Repayment of maintenance.

1296. If on appeal quarter sessions determines in favour of the appellant that the removal was not justified, they may order the appellant to be repaid such a sum as has been reasonably paid by the parish or place on whose behalf the appeal was made in respect of the relief of the poor person in question, between the time of the removal and the determination of the appeal, and such sum will be recoverable in the same way as costs are recoverable (*r*).

Costs of appeal.

1297. The court may order the losers to pay to the other side such costs and charges as the court deems just and reasonable (*s*), and certify the amount thereof, which on default may be levied by distress and sale (*t*). By consent the costs may be taxed out of sessions (*a*).

(ii.) *By Special Case.*

Special case.

1298. The parties to an appeal against a removal order have the same power of agreeing that, by order of a judge of the High Court, the facts should be stated in the form of a special case for

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(*n*) See *R.* v. *Carnarvon Justices* (1820), 4 B. & Ald. 86; *R.* v. *Hockworthy* (*Inhabitants*) (1837), 7 Ad. & El. 492.

(*o*) See *R.* v. *Yelvertoft* (*Inhabitants*) (1844), 6 Q. B. 801; *R.* v. *Abergavenny Union* (1880), 6 Q. B. D. 31; and, as to procedure and evidence generally, see title MAGISTRATES, Vol. XIX., pp. 646, 647, and Archbold, Poor Law, 15th ed., pp. 719—752.

(*p*) Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), s. 7. There cannot be a case stated on any of the matters included *ibid.* (*R.* v. *Ruyton of the Eleven Towns* (*Inhabitants*) (1861), 1 B. & S. 534).

(*q*) For the procedure etc. as to stating a case, see title MAGISTRATES, Vol. XIX., pp. 664 *et seq.*

(*r*) Poor Relief Act, 1722 (9 Geo. 1, c. 7), s. 9.

(*s*) The court must use their discretion in each case and consider the question in relation to the particular case (*R.* v. *Glamorganshire Justices* (1850), 4 New Sess. Cas. 110; *R.* v. *Merionethshire Justices* (1844), 6 Q. B. 163).

(*t*) Stat. (1696) 8 & 9 Will. 3, c. 30, s. 3; Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 82. See *ibid.* as to the recovery of costs so certified.

(*a*) See *Freeman* v. *Read* (1860), 9 C. B. (N. S.) 301; *Midland Rail. Co.* v. *Edmonton Union*, [1895] A. C. 485.

SECT. 3. Removal Orders.

the opinion of the High Court, as they have in respect of other decisions of petty sessions (*b*).

(iii.) *Arbitration.*

Reference to arbitrator.

1299. The parties to an appeal may agree that the matter in difference shall be referred to arbitration, and to that end may apply to a judge of the High Court or to quarter sessions for an order of reference (*c*).

Reference to Local Government Board.

1300. The guardians of any two unions or parishes, or the guardians of a union and the guardians of a parish, or the guardians of a union or parish and the overseers of any parish, or the overseers of any two parishes, between whom any question affecting the settlement, removal, or chargeability of any poor person shall arise, may, if they think fit so to do, by agreement in writing executed in respect of any guardians by sealing with their common seal, and in respect of overseers by the signatures of a majority of them, submit such question to the Local Government Board for its decision, and the Board may, if it sees fit, entertain such question, and by an order under its seal determine the same. Every such order is, in all courts and for all purposes as to the question therein determined (*d*), final and conclusive between the parties submitting such question.

Part VIII.—Vagrancy.

SECT. 1.—*In General.*

Meaning of "vagrant."

1301. The term "vagrant" is an elastic one, and, as ordinarily used, no precise meaning can be attached to it, though it may be regarded for most purposes as being synonymous with vagabond or loiterer (*e*). So far as poor law purposes are primarily concerned, the designation "vagrant" is displaced by the expression "casual" or "casual pauper," and elaborate provision is made for the relief and incidental control of destitute wayfarers (*f*). These latter, however, form but a small portion of the offenders aimed at by what are known as the Vagrancy Laws, which are now based upon

(*b*) See Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 11; title MAGISTRATES, Vol. XIX., p. 663.

(*c*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), ss. 13, 14; and see title MAGISTRATES, Vol. XIX., p. 649.

(*d*) Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 12. The Local Government Board will only decide questions of law, not of fact, on such a submission.

(*e*) Blackstone, writing of vagrants (4 Bl. Com. 170), calls them idle persons and vagabonds, and says that ancient statutes described them as being "such as wake on the night and sleep on the day, and haunt customable taverns and alehouses, and routs about; and no man wot from whence they come, ne whither they go."

(*f*) See p. 567, *ante*.

the Vagrancy Act, 1824 (*g*), and were originally directed against such offenders, whether wayfarers or not, as might fall within one or other of three arbitrary classes thereby set up, namely, idle and disorderly persons, rogues and vagabonds, and incorrigible rogues. Later statutes have provided that persons committing certain offences shall be deemed to come within one or other of these divisions, and so many offenders who are in no ordinary sense of the word vagrants, have been brought under the laws relating to vagrancy, and the greater number of the offences coming within the operation of those laws have little or no relation to the subject of poor relief, but are more properly directed towards the prevention of crime, the preservation of good order, and the promotion of social economy.

SECT. 2.—*Idle and Disorderly Persons.*

1302. The following are comprised under the description of idle and disorderly persons:— Idle and disorderly persons.

(1) Every person who, being able wholly or in part to maintain himself or herself, or his or her family, by work or other means, wilfully refuses or neglects so to do, by which refusal or neglect he or she or any of his or her family, whom he or she is legally bound to maintain, shall have become chargeable to any parish, township, or place, or to the common fund of any union (*h*). Neglect to maintain family.

(*g*) 5 Geo. 4, c. 83.

(*h*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3, as extended by the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 3. For liability to maintain, see p. 573, *ante*. Chargeability may be proved by a certificate of the guardians of the union (Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 69), or by other means. In order that the neglect or refusal may be wilful, some evidence must be adduced of the defendant's means or ability (*Hosegood* v. *Camps* (1889), 53 J. P. 612), but it is not necessary to show that he has actually refused to work or is an idle person, for an able-bodied man, who is capable of maintaining his family by work and does not do so, may be convicted as an idle and disorderly person (*Carpenter* v. *Stanley* (1868), 33 J. P. 37). *Mens rea* is necessary for a conviction (*Morris* v. *Edmonds* (1897), 77 L. T. 56). But the fact that the defendant by his own misconduct has put himself into such a condition that he is unable to work does not amount to wilful refusal or neglect (*St. Saviour's Union* v. *Burbridge*, [1900] 2 Q. B. 695 (delirium tremens); but see *contra*, *R.* v. *Hopkins*, *Ex parte St. Saviour's Union* (1900), 64 J. P. 582), nor does a refusal to work subject to certain conditions which have no relation to the work itself (*Poplar Guardians* v. *Martin*, [1905] 1 K. B. 728). "Striking" is a refusal that may be dealt with under the section; see *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516, C. A. Soldiers and marines are not within this provision (Army Act (44 & 45 Vict. c. 58), ss. 145, 190; see p. 572, *ante*. A husband cannot be convicted under the section for neglecting to maintain his wife if she refuses to live with him without justification (*Flannagan* v. *Bishop Wearmouth Overseers* (1857), 8 E. & B. 451); or is living in adultery (*R.* v. *Flintan* (1830), 1 B. & Ad. 227; *Phillips* v. *South Dublin Union Guardians*, [1902] 2 I. R. 112; *Govier v. Hancock* (1796), 6 Term Rep. 603); or if he *bonâ fide* believes she is doing so (*Morris* v. *Edmonds* (1897), 18 Cox, C. C. 627), unless he has condoned or connived at the misconduct (*Wilson* v. *Glossop* (1888), 20 Q. B. D. 354, C. A.). As to what amounts to condona-

SECT. 2. **Idle and Disorderly Persons.**

(2) Any woman neglecting to maintain her bastard child being able wholly or in part so to do, whereby such child becomes chargeable (*i*);

Neglect to maintain illegitimate child.

(3) Every person returning to or becoming chargeable to any parish, township, or place from which he or she has been legally removed by order of justices, unless he or she produces a certificate of the churchwardens and overseers of some other parish, township or place, thereby acknowledging him or her to be settled there (*k*);

Disregarding removal order.

(4) Every pauper removed under an order obtained by the guardians of a union who returns within twelve months, and becomes chargeable to that union, without the guardian's consent (*l*);

Fraudulent applicants for relief.

(5) Any person who when applying for relief at any workhouse, or to any relieving officer or overseer, has at the time in his possession and under his immediate control any property of which on inquiry he does not make a correct and complete disclosure (*m*);

(6) Any pauper who wilfully gives a false name, or makes a false statement for the purpose of obtaining relief (*a*);

(7) Any person who obtains relief by giving a false answer or making a false statement (*b*);

(8) Any person who, for the purpose of obtaining relief from the rates raised for the relief of the poor for himself or any other person, wilfully gives a false name, or makes or uses a false statement to the guardians of any union, or any of their officers (*c*);

Disorderly paupers

(9) Any pauper who (i.) absconds or escapes from or leaves any casual ward before he is entitled to discharge himself therefrom; or (ii.) refuses to remove to any workhouse or asylum; or (iii.) absconds, or escapes from, or leaves, any workhouse or asylum during the period of detention; or (iv.) refuses or neglects, whilst an

tion, see title HUSBAND AND WIFE, Vol. XVI., p. 489. A husband is not liable under this section in respect of his wife when she becomes chargeable by reason of lunacy.

(*i*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 6. For a second offence she is punishable as a rogue and vagabond (*ibid.*), as to which see p. 610, *post*. The liability of the mother only attaches while she is unmarried or a widow, and while the child is under sixteen years of age, or, if a girl, is unmarried and under that age (Poor Law Amendment Act, 1834 (4 & 5 Will. 4. c. 76), s. 71); and see title BASTARDY, Vol. II., p. 440.

(*k*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3; Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 55. This provision does not apply to a return to a different parish though situate in the same town, nor to a person coming back otherwise than in a state of vagrancy (*R.* v. *Fillongley* (*Inhabitants*) (1788), 2 Term Rep. 709; *R* v. *Barham* (*Inhabitants*) (1828), 8 B. & C. 99; *Mann* v. *Davers* (1819), 3 B. & Ald. 103). As to removal orders, see p. 596, *ante*.

(*l*) Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 7.

(*m*) Poor Law Amendment Act, 1848 (11 & 12 Vict. c. 110), s. 10.

(*a*) Pauper Inmates Discharge and Regulation Act, 1871 (34 & 35 Vict. c. 108), s. 7. A second conviction makes the offender a rogue and vagabond (*ibid.*); see p. 610, *post*.

(*b*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 44.

(*c*) Casual Poor Act, 1882 (45 & 46 Vict. c. 36), s. 5.

inmate of any casual ward, workhouse, or asylum, to do the work or observe the regulations prescribed (*d*);

(10) Every person relieved in a workhouse who refuses or neglects to perform the prescribed task, or who destroys his clothes, or damages the property of the guardians (*e*);

(11) Every person relieved out of a workhouse who refuses or wilfully neglects to perform the task of work, or who destroys or damages tools, materials, or other property of the guardians (*f*);

Beggars.

(12) Every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing or procuring or encouraging any child or children so to do (*g*);

Pedlars.

(13 Every petty chapman or pedlar wandering abroad, and trading without being duly licensed or otherwise authorised by law (*h*); and

Prostitution.

(14) Every common prostitute wandering in a public street or public highway, or in any place of public resort, and behaving in a riotous or indecent manner (*i*).

Punishment.

1303. Idle and disorderly persons are punishable upon summary conviction, if before a single justice or at an occasional court house, with imprisonment with or without hard labour for not exceeding fourteen days, or if before two justices in a petty sessional court, for not exceeding one calendar month (*k*). A fine not exceeding £1 or £5, as the case may be, recoverable by distress, may be imposed

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(*d*) Pauper Inmates Discharge and Regulation Act, 1871 (34 & 35 Vict. c. 108), s. 7. The master or porter of a workhouse, or officer in charge of a casual ward, may take a disorderly pauper before a justice without summons or warrant and convey the offender upon conviction to gaol (*ibid.*, s. 8). As to the prescribed work, see General Order of Local Government Board, 18th December, 1882; *Poplar Guardians* v. *Martin*, [1905] 1 K. B. 728; *R.* v. *Baddeley, Ex parte Moore* (1906), 70 J. P. 346; and as to misbehaviour, see *Mile End Guardians* v. *Sims*, [1905] 2 K. B. 200; *Holland* v. *Peacock*, [1912] 1 K. B. 154.

(*e*) Poor Law Amendment Act, 1842 (5 & 6 Vict. c. 57), s. 5; and see p. 613, *post*.

(*f*) Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), s. 15.

(*g*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3. This provision is aimed at habitual beggars, and does not touch persons collecting alms in an orderly manner under exceptional circumstances, *e.g.*, workmen on strike (*Pointon* v. *Hill* (1884), 12 Q. B. D. 306). As to begging by children, see the Children Act, 1908 (8 Edw. 7, c. 67), ss. 14, 58, 59, and title INFANTS AND CHILDREN, Vol. XVII., p. 163.

(*h*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3. As to pedlars' certificates, see the Pedlars Acts, 1871 and 1881 (34 & 35 Vict. c. 96; 44 & 45 Vict. c. 45); and as to pedlars and hawkers, generally, see title MARKETS AND FAIRS, Vol. XX., p. 55.

(*i*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3. Merely to accost a man is not behaving in a riotous or indecent manner (*R.* v. *Duke* (1909), 73 J. P. 88 (quarter sessions case), but to take a man by the arm and walk with him against his will may be such behaviour (*Duval* v. *Denman* (1901), 65 J. P. 297 (North London Sessions)), but see, *contra*, *R.* v. *De Ruiter* (1880), 44 J. P. 90 (Middlesex Sessions); see also *Bonner* v. *Lushington* (1893), 68 L. T. 91.

(*k*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20.

SECT. 2. Idle and Disorderly Persons.

instead of imprisonment, but hard labour cannot be adjudged for default in payment (*l*).

The punishment of an absconding pauper (*m*) who is suffering from an infectious disease may be suspended till he is cured (*n*).

SECT. 3.—*Rogues and Vagabonds.*

Rogues and vagabonds.

1304. The following are comprised under the description rogues and vagabonds:—

Persons previously convicted.

(1) Persons committing any of the offences rendering them punishable as idle and disorderly persons (*o*), after having been previously convicted of any such offence (*p*);

Resisting arrest.

(2) Every person apprehended as an idle and disorderly person (*q*), and violently resisting any constable or other police officer so apprehending him or her, and being subsequently convicted of the offence for which the apprehension took place (*r*);

Deserting family.

(3) Any person running away (*s*) and leaving his wife, or his or her legitimate child or children (*t*), chargeable (*a*), or whereby she or they, or any of them, become chargeable to any parish, township, or place, or to the common fund of any union (*b*);

(4) Any woman deserting her bastard child, whereby it becomes chargeable, or convicted for a second time of neglecting to maintain her bastard child (*c*);

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4.

(*m*) See pp. 562, 608, *ante*.

(*n*) Pauper Inmates Discharge and Regulation Act, 1871 (34 & 35 Vict. c. 108), s. 7.

(*o*) See pp. 607 *et seq.*, *ante*.

(*p*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4. As to second offences by paupers, see also Pauper Inmates Discharge and Regulation Act, 1871 (34 & 35 Vict. c. 108), s. 7.

(*q*) See pp. 607 *et seq.*. *ante*.

(*r*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4.

(*s*) To constitute a "running away" there must be an absconding or concealment or absenting by going some distance away and for some considerable time; see *Cambridge Union Guardians* v. *Parr* (1861), 25 J. P. 518, *per* ERLE, C.J. It is a question of fact for the justices whether the acts alleged amount to a running away (*Pallin* v. *Buckland* (1911), 105 L. T. 197).

(*t*) *R.* v. *Maude* (1842), 2 Dowl. (N. S.) 58. As to presumption of legitimacy, see title BASTARDY, Vol. II., p. 427.

(*a*) *Heath* v. *Heape* (1856), 1 H. & N. 478; and see *Bannister* v. *Sullivan* (1904), 91 L. T. 380.

(*b*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4; Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 3. A married woman, deserted by her husband, and without separate property, cannot be convicted under these sections (*Peters* v. *Cowie* (1877), 2 Q. B. D. 131). If when a man leaves his wife she has sufficient means of livelihood, he cannot be convicted without proof of knowledge of the chargeability (*Sweeney* v. *Spooner* (1863), 3 B. & S. 329). Soldiers and marines are not within this provision (Army Act (44 & 45 Vict. c. 58), ss. 145, 190; and see p. 572, *ante*).

(*c*) Poor Law Amendment Act, 1844 (7 & 8 Vict c. 101), s. 6; see p. 608, *ante*; see also title BASTARDY, Vol. II., p. 440. Proceedings may be

(5) Any person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence (*d*);

Fraudulent beggars.

(6) Any person wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms (*d*);

Exposing wounds.

(7) Any person wandering abroad and lodging in any barn on outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself (*d*);

Indecent exhibitions.

(8) Any person wilfully exposing to view in any street, road, or highway, or public place, or in the window or other part of any shop, or other building, situate in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibitions (*e*);

Exposing the person.

(9) Any person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in view thereof, or in any place of public resort with intent to insult any female (*f*);

Men living on prostitutes.

(10) Any male person who knowingly lives wholly or in part on the earnings of prostitution, or who in any public place persistently solicits or importunes for immoral purposes (*g*);

commenced at any time within two years from the time when the offender absconds (*Ashley* v. *Blaker* (1909), 101 L. T. 682; but see *Reeve* v. *Yeates* (1862), 1 H. & C. 435, where it was held that time did not begin to run until the date of chargeability), by any relieving officer, on an information stating that relief has been applied for on behalf of the wife or child, and that he is informed and believes that the husband or parent has left the wife or child and gone away (Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 19). It is not necessary for the informing officer to obtain the sanction of the guardians (*R.* v. *Mirehouse* (1863), 11 W. R. 316).

(*d*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4.

(*e*) *Ibid.*; Vagrancy Act, 1838 (1 & 2 Vict. c. 38), s. 2; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 537, 538, 539; Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18). It has been held at quarter sessions that writing obscene words on a gate in a public highway is not within the above provision (*Thomas* v. *Bradbury* (1883), 47 J. P. 505).

(*f*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 537.

(*g*) Vagrancy Act, 1898 (61 & 62 Vict. c. 39), s. 1 (1). If it is made to appear to a court of summary jurisdiction by information on oath that there is reason to suspect that any house or any part of a house is used by a female for purposes of prostitution, and that any male person residing in or frequenting the house is living wholly or in part on the earnings of the prostitute, the court may issue a warrant authorising any constable to enter and search the house, and to arrest that male person (*ibid.*, s. 1 (2)). A man proved to be living with or to be habitually in the company of a prostitute, and to have no visible means of subsistence, will be deemed to be knowingly living on the earnings of prostitution, unless he can satisfy the court to the contrary (*ibid.*, s. 1 (3)). The wife of a person charged with living on the earnings of her prostitution is not a competent witness against her husband (*Director of Public Prosecutions* v. *Blady* (1912), 76 J. P. 141, C. C. A.).

SECT. 3. **Rogues and Vagabonds.**

(11) Any person pretending or professing to tell fortunes, or using any subtle craft, means, or device (*h*), by palmistry or otherwise, to deceive and impose (*i*);

Fortune-telling.

Suspected persons.

(12) Every person found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area for any unlawful purpose (*k*);

(13) Every suspected person or reputed thief frequenting or loitering about or in any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street or any highway, or any place adjacent to a street or highway, with intent to commit a felony (*l*);

Possession of housebreaking implements or weapons.

(14) Every person having in his or her custody or possession any picklock, key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable, or outbuilding (*m*);

(*h*) It has been held that the "device" must be *ejusdem generis* with palmistry, and that the word does not include a conjuring trick (see *Johnson* v. *Fenner* (1869), 33 J. P. 740); but compare cases cited *infra*, and see *R.* v. *Ward* (1900), 64 J. P. 776 (Central Criminal Court).

(*i*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4. As to fortune-telling as a misdemeanour, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 692. It is not necessary to prove that the defendant had actually told the fortune of an individual; the offence is the offering to do so (*Penny* v. *Hanson* (1887), 18 Q. B. D. 478 (advertisement offering to cast nativities or tell fortunes by means of astrology)). Spiritualists and others who profess to commune with the dead may be proceeded against under this section, by virtue of the words "or otherwise" (*Monck* v. *Hilton* (1877), 2 Ex. D. 268; *R.* v. *Middlesex Justices* (1877), 2 Q. B. D. 516; *R.* v. *Entwistle, Ex parte Jones*, [1899] 1 Q. B. 846).

(*k*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4. It is, perhaps, doubtful whether the unlawful purpose need be a felonious purpose (see *Kerkin* v. *Jenkins* (1863), 9 Cox, C. C. 311), but there must be a purpose to commit an offence punishable as a crime, and not a mere offence against, *e.g.*, morality (*Hayes* v. *Stephenson* (1860), 3 L. T. 296). It is not necessary that the arrest should be made upon the premises (*Moran* v. *Jones* (1911), 27 T. L. R. 421).

(*l*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4; Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 7. In order to prove intent it is not necessary to show that the accused was guilty of any particular act or acts tending to show his purpose or intent; he may be convicted if, from the circumstances of the case and from his known character, the court is of opinion that he was intending to commit a felony (Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 15; and see *R.* v. *Pattitt* (1911), 75 J. P. 432, C. C. A., and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 383). A public highway is not necessarily a place of public resort; it must be shown that it is, or that it leads to, or is adjacent to, one of the other designated places (*Re Timson* (1870), L. R. 5 Exch. 257, following *Re Jones* (1852), 7 Exch. 586, and not following *R.* v. *Brown* (1852), 17 Q. B. 833). The platform of a railway station is a place of public resort (*Re Davis* (1857), 2 H. & N. 149); but not a ship lying at a quay (*R.* v. *Taylor* (1857), 21 J. P. 488). A private house in which a sale by public auction is going on is, for the time being, a place of public resort (*Sewell* v. *Taylor* (1859), 7 C. B. (N. S.) 160).

(*m*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4. In addition to fine or imprisonment (see p. 613, *post*), the implements will be forfeited

(15) Every person being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument, with intent to commit any felonious act (*n*);

(16) Every pauper who wilfully destroys or injures his own clothes or damages any of the property of the guardians (*o*); Damage by pauper.

1305. Every person playing or betting by way of gaming or wagering in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance, is punishable as a rogue and vagabond, or by fine (*p*). Gambling in public places.

Under the Lotteries Acts, persons convicted of selling tickets in a lottery are to be deemed to be rogues and vagabonds (*q*).

1306. Any person untruly confessing himself a deserter or to be improperly absent from one of His Majesty's ships, or making a false statement on enlistment in the naval service, will be deemed to be a rogue and vagabond within the meaning of the Vagrancy Act, 1824 (*r*), and may be punished accordingly (*s*). Sailors.

1307. Certain offenders against the provisions regulating alien immigration are deemed to be rogues and vagabonds (*t*). Aliens.

1308. A rogue and vagabond may, on conviction of the offence before one justice or before justices sitting in an occasional court-house, be fined not exceeding 20*s.*, or sentenced to not more than fourteen days' imprisonment (*u*), or if convicted before two justices Punishment.

(Vagrancy Act 1824 (5 Geo. 4, c. 83), s. 4). As to possession by night, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 675.

(*n*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4. In addition to fine or imprisonment (see the text, *infra*), the weapons will be forfeited (Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4). As to going armed, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 468.

(*o*) Pauper Inmates Discharge and Regulation Act, 1871 (34 & 35 Vict. c. 108), s. 7.

(*p*) Vagrant Act Amendment Act, 1873 (36 & 37 Vict. c. 38), s. 3; see title GAMING AND WAGERING, Vol. XV., p. 291. A hackney carriage standing in a street has been held to be a public place (*R.* v. *Weller* (1894), 58 J. P. 286).

(*q*) See title GAMING AND WAGERING, Vol. XV., p. 302, and *ibid.*, note (*m*), for the special punishment. A limited liability company cannot be convicted under the Lotteries Acts as a rogue and vagabond (*Hawke* v. *Hulton (E.) & Co., Ltd.*, [1909] 2 K. B. 93).

(*r*) 5 Geo. 4, c. 83.

(*s*) Naval Deserters Act, 1847 (10 & 11 Vict. c. 62), s. 10; Naval Enlistment Act, 1853 (16 & 17 Vict. c. 69), s. 16. The last-mentioned section does not apply to a person desiring to enter the Royal Naval Reserve (*Westhorpe* v. *Powley*, [1905] 1 K. B. 286); see title ROYAL FORCES.

(*t*) See title ALIENS, Vol. I., p. 328.

(*u*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20.

SECT. 3. Rogues and Vagabonds.

in a petty sessional court, be imprisoned, with or without hard labour, for not more than three months, or be fined not exceeding £25 (*v*), with imprisonment without hard labour in default of distress (*w*).

SECT. 4.—*Incorrigible Rogues.*

Incorrigible rogues.

1309. The following may be dealt with as incorrigible rogues:—

Second conviction as rogue and vagabond.

(1) Every person committing any offence which shall subject him or her to be dealt with as a rogue and vagabond (*x*), such person having been at some former time adjudged so to be and duly convicted thereof (*y*);

Resisting arrest.

(2) Every person apprehended as a rogue and vagabond, and violently resisting any constable or other police officer so apprehending him or her, and who is subsequently convicted of the offence for which he or she was so apprehended (*a*);

Prison breakers.

(3) Every person breaking or escaping out of any place of legal confinement before the expiration of the term for which he or she has been committed or ordered to be confined by virtue of the Vagrancy Act, 1824 (*b*).

Punishment

1310. Any person convicted by a justice or justices of an offence which constitutes him or her an incorrigible rogue must be committed to prison, with or without hard labour, until the next general or quarter sessions of the peace (*c*). At such sessions the court may examine into the circumstances of the case, and may order that the offender be further imprisoned with hard labour for not exceeding one year from the date of the order, and, further, that the offender, if a male, be whipped at such time during his imprisonment, and at such place, as, according to the nature of the offence, the court deems to be expedient (*d*). In such cases as begging the maximum sentence should not be imposed in the absence of aggravating circumstances (*e*). An appeal against the sentence imposed by quarter sessions lies to the Court of Criminal Appeal (*f*).

(*v*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4.

(*w*) For scale of imprisonment in default of payment, see the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 5, 47, and title MAGISTRATES, Vol. XIX., p. 604.

(*x*) See p. 610, *ante*.

(*y*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 5. There must be evidence that the offender has been previously convicted as a rogue and vagabond before he can be convicted as an incorrigible rogue under this provision (*R.* v. *Johnson*, [1909] 1 K. B. 439, C. C. A.).

(*a*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 5.

(*b*) 5 Geo. 4, c. 83, s. 5; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 508.

(*c*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 5; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4.

(*d*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 10.

(*e*) *R.* v. *Cooper* (1910), 75 J. P. 125, C. C. A.; and see *R.* v. *Edwards* (1909), 73 J. P. 286, C. C. A.

(*f*) *R.* v. *Johnson*, [1909] 1 K. B. 439, C. C. A.

SECT. 5.—*Practice.* SECT. 5. Practice.

1311. Any person may apprehend without warrant anyone found offending (*g*) against the Vagrancy Act, 1824 (*h*), and may convey him before a justice or justices, or deliver him to a peace officer (*i*) for that purpose (*k*). A constable refusing to take him into custody, and any person hindering a constable in the execution of the Act (*l*), may be fined a sum not exceeding £5 (*m*). Arrest.

1312. On a charge of neglecting to maintain or deserting wife or family, the wife or husband of the person charged is a competent and compellable witness (*n*). Witnesses.

1313. Any money found upon or in the possession of an offender may be applied towards the expenses of his apprehension, conveyance to prison, and maintenance there. If money sufficient for these purposes is not found, his effects may be ordered to be sold and so applied, any surplus being returned to him (*o*). Payment of expenses.

1314. A justice, upon information on oath that any person within the purview of the Vagrancy Act, 1824 (*l*), is, or is reasonably suspected to be, harboured or concealed in any house kept for the lodging of travellers, may, by warrant under his hand and seal, authorise any person to enter at any time into such house and apprehend such person (*p*). Search warrant.

1315. An appeal against a conviction under any of the three heads dealt with above lies to quarter sessions (*q*), but not to the Appeal.

(*g*) The person must be actually committing one of the specified offences; see *Horley* v. *Rogers* (1860), 2 E. & E. 674. As to arrest generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 296.

(*h*) 5 Geo. 4, c. 83. The person giving into custody or apprehending an offender is not liable for the costs of the prosecution (*Reddish* v. *Hitchinor* (1878), 40 L. T. 65).

(*i*) As to who is a peace officer, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 298.

(*k*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 6.

(*l*) 5 Geo. 4, c. 83.

(*m*) *Ibid.*, s. 11; see also Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43).

(*n*) Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 4, Sched.

(*o*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 8. As to costs generally, see title MAGISTRATES, Vol. XIX., pp. 604, 629, 648.

(*p*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 13. As to search warrants generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 310.

(*q*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 14; Vagrancy Act, 1838 (1 & 2 Vict. c. 38), s. 1; Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), Sched. The prosecutor's costs of appeal may be ordered by quarter sessions to be paid by the treasurer of the county, riding, division, or place in which the offence was committed (Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 9). If such place is a borough having a separate commission of the peace but not a separate court of quarter sessions, the order for payment should be made upon the county treasurer, not upon the borough treasurer. The word "place" in *ibid.*, s. 9, must be construed as meaning a place having a separate court of quarter sessions (*R.* v. *West Riding Justices*, [1900] 1 Q. B. 291). As to costs of appeal, see title MAGISTRATES, Vol. XIX., p. 648.

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Court of Criminal Appeal, as such a conviction is not a conviction upon indictment (*r*). An appeal, however, lies to that court against a sentence imposed at quarter sessions upon an incorrigible rogue (*s*). If the conviction is confirmed by quarter sessions and the appellant is not in custody, it is for quarter sessions, not for the convicting justice or justices, to issue a warrant for his apprehension to undergo his sentence (*a*).

Costs.

1316. The provisions as to payment of costs in criminal cases apply in the case of a person committed as an incorrigible rogue as if he had been committed for trial for an indictable offence, and in the case of any appeal under the Vagrancy Act, 1824, as if the hearing of the appeal by the court of quarter sessions were the trial of an indictable offence (*b*).

Part IX.—Old Age Pensions.

SECT. 1.—*The Pension.*

Meaning of old age pension.

1317. By an old age pension is meant the weekly payment out of moneys provided by Parliament which a person is entitled to receive by virtue of the provisions of the Old Age Pensions Acts, 1908 and 1911 (*c*), when and so long as such person satisfies the conditions prescribed by those Acts, and in accordance with the regulations made thereunder by the Treasury (*d*).

Conditions for receipt of pension.

1318. In order to be entitled to receive an old age pension a

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(*r*) *R.* v. *Brown* (1908), 72 J. P. 427, C. C. A.; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 443. It is sufficient if the notice of appeal states that the appellant was not guilty (*R.* v. *Newcastle-upon-Tyne Justices* (1831), 1 B. & Ad. 933). As to appeals generally, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*s*) *R.* v. *Johnson*, [1909] 1 K. B. 439, C. C. A. The Home Secretary, in the consideration of any petition for mercy, can, however, refer the whole matter to be dealt with by the Court of Criminal Appeal, under the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 19; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 443.

(*a*) *Ex parte Moore* (1837), 1 Jur. 135.

(*b*) Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 9 (4); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 328, note (*s*).

(*c*) 8 Edw. 7, c. 40; 1 & 2 Geo. 5, c. 16. It should be noted that the provisions of the Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), modifying the statutory conditions for the receipt of a pension are not to operate so as to disentitle a person then in receipt of a pension to continue to receive the pension or to reduce the rate of pension (*ibid.*, s. 8).

(*d*) For these regulations, see Old Age Pensions Regulations, 1911.

person of either sex must have attained the age of seventy (*e*), and must satisfy the pension authorities (*f*)—

Age.

(1) That for at least twenty years up to the date of the receipt of any sum on account of a pension he or she has been a British subject (*g*), except in the case of a woman who satisfies the pension authorities that she would, but for her marriage with an alien, have fulfilled such condition, and that, at the date of the receipt of any sum on account of a pension, the alien is dead, or the marriage with him has been dissolved or annulled, or she has, for a period of not less than two years up to the said date, been legally separated from or deserted by him (*h*);

Nationality.

Residence.

(2) That for at least twelve years in the aggregate out of the twenty years up to the date of the receipt of any sum on account of a pension he or she has had his or her residence in the United Kingdom. In computing such period of residence, there must be counted as residence in the United Kingdom: (i.) any periods spent abroad in any service under the Crown, the remuneration for which is paid out of moneys provided by Parliament, or as the wife or servant of a person in any such service so remunerated; (ii.) any periods spent in the Channel Islands or the Isle of Man by a person born in the United Kingdom; (iii.) any periods spent abroad by any person during which that person has maintained or assisted in maintaining any dependant in the United Kingdom; (iv.) any periods of absence spent in service on board a vessel registered in the United Kingdom by a person who before his absence on that service was living in the United Kingdom; and (v.) any periods of temporary absence not exceeding three months in duration at any one time (*i*); and

Yearly means.

(3) That his or her yearly means, as calculated in the prescribed manner, do not exceed £31 10*s.* (*k*). In calculating the means of a person account must be taken of: (i.) the yearly value of any property belonging to that person (not being property personally used or enjoyed by him) which is invested, or is otherwise put to profitable use by him, or which, though capable of investment or profitable use, is not so invested or put to profitable use by him, the yearly value of that property being taken to be one-twentieth part of the capital value thereof (*l*); (ii.) the income which that person may reasonably expect to receive during

(*e*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 2 (1). A person is deemed to have attained the age of seventy on the commencement of the day previous to the seventieth anniversary of the day of birth (Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 1). Attainment of the age of seventy is a condition precedent to the receipt of a pension; see *Murphy* v. *R.*, [1911] A. C. 401.

(*f*) See p. 621, *post*.

(*g*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 2 (2).

(*h*) Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 3 (1).

(*i*) *Ibid.*, s. 3 (2).

(*k*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 2 (3).

(*l*) Where under this provision the yearly value of any property is taken to be one-twentieth part of the capital value thereof, no account must be taken under paragraphs (ii.), (iii.), or (iv.) of any appropriation of that property for the purpose of current expenditure (Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 2 (1)).

SECT. 1. The Pension.

the succeeding year in cash, excluding any sums receivable on account of an old age pension under the Act, and excluding any sums arising from the investment or profitable use of property (not being property personally used or enjoyed by him), that income, in the absence of other means for ascertaining the income, being taken to be the income actually received during the preceding year; (iii.) the yearly value of any advantage accruing to that person from the use or enjoyment of any property belonging to him which is personally used or enjoyed by him, except furniture and personal effects in a case where the total value of the furniture and effects does not exceed £50; and (iv.) the yearly value of any benefit or privilege enjoyed by that person (*m*).

In calculating the means of a person being one of a married couple living together in the same house, the means must be taken to be half the total means of the couple (*n*). If a person has directly or indirectly deprived himself of any income or property in order to qualify for pension or for the receipt of a higher rate of pension, that income or the yearly value of that property must be taken to be part of the means of that person (*o*).

Disqualifications for pension:—

1319. A person is disqualified for receiving or continuing to receive a pension:

Poor relief.

(1) While he is in receipt of any poor relief, other than medical or surgical assistance (including food or comforts) supplied by or on the recommendation of a medical officer, or relief given to such person by means of the maintenance of a dependant in a lunatic asylum, infirmary or hospital, or other than the payment of any expenses of the burial of a dependant, or other than any other relief which by law is expressly declared not to be a disqualification for registration as a parliamentary elector or a reason for depriving any person of any franchise, right, or privilege (*p*);

Improvidence.

(2) If before he becomes entitled to a pension he has habitually failed to work according to his ability, opportunity, and need, for the maintenance or benefit of himself and those legally dependent upon him (*q*);

(*m*) Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 2 (1).

(*n*) *Ibid.*, s. 2 (2).

(*o*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 4 (3).

(*p*) *Ibid.*, s. 3 (1) (a). Any rule of law and any enactment the effect of which is to cause relief given to or in respect of a wife or relative to be treated as relief given to the person liable to maintain the wife or relative does not apply to disqualify for pension (see Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 4 (1)). The receipt of a pension does not deprive the pensioner of any franchise, right, or privilege, or subject him to any disability (Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 1 (4)).

(*q*) This disqualification does not apply if the person has continuously for ten years up to attaining the age of sixty made proper provision against old age, sickness, infirmity, or want or loss of employment; such provision, when made by the husband in the case of a married couple living together, is treated as provision made by the wife as well as by the husband (*ibid.*, s. 3 (1) (b)). A person attains the age of sixty on the commencement of the day previous to the sixtieth anniversary of the day of birth; see Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 1. For a

• (3) While he is detained in any asylum within the meaning of the Lunacy Act, 1890 (*r*), or while he is being maintained in any place as a pauper or criminal lunatic (*s*); Lunacy.

(4) While detained in prison under any sentence imposed without the option of a fine, and for a further period of ten years after the date on which he is released from prison (*a*), or, if the term for which he has been ordered to be imprisoned without the option of a fine does not exceed six weeks, for a further period of two years after the date on which he is released (*b*); Imprisonment.

(5) During the continuance of any period of disqualification arising or imposed in consequence of conviction for an offence (*c*). By order of court etc.

In addition to the specific disqualification mentioned above (*d*), a person of sixty years of age or upwards (*e*) who, having been convicted before any court, is liable to have a detention order made against him as an habitual drunkard (*f*), and is not in consequence necessarily disqualified for pension, may be ordered by the court to be disqualified for any period not exceeding ten years (*g*); and any person already in receipt of a pension who is convicted of certain specified offences (*h*) will, if not otherwise subject to disqualification, be disqualified for receiving or continuing to receive a pension

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definition of "proper provision," see Old Age Pensions Regulations, 1911, s. 30.

(*r*) 53 & 54 Vict. c. 5. By *ibid.*, s. 341, "asylum" means an asylum for lunatics provided by a county or borough, or by a union of counties or boroughs. See also title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 440.

(*s*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 3 (1) (c).

(*a*) *Ibid.*, s. 3 (1) (d), (2).

(*b*) Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 4 (2).

(*c*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 3 (1) (d).

(*d*) Namely, under *ibid.*, s. 3 (2), as supplemented by the Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 4 (2).

(*e*) See note (*q*), p. 618, *ante*.

(*f*) Under the Inebriates Act, 1898 (61 & 62 Vict. c. 60); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 417.

(*g*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 3 (3).

(*h*) *I.e.*, any offence mentioned or deemed to be mentioned or included in the Inebriates Act, 1898 (61 & 62 Vict. c. 60), Sched. I., namely being found drunk in a highway or other public place, whether a building or not, or on licensed premises; being guilty while drunk of riotous or disorderly behaviour in a highway or other public place, whether a building or not; being drunk while in charge, on any highway or other public place, of any carriage, horse, cattle, or steam-engine; being drunk when in possession of any loaded firearms (Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12); refusing or failing when drunk to quit licensed premises when so requested (*ibid.*, s. 18); refusing or failing when drunk to quit any premises or place licensed under the Refreshment Houses Act, 1860, when so requested (Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 41); being found drunk in any street or public thoroughfare within the Metropolitan Police District, and being guilty while drunk of any riotous or indecent behaviour (Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 58); being drunk in any street, and being guilty of riotous or indecent behaviour therein (Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 29); being intoxicated while driving a hackney carriage (*ibid.*, s. 61); being drunk during employment as a driver of a hackney carriage, or as a driver or conductor of a stage carriage in the Metropolitan Police District (London Hackney Carriages Act, 1843

SECT. 1. The Pension.

for a period of six months after the date of his conviction, unless the convicting court direct to the contrary (*i*).

Rate of pension.

1320. The rate of pension payable depends upon the yearly means of the pensioner, varying from 5*s.* to 1*s.* a week (*k*), and, subject to the directions of the Treasury in special cases, is paid weekly in advance on Friday, in such manner and subject to such conditions as to identification as the Treasury direct (*l*). No sum, however, can be paid on account of pension to any person while absent from the United Kingdom, or after three months from the date on which it became payable (*m*).

Pension not assignable.

1321. A pension cannot be assigned or charged, and on the bankruptcy of a pensioner the pension does not enure for the benefit of his creditors (*n*).

False statements.

1322. If for the purpose of obtaining or continuing a pension, or of obtaining or continuing a pension at a higher rate than is appropriate to the case, either for himself or for any other person, any person knowingly makes any false statement or declaration, he is liable on summary conviction to imprisonment for a term not exceeding six months, with hard labour (*o*).

Repayment of pension.

1323. If it is found at any time that a person has been in receipt of a pension while the statutory conditions were not fulfilled, or while he was disqualified, or of a pension at a rate higher than the appropriate rate, he, or in case of his death his personal representative, will be liable to repay to the Treasury any sums improperly received as pension, which sums may be recovered as a debt due to the Crown (*p*), or may be deducted from any sums to which the person becomes entitled on account of an old age pension. In the case of a personal representative the deduction can only be made from any sums to which he becomes entitled as a personal representative (*q*).

(6 & 7 Vict. c. 86), s. 28); being drunk and persisting, after being refused admission on that account, in attempting to enter a passenger steamer; being drunk on board a passenger steamer, and refusing to leave such steamer when requested (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 287); being found drunk in any highway or other public place, whether a building or not, or on any licensed premises, while having the charge of a child apparently under the age of seven years (Licensing Act, 1902 (2 Edw. 7, c. 28), s. 2).

(*i*) Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 4 (3).

(*k*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 1 (2), Sched.

(*l*) *Ibid.*, s. 5.

(*m*) Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 5.

(*n*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 6.

(*o*) *Ibid.*, s. 9 (1).

(*p*) *Ibid.*, s. 9 (2); Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 7 (1); see title CROWN PRACTICE, Vol. X., pp. 14 *et seq.* As to the conclusiveness and proof of the decision of the local pension committee on any point as to the improper receipt of pension, see Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 7 (2).

(*q*) *Ibid.*, s. 7 (3).

SECT. 2.—*The Pension Authorities.*

SECT. 2. The Pension Authorities.

1324. The Old Age Pensions Acts (*r*) are administered by the Local Government Board (*s*) as the central pension authority (*t*), by local pension committees, and by pension officers who are appointed by the Treasury (*u*). These authorities act in accordance with regulations made by the Treasury in conjunction with the Board and with the Postmaster-General (so far as relates to the Post Office). Such regulations may prescribe the evidence to be required as to the fulfilment of statutory conditions; the manner in which claims to pensions are to be made, considered, and determined; the mode in which questions are to be raised; the number, quorum, term of office, and proceedings generally of the local pension committee; the use by the committee of any offices of a local authority; the payment of expenses; and other matters necessary for carrying the Acts into effect. Regulations must be laid before each House of Parliament (*a*).

Pension authorities. Regulations.

1325. The council of every county (*b*), and of each borough and urban district with a population of 20,000 or over, appoint a local pension committee for their area. The persons appointed to be members of a committee need not be members of the council appointing them. A committee may appoint sub-committees, consisting either wholly or partly of the members of the committee, and may delegate, either absolutely or conditionally, any of their powers and duties to any such sub-committee (*c*).

Local pension committee.

1326. All claims for old age pensions, and all questions whether the statutory conditions are fulfilled in the case of any claimant or pensioner, and all questions of disqualification, come before the local pension committee, who must, except in the case of a question which has been originated and already reported on by the pension officer, refer the claim or question to the pension officer for report and inquiry. The officer must inquire into and report upon the matter, and the committee then consider the case and give their decision (*d*).

Claims and questions.

1327. A question may be raised at any time, whether at any time or during any period a person has been in receipt of an old age pension when the statutory conditions were not fulfilled, or when he was

Raising questions.

(*r*) 8 Edw. 7, c. 40; 1 & 2 Geo. 5, c. 16.

(*s*) As to the Local Government Board generally, see title CONSTITUTIONAL LAW, Vol. VII., p. 103.

(*t*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 8 (3).

(*u*) *Ibid.*, s. 8 (4); Finance Act, 1908 (8 Edw. 7, c. 16), s. 14: Order in Council, 15th February, 1909; Old Age Pensions Regulations, 1911, r. 32.

(*a*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 10. The Old Age Pensions Regulations, 1911, have been made under this authorisation. The Treasury have also by Minute, dated 20th August, 1908, given instructions on financial matters to the pension committees.

(*b*) The Scilly Isles are deemed to be a county (Old Age Pensions Act, 1908 (8 Edw. 7, c. 40) s. 11 (3)).

(*c*) *Ibid.*, s. 8 (1), (2).

(*d*) *Ibid.*, s. 7 (1) (a), (b) For the duties of the officers, see the Old Age Pensions Regulations, 1911, rr. 9, 10.

SECT. 2. The Pension Authorities.

disqualified for receiving the pension; and whether a person has been at any time or during any period in receipt of a pension at a certain rate when his means exceeded the amount which justified the payment of a pension at that rate, and, if so, at what rate the pension, if any, should have been paid; and whether a person who is in receipt of a pension, at a certain rate, is, having regard to his means, entitled to a pension at a higher or a lower rate, and if so, at what rate the pension, if any, should be paid; and an application may be made at any time to alter or revoke a provisional allowance of a claim for a pension (*e*).

Any such question may be raised notwithstanding that a decision thereon involves a decision as to the correctness of a former decision of the committee or the central authority, but if by a later decision a former decision is reversed, a person who has received any sums on account of pension in accordance with the former decisions is entitled to retain such sum, in the absence of any fraud on his part (*f*).

Discontinuing pensions.

1328. Where a question is raised as to the disqualification of a person to receive an old age pension, and it is alleged that the disqualification has arisen since the person has been in receipt of the pension, and that the disqualification is continuing at the time the question is raised, or, if it has ceased, has ceased less than three weeks before that time, the payment of the pension must be discontinued, and no sum can be paid to the pensioner on account of the pension after the date on which the question is raised. But if the question is decided in favour of the pensioner, he will be entitled to receive all sums which would have been payable to him if the question had not been raised (*g*).

If the decision on any question involves the discontinuance of an old age pension, or the reduction of the rate at which the pension is paid, or if, in a case where the payment of the pension has been discontinued on the raising of the question, the question is not decided in favour of the pensioner, the person in respect of whose pension the decision is given is not entitled to receive a pension or to receive a pension at a rate higher than that determined by the committee or authority, as the case may be, notwithstanding any change of circumstances, unless he makes a fresh claim for the purpose and the claim is allowed, or, in a case where he alleges that he is entitled to receive a pension at a higher rate, raises a question for the purpose and the pension is allowed at a higher rate (*h*).

(*e*) Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 6 (1). The Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 7, applies to any such question or application (Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 7 (2)). These provisions appear to render unimportant the decisions in *R.* (*Pawley*) v. *Local Government Board for Ireland*, [1910] 2 I. R. 440, C. A., and *R.* (*Sinnott*) v. *Co. Wexford Local Pension Committee*, [1910] 2 I. R. 403.

(*f*) See Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 6 (3), which to this extent limits the effect of the Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 9 (2), as to which see p. 620, *ante*.

(*g*) Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 6 (4).

(*h*) *Ibid.*, s. 6 (5).

SECT. 2. The Pension Authorities. Appeals.

1329. The pension officer and any person aggrieved may appeal to the central pension authority against a decision of the local pension committee on any claim or question, and if any person, including the pension officer (*i*), is aggrieved by the refusal or neglect of a local pension committee to consider a claim or determine a question, that person may apply to the central authority, who may consider and determine the claim or question (*k*). Appeals and applications must be made within the time and in the manner prescribed by the regulations (*l*).

(*i*) Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 6 (6).
(*k*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 7 (1) (c), (d).
(*l*) *Ibid.* For these regulations, see Old Age Pensions Regulations, 1911, rr. 18—20. The Local Government Board must notify an applicant for a pension that an appeal has been taken, but is not bound to give him notice of the time or place fixed for hearing the appeal, nor need he be permitted to give evidence (*R.* (*Cairns*) v. *Local Government Board*, [1911] 2 I. R. 331).

PORT AND PORT DUES.

See SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

PORT OF LONDON.

See METROPOLIS; WATERS AND WATERCOURSES.

PORTIONS.

See EQUITY; INFANTS AND CHILDREN; SETTLEMENTS; WILLS.

PORTS AND HARBOURS.

See WATERS AND WATERCOURSES.

POSSESSION.

See DISTRESS; LANDLORD AND TENANT; MORTGAGE; PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL; RECEIVERS; SALE OF LAND; SHERIFFS AND BAILIFFS.

POSSESSORY TITLE.

See SALE OF LAND.

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See DESCENT AND DISTRIBUTION; PERPETUITIES; SETTLEMENTS; WILLS.

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See BONDS.

POST OFFICE.

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Part I.—Constitution.

SECT. 1.—*In General.*

1330. The Post Office is conducted by the Postmaster-General with the aid of an Assistant Postmaster-General, and a staff of permanent officials (*a*). Its business includes the transmission of inland, foreign, and colonial correspondence; the transmission of telegraphic messages; the conduct of telephone communications, and of wireless telegraphy (*b*), in respect of all of which it has a monopoly (*c*); the transmission of small sums through the post by means of money orders and postal orders (*d*); the conduct of the Post Office Savings Bank, and of investments in Government stock (*e*); life insurance, and the grant of annuities (*f*) through the medium of the Bank of England. It also sells postage stamps, post-cards, letter-cards, stamped envelopes and newspaper wrappers; issues local taxation

In general.

(*a*) The staff includes a solicitor, who is deemed duly qualified to act under the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12; see also Revenue Solicitors' Act, 1828 (9 Geo 4, c. 25); Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 47; Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 33; and title SOLICITORS.

(*b*) The business of the National Telephone Co., Limited, was transferred to the Post Office by the Telephone Transfer Act, 1911 (1 & 2 Geo. 5, c. 26), as amended by the Telephone Transfer Amendment Act, 1911 (1 & 2 Geo. 5, c. 56), and a working agreement between the Postmaster-General and Marconi's Wireless Telegraph Co., Limited, was concluded in March, 1912. As to licences for wireless telegraphy, see the Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24). As to telegraphs and telephones generally, see title TELEGRAPHS AND TELEPHONES. As to nuisance by telegraph wires, see title NUISANCE, Vol. XXI., p. 516.

(*c*) The Post Office originated in the provision by the Crown of messengers, starting at fixed times, and travelling by means of relays of horses, for the carriage of letters between London and two or three of the principal towns of the kingdom; a monopoly of the right so to carry letters was subsequently claimed. The first statutory grant of a monopoly was embodied in an Ordinance of the Protectorate; this was replaced by an Act passed soon after the Restoration, and the monopoly has been regranted from time to time in substantially the same form by successive statutes; that now in force is the Post Office Act, 1908 (8 Edw. 7, c. 48), ss. 3, 34 (2), (3); and see pp. 631, 660, *post*.

(*d*) See pp. 648, 649, *post*.

(*e*) See title BANKERS AND BANKING, Vol. I., pp. 579, 580.

(*f*) See titles BANKERS AND BANKING, Vol. I., p. 530; RENTCHARGES AND ANNUITIES.

SECT. 1. In General.

licences (*g*); carries parcels (*h*), pays old age pensions (*i*), and transacts various other Government business of minor importance (*j*).

SECT. 2.—*The Postmaster-General.*

SUB-SECT. 1.—*Appointment.*

Appointment.

1331. The Postmaster-General is appointed by His Majesty by letters patent, by the style of His Majesty's Postmaster-General (*k*). By virtue of such appointment the benefit of all contracts, bonds, securities, and things in action, vested in his predecessor, is transferred to, and vested in, the person so appointed, in the same manner as if he had been contracted with instead of his predecessor, and as if his name had been inserted therein instead of the name of his predecessor (*l*).

Appointment to the office of Postmaster-General does not disqualify the holder from being elected, or from sitting or voting, as a member of the House of Commons (*m*).

Oath.

1332. Upon acceptance of office the Postmaster-General must take the statutory oath of allegiance and official oath (*n*).

SUB-SECT. 2.—*Assistant Postmaster-General.*

Power to appoint Assistant Postmaster-General.

1333. The Postmaster-General may appoint an Assistant Postmaster-General, who is not, by reason of his office, incapable of being elected to, or of voting in, the House of Commons (*o*).

SUB-SECT. 3.—*Appointment of Officers.*

Power to appoint subordinates.

1334. The Postmaster-General has power by statute (*p*) to appoint such officers, deputies, agents, and servants as seem to him necessary.

Salaries.

The salaries of the Postmaster-General, the Assistant Postmaster-General, and of the permanent staff of the Post Office are paid out

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(*g*) See title REVENUE.

(*h*) See p. 653, *post*.

(*i*) See title POOR LAW.

(*j*) As to the duties of the Post Office under the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), see title WORK AND LABOUR. As to provisions under the Finance Act, 1911 (1 & 2 Geo. 5, c. 48), s. 20), for enabling the Post Office to exercise powers in relation to stamps etc., see title REVENUE.

(*k*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 33 (1); see title CONSTITUTIONAL LAW, Vol. VII., pp. 105, 106. See also p. 634, *post*.

(*l*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 33 (2). Balances standing in the name of the Postmaster-General are, at his death, resignation or removal, vested in and transferred to the public accounts of his successor (Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), s. 18).

(*m*) See Succession to the Crown Act, 1707 (6 Anne, c. 41); Post Office (Postmaster-General) Act, 1866 (29 & 30 Vict. c. 55), s. 1. As to the House of Commons generally, see title PARLIAMENT, Vol. XXI., pp. 655 *et seq*.

(*n*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), ss. 2, 3, 5. As to these oaths, see title CONSTITUTIONAL LAW, Vol. VII., pp. 24 *et seq*.

(*o*) Assistant Postmaster-General Act, 1909 (9 Edw. 7, c. 14), s. 1.

(*p*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 42. Any officer appointed under any Act repealed by the Post Office Act, 1908 (8 Edw. 7, c. 48), is deemed to have been appointed under the Post Office Act, 1908 (*ibid.*, s. 92 (b)). As to definition of "officer of the Post Office," see note (*a*), p. 630, *post*.

of moneys annually voted by Parliament upon estimates submitted by the Treasury (*q*).

SECT. 2. The Postmaster-General.

1335. The Postmaster-General is not liable for wrongful acts done by his subordinates in carrying on the business of the Post Office (*r*).

Acts done by Postmaster-General or his subordinates.

1336. Any act authorised or required to be done by, to, or before the Postmaster-General may, subject to his special directions, be done by, to, or before any officer, deputy, servant, and agent appointed by him (*s*). Any instrument requiring to be executed by the Postmaster-General, or to which he is a party, may be executed in his name by any of the secretaries of the Post Office; if so executed, it is deemed executed by him, and has effect accordingly (*t*). Any deed, instrument, money order, bill, cheque, receipt, or other document made for Post Office purposes by, to, or with His Majesty or any officer of the Post Office, is exempt from stamp duty (*u*). Any person having general or special authority under the seal of the Postmaster-General may, on his behalf, give any notice, or make any claim, demand, entry or distress which the Postmaster-General, in his corporate capacity or otherwise, might give or make; every such notice, claim, demand, entry or distress is deemed given and made by the Postmaster-General on behalf of His Majesty (*v*).

(*q*) The benefits of the Superannuation Act, 1859 (22 Vict. c. 26), are extended by the amending Acts (Superannuation Act Amendment Act, 1873 (36 & 37 Vict. c. 23), now repealed, and the Superannuation Act, 1881 (44 & 45 Vict. c. 43)) to persons appointed before 1882 to subordinate positions in the Post Office without certificate from the Civil Service Commissioners. The Post Office and Telegraph Act, 1897 (60 & 61 Vict. c. 41), s. 3, makes special provision for the superannuation of certain former servants of the Submarine Telegraph Co., Limited, and the Société Carmichael et Cie., who on 1st April, 1889, entered the permanent civil service; see Post Office Act, 1908 (8 Edw. 7, c. 48), s. 40, and the Annual Appropriation Acts. The Telephone Transfer Act, 1911 (1 & 2 Geo. 5, c. 26), provides for the transferred staff of the National Telephone Co., Limited; see title TELEGRAPHS AND TELEPHONES.

(*r*) *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178, C. A. See *Lane* v. *Cotton* (1701), 1 Ld. Raym. 646; approved in *Whitfield* v. *Le Despencer* (*Lord*) (1778), 2 Cowp. 754 (bank-note stolen by letter sorter); compare *Jones* v. *Monsell* (1872), 6 I. R. C. L. 155, and the decision (as to the Admiralty) in *Raleigh* v. *Goschen*, [1898] 1 Ch. 73; see also *Postmaster-General* v. *Green* (1887), 51 J. P. 582 (mistaken representation by clerk as to sum payable on telegram); as to liability for loss of postal packet, see pp. 642, 643, *post*; as to liability in respect of money orders, see p. 648, *post*.

(*s*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 42.

(*t*) *Ibid.*, s. 35 (1). Instruments purporting to be so executed are deemed duly executed till the contrary is proved (*ibid.*, s. 35 (2)).

(*u*) Under any statute past or future (*ibid.*, s. 38), but this provision does not apply so as to prevent increment value duty being collected on any instrument by which the transfer on sale of the fee simple of, or any interest in, any land, or the grant of any lease of any land to the Post Office, or to any officer on behalf of or for the purposes of the Post Office, is effected or agreed to be effected (Finance (1909-10) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 8), s. 10 (2)). The exemption from stamp duty does not extend to duty declared by the document, or some memorandum indorsed thereon, to be payable by some person other than the Postmaster-General, nor to any specific charge by a future Act (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 38); see title REVENUE.

(*v*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 37.

SECT. 2. The Postmaster-General.

Privileges of officers.

1337. No officer of the Post Office (*a*) can be compelled to serve as mayor (*b*) or sheriff, or in any ecclesiastical, corporate parochial or other public office or employment, or on any jury or inquest, or in the militia (*c*).

Return of property on vacation of office.

1338. Where an officer of the Post Office (*d*) vacates his office, whether by reason of dismissal, resignation, death, or otherwise, he, or, if he be dead, his personal representative or the person acting as such, must deliver to the Postmaster-General all articles, whether uniform, accoutrements, appointments, or other necessaries, issued to such officer for the execution of his duty, and not his property, in good order and condition, fair wear and tear only excepted (*e*).

SUB-SECT. 4.—*General Powers.*

General powers.

1339. The Postmaster-General has power to establish posts (*f*) and post offices (*g*) as he thinks expedient, and to collect, receive, forward, convey, and deliver, in such manner as he thinks expedient, all postal packets (*h*) transmitted within, or to, or from the British

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(*a*) "Officer of the Post Office" includes the Postmaster-General, and any person employed in any business of the Post Office, whether employed by the Postmaster-General, or by any person under him or on behalf of the Post Office (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 89); see note (*t*), p. 664, *post*.

(*b*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 43. As to the office of mayor, see title LOCAL GOVERNMENT, Vol. XIX., pp. 296 *et seq.*

(*c*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 43; see title JURIES, Vol. XVIII., p. 232, note (*e*). Exemption from the office of parish constable was given by the Parish Constables Act, 1850 (13 & 14 Vict. c. 20), s. 5. As to protection of officers of the Post Office in actions, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*d*) See note (*a*), *supra*.

(*e*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 44 (1). Any person failing to do so is liable on summary conviction to a fine not exceeding 40*s.*, and to pay such further sum, not exceeding 40*s.*, as the court may determine to be the value of the articles undelivered or of the damage done thereto (*ibid.*, s. 44 (2)). A justice of the peace in such case may issue a search warrant as in the case of stolen goods (*ibid.*, s. 44 (3)). As to search warrants generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 310; MAGISTRATES, Vol. XIX., p. 576; POLICE, p. 498, *post*.

(*f*) By the Post Office Act, 1908 (8 Edw. 7, c. 48), s. 92 (a), any post established under any Act thereby repealed continues as if established under the Post Office Act, 1908 (8 Edw. 7, c. 48).

(*g*) "Post office" is defined (*ibid.*, s. 89) as including any house, building, room, carriage, or place used for the purpose of the Post Office, and any post office letter box. The expression "post office letter box" includes any pillar box, wall box, or other box or receptacle provided by the permission or under the authority of the Postmaster-General for the purpose of receiving postal packets, or any of them, for transmission by or under his authority (*ibid.*). As to notices in post offices and as to early closing, see p. 645, *post*.

(*h*) "Postal packet" means a letter, post-card, reply post-card, newspaper, book packet, pattern or sample packet, or parcel, and every packet or article transmissible by post, and includes a telegram (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 89). Upon the question whether any postal packet is a letter or any other description of postal packet within the meaning of this Act, or any warrant or regulations made thereunder, the decision of the Postmaster-General is final; but the Treasury may, if they think fit, on the application of any person interested, reverse or modify the decision and order accordingly (*ibid.*, s. 19).

Islands (*i*) or any British possession (*k*), subject to the provisions contained in the Post Office Act, 1908 (*l*).

The Postmaster-General's powers extend to the Channel Islands and the Isle of Man (*m*), and to British possessions where there is a post established by him, subject to modification by Order in Council or by any enactment of the legislature of the possession (*n*).

Extent of powers.

1340. He may also, with the consent of the Treasury, either generally, or in the case of any particular person, authorise letters or other postal packets to be sent, conveyed, and delivered otherwise than by post (*o*), and the same to be collected otherwise than by an officer of the Post Office, subject to such conditions and restrictions as are specified in the Post Office regulations (*p*).

Power to authorise collection and despatch.

SUB-SECT. 5.—*Monopoly.*

1341. Subject to the provisions contained in the Post Office Act, 1908 (*q*), with respect to British possessions (*r*), the Postmaster-General has, subject to the exceptions set out below, wherever within His Majesty's dominions posts (*s*), or post communications, are for the time being established, the exclusive privilege (*t*) of conveying from one place to another all letters (*u*), and also the exclusive privilege of performing all the incidental services of receiving, collecting, sending, despatching, and delivering all letters.

Monopoly.

The exceptions are:—

(1) Letters sent by a private friend in his way, journey, or travel,

Exceptions.

(*i*) "British Islands" include the Channel Islands and the Isle of Man (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (1); see title STATUTES).

(*k*) "British possession" does not include the Channel Islands or Isle of Man (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 89); under the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (2), it includes any part of His Majesty's dominions exclusive of the United Kingdom.

(*l*) 8 Edw. 7, c. 48, s. 34 (1).

(*m*) *Ibid.*, s. 88.

(*n*) *Ibid.*, s. 84. As to the power of the legislature of a British possession to establish posts and the effect of the exercise of this power upon the Postmaster-General's position, see p. 657, *post*.

(*o*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 14 (a); see District Messenger Company Warrant, 1907 (Stat. R. & O., 1907, p. 913), and conditions therein contained.

(*p*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 14. For definition of "officer of the Post Office," see note (*a*), p. 630, *ante*.

(*q*) 8 Edw. 7, c. 48.

(*r*) See p. 657, *post*.

(*s*) "Post" here includes all post communications by land or water (except outward-bound vessels not being employed by or under the Post Office or Admiralty to carry postal packets (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 34 (6)). "Outward-bound" includes vessels bound from ports in the United Kingdom or in a British possession (*ibid.*, s. 89). For definition of "postal packet," see note (*h*), p. 630, *ante*. It is unlawful to make a collection of letters for transmission by a private outward-bound vessel (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 34 (2)).

(*t*) *Ibid.*, s. 34 (2). The postal monopoly only is here dealt with; for the Postmaster-General's telegraph and telephone monopoly, see title TELEGRAPHS AND TELEPHONES.

(*u*) "Letter" here includes packet (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 34 (7)). The monopoly does not extend to newspapers (*ibid.*, s. 20 (3); see pp. 646 *et seq.*, *post*), or to parcels (see pp. 653, 654, *post*).

SECT. 2. The Postmaster-General.

so as those letters be delivered by him to the person to whom they are directed;

(2) Letters sent by a messenger on purpose, concerning the private affairs of the sender or receiver thereof (*v*);

(3) Commissions or returns thereof, and affidavits and writs, process or proceedings, or returns thereof, issuing out of a court of justice;

(4) Letters sent out of the British Islands by a private vessel, not being a vessel carrying postal packets (*a*) under contract;

(5) Letters of merchants, owners of vessels of merchandise, or the cargo or loading therein, sent by those vessels of merchandise or by any person employed by those owners for the carriage of those letters, according to their respective directions, and delivered to the respective persons to whom they are directed, without paying or receiving hire or reward, advantage or profit for the same in any wise (*b*);

(6) Letters concerning goods or merchandise sent by common known carriers (*c*), to be delivered with the goods which those letters concern, without hire or reward or other profit or advantage for receiving or delivering those letters.

Collection of excepted letters not authorised.

1342. None of these statutory exceptions authorise anyone to make a collection of such excepted letters for the purpose of sending them in the manner thereby authorised (*d*).

Persons forbidden to carry or receive letters.

1343. Subject as aforesaid, the following persons are (*e*) expressly forbidden to carry a letter, or to receive or collect or deliver a letter, although they receive no hire or reward for it:—

(1) Common known carriers (*c*), their servants or agents, except a letter concerning goods in their carts or waggons or on their pack horses (*f*), and owners, drivers, or guards of stage coaches;

(2) Owners, masters, or commanders of ships, vessels, or steam-boats, sailing or passing coastwise or otherwise between ports or places within the British Islands, or between, to, or from any ports within His Majesty's dominions out of the British Islands, or their servants or agents, except in respect of letters of merchants, owners of ships or goods on board;

(3) Passengers or other persons on board any such ship, vessel, or steam-boat;

(4) The owners of, or sailors, watermen, or others on board, a

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(*v*) See *Circular Delivery Co., Ltd.* v. *Clare* (1869), 20 L. T. 701 (conviction under the similar provision in the Post Office (Management) Act, 1837 (7 Will. 4 & 1 Vict. c. 33), repealed by Post Office Act, 1908 (8 Edw. 7, c. 48).

(*a*) For definition of "postal packet," see note (*h*), p. 630, *ante*.

(*b*) As to shipping generally, and as to owners and masters of ships, see title SHIPPING AND NAVIGATION.

(*c*) As to who is a common carrier, see title CARRIERS, Vol. IV., pp. 1—5.

(*d*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 34 (2).

(*e*) *Ibid.*, s. 34 (3).

(*f*) See *Bennett* v. *Clough* (1818), 1 B. & Ald. 461 (a decision under stat. (1802) 42 Geo. 3, c. 81, s. 6 (now repealed)).

ship, vessel, steam-boat, or other boat or barge passing or repassing on a river or navigable canal within His Majesty's dominions (*g*).

1344. Any unauthorised person who sends or causes to be sent, or tenders or delivers in order to be sent, or conveys, or performs any service incidental to conveying, otherwise than by post (*h*), any letter not excepted from the exclusive privilege of the Postmaster-General, or makes a collection of those excepted letters for the purpose of conveying or sending them either by post or otherwise, is liable on summary conviction to a fine not exceeding £5 for every letter, or, if he be in the practice of doing any of the said things, to a forfeit of £100 for every week during which the practice is continued (*i*). Offences and penalties.

SECT. 3.—*Finance.*

SUB-SECT. 1.—*Revenue.*

1345. The gross revenues of the Post Office (*j*) must be paid at the times and under the regulations prescribed by the Treasury, to the account of His Majesty's Exchequer at the Bank of England and the Bank of Ireland respectively (*k*). But of the gross receipts (*l*) from the carriage of postal parcels (*m*) conveyed by railway (*n*), eleven-twentieths, or, upon revision, such other amount as may be fixed by agreement or arbitration (*o*), must by statute (*p*) be apportioned and paid to the railway companies through the medium of the London Railway Clearing Committee (*q*). To whom revenue payable.

1346. Post Office revenue vested in the Crown is alienable, chargeable, or grantable by the Sovereign for his or her life only; all gifts, grants, or alienations made otherwise are null and void (*r*). Vested in Crown.

(*g*) As to rivers and navigable canals, see titles RAILWAYS AND CANALS; WATERS AND WATERCOURSES.

(*h*) See definition, note (*s*), p. 631, *ante*.

(*i*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 34 (4), (5). As to offences and penalties generally, see p. 660, *post*.

(*j*) After deduction of payments for draw-backs, bounties of the nature of draw-backs, repayments, and discounts (Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), s. 10).

(*k*) *Ibid.*; and see title REVENUE.

(*l*) See Post Office (Parcels), Act 1882 (45 & 46 Vict. c. 74), ss. 2 (2), 4.

(*m*) "Parcels" are all such postal packets as by the Regulations of the Treasury, made under the Post Office Act, 1908 (8 Edw. 7, c. 48), are defined to be parcels (Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74), s. 17; Post Office Act, 1908 (8 Edw. 7, c. 48), s. 91). See Inland Post Warrant, 1903, s. 79 (Stat. R. & O. Rev., Vol. X., Post Office, p. 32).

(*n*) See p. 653, *post*.

(*o*) See Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74), s. 8. Under the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 53), and amending Acts, and now by the Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), s. 1, at the instance of any party, the Railway and Canal Commission are the tribunal of arbitration, as to which see titles COURTS, Vol. IX., p. 217: RAILWAYS AND CANALS.

(*p*) Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74), s. 6.

(*q*) *Ibid.*, ss. 5, 12; and see Railway Clearing Act, 1850 (13 & 14 Vict. c. xxxiii); title RAILWAYS AND CANALS.

(*r*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 39; see also Crown Lands Act, 1702 (1 Anne, c. 1), s. 7, confirmed by Civil List Act, 1837 (1 & 2 Vict. c. 2), s. 1; Civil List Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 28); see title CONSTITUTIONAL LAW, Vol. VII., p. 108.

SECT. 3. SUB-SECT. 2.—*Finance.*

Finance.

Expenses.

1347. Without prejudice to the provision above-mentioned as to payment for the carriage of parcels, all expenses incurred by the Postmaster-General in the management of the Post Office are paid out of moneys provided by Parliament (*s*).

SUB-SECT. 3.—*Accounts.*

Accounts.

1348. The Postmaster-General must cause such accounts to be kept of the Post Office revenue and expenses by such officers and under such regulations as the Treasury direct (*t*).

Audit.

1349. The Comptroller and Auditor-General must, if so required by, and according to any regulations prescribed by, the Treasury, examine and audit the accounts of the Post Office (*a*).

Part II.—Dealings with Land.

SECT. 1.—*Holding of Land.*

Postmaster-General a corporation sole.

1350. The Postmaster-General for the time being is a corporation sole (*b*) for the purpose of acquiring and holding land (*c*). All land vested in him is held in trust for His Majesty for the purpose of the Post Office (*d*).

SECT. 2.—*Acquisition of Land.*

Power to purchase land.

1351. The Postmaster-General, with the consent of the Treasury, may purchase land for the purpose of the Post Office (*e*). Such

(*s*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 40.

(*t*) *Ibid.*, s. 41. Accounts of the payments of gross revenues into the Exchequer must be rendered to the Comptroller and Auditor-General daily, in such form as the Treasury may prescribe (Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), s. 10).

(*a*) *Ibid.*, s. 33.

(*b*) By the name of His Majesty's Postmaster-General with perpetual succession and an official seal (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 45 (1)); see title CORPORATIONS, Vol. VIII., p. 305. As to the purpose of his incorporation, see *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178, C. A., *per* MATHEW, L.J., at pp. 193, 194; as to the effect of his demise, see some observations of F. W. Maitland, Law Quarterly Review, Vol. XVII., p. 145; see title CONSTITUTIONAL LAW, Vol. VII., pp. 105, 106; and see, further, p. 628, *ante*.

(*c*) "Land" here includes any right or easement in, over, or in respect of land (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 46 (4)).

(*d*) The "purpose of the Post Office" means any purpose of any of the Post Office Acts or of any Acts for the time being in force relating to Post Office money orders, Post Office telegraphs, or Post Office savings banks, and includes any purpose relating to or in connection with the execution of the duties for the time being undertaken by the Postmaster-General or any of his officers (*ibid.*, s. 89).

(*e*) *Ibid.*, s. 46 (1), and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 162; see definition of "land" in note (*c*), *supra*. See also the text, *supra*. The vendor or lessor is not bound or entitled to inquire if the dealing has statutory authority or the consent of the Treasury (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 47 (3)). Where the Postmaster-General has purchased land, compulsorily or by agreement, for the purposes of the Post Office, with notice of restrictive

purchase is sometimes made under special statutory powers (*f*); it may also be made under the provisions of the Lands Clauses Acts (*g*), which are incorporated with the Post Office Act, 1908 (*h*), except the provisions relating to access to the special Act (*i*).

The provisions of these incorporated Acts with respect to compulsory purchase of land must not be put in force until the sanction of Parliament has been obtained (*j*).

Sanction of Parliament required to purchase compulsorily.

1352. At least three months before application is made to Parliament for sanction to the compulsory purchase of land, the Postmaster-General, with the consent of the Treasury, must serve a notice on every owner or reputed owner, lessee or reputed lessee, and occupier of any land intended to be so purchased, describing the land intended to be taken, and in general terms the purposes to which it is to be applied, and stating the intention of the Treasury to obtain the sanction of Parliament to the purchase thereof, and inquiring whether the person so served assents or dissents to the taking of his land, and requesting him to forward to the Treasury any objections he may have to his land being taken (*k*). The Treasury must, at some time after the service of the notice, make a local inquiry by a competent officer into the objections made by any persons whose land is required to be taken, and by any other persons interested (*l*). The Treasury, if satisfied after inquiry that

Procedure to obtain sanction.

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covenants thereon, the covenantee's remedy for injury is to claim compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68 (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 43), and not damages by action for breach of covenant (see *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437, C. A.). Similarly, interference by a Post Office building with ancient lights cannot be restrained, but gives rise to a claim for compensation. As to acquisition of rights to light as against the Crown, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 309. For a case of alleged breach of covenant by the Postmaster-General to use premises as a post office for the district, see *Wadham* v. *Postmaster General* (1871), L. R. 6 Q. B. 644. For form of lease to the Postmaster-General, see Encyclopædia of Forms and Precedents, Vol. VII., p. 418. As to increment value duty and stamp duty, see p. 629, *ante*.

(*f*) For example, power was given by the Post Office Extension Act, 1865 (28 & 29 Vict. c. 87), to purchase a site for the extension of the General Post Office in St. Martin's-le-Grand, and by the Post Office (Sites) Act, 1885 (48 & 49 Vict. c. 45), to acquire certain lands in London, Birmingham, Bristol, and Newcastle-upon-Tyne for the public service. The Public Buildings Expenses Act, 1898 (61 & 62 Vict. c. 5), provided for defraying expenses of purchase of land for, and works on, Post Office buildings at Queen Victoria Street and West Kensington; see also Public Buildings Expenses Act, 1903 (3 Edw. 7, c. 41).

(*g*) See title REAL PROPERTY AND CHATTELS REAL.

(*h*) 8 Edw 7, c. 48, s. 46.

(*i*) In construing those Acts for this purpose, the Post Office Act, 1908 (8 Edw. 7, c. 48), is the "special Act," the Postmaster-General is "the promoter of the undertaking," and "land" has the meaning as in note (*c*), p. 634, *ante* (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 46 (2) (a)). The bond required by the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 85, must be under the Postmaster-General's seal, and is sufficient without sureties (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 46 (2) (b)).

(*j*) *Ibid.*, s. 46 (2) (c).

(*k*) *Ibid.*, s. 46 (2) (c), (d).

(*l*) *Ibid.*, s. 46 (2) (e).

SECT. 2. Acquisition of Land.

the land ought to be taken, may submit a Bill to Parliament authorising the Postmaster-General to take the land. Any such Bill is deemed to be a public Bill, and, if passed into an Act, to have conveyed the sanction of Parliament to the compulsory purchase therein mentioned. The period for the compulsory purchase is three years after the passing of the Act (*m*).

Lands belonging to Duchy of Lancaster.

1353. Where the Postmaster-General deems it expedient, with the consent of the Treasury, to purchase for the purpose of the Post Office any land belonging to His Majesty in right of the Duchy of Lancaster, the Chancellor and Council of the Duchy may, if they think fit, agree with the Postmaster-General for the sale of, and may absolutely make sale of, such land for such sum of money as may to them appear sufficient consideration for the same (*n*).

SECT. 3.—*Disposition of Land.*

General powers as to disposition of land.

1354. The Postmaster-General may, with the consent of the Treasury, sell, exchange (*o*), lease, or surrender on any terms, any land for the time being vested in him (*p*), stipulating for, creating, or reserving all such rights or easements as may be deemed proper (*q*). He may sell either by public auction or by private contract, and may make any stipulations, as to title or otherwise, in any conditions of sale or contract of sale or exchange, and may buy in at any auction, and may rescind or vary any contract for sale or exchange, and may re-sell or re-exchange any such land (*r*).

Part III.—Conduct of Business.

SECT. 1.—*Regulations.*

Regulations.

1355. The Treasury may make regulations by warrant (*s*), on

(*m*) If while the Bill is pending in either House of Parliament a petition is presented against anything comprised therein, the Bill may be referred to a select committee, and the petitioner may appear and oppose as in the case of private Bills (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 46 (2) (f)). See also title PARLIAMENT, Vol. XXI., pp. 747 *et seq.*

(*n*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 46 (3). The land may be assured to the Postmaster-General, and the money is to be paid and dealt with as if the land had been sold under the Duchy of Lancaster Lands Act, 1855 (18 & 19 Vict. c. 58). See also title CONSTITUTIONAL LAW, Vol. VII., pp. 221, 222, 228.

(*o*) On any such exchange he may give or receive any money for equality of exchange (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 47 (1)).

(*p*) *Ibid.* No party to the dealing is bound or entitled to inquire whether statutory authority or the consent of the Treasury has been given thereto (*ibid.*, s. 47 (3)).

(*q*) *Ibid.*, s. 47 (2).

(*r*) *Ibid.*, s. 47 (1). As to stamp duty, see p. 629, *ante*.

(*s*) Any such warrant may be signified in manner provided by the Treasury Instruments (Signature) Act, 1849 (12 & 13 Vict. c. 89); any order, consent, authority, or direction of the Treasury (not being a warrant) under the Post Office Act, 1908 (8 Edw. 7, c. 48), may be signified either as by that Act provided, or under the hand of one of their secretaries or assistant secretaries (see p. 629, *ante*) (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 83). Warrants or regulations made under any Act repealed by the Post Office Act, 1908 (8 Edw. 7, c. 48), may be revoked or altered by

SECT. 1. Regulations.

the representation of the Postmaster-General (*t*), with respect to all matters authorised or required by the Post Office Act, 1908 (*u*), to be effected by Post Office regulations (*v*). All Post Office regulations must be laid as soon as may be before both Houses of Parliament, and a notice of the regulations having been made, and of the place where copies of them can be purchased, must be published in the *London Gazette* (*w*).

SECT. 2.—*Postage.*

SUB-SECT. 1.—*In General.*

Power to charge postage.

1356. On all postal packets (*x*) which are conveyed or delivered for conveyance by post under his authority, the Postmaster-General has power to charge, for the use of His Majesty, such postage (*y*) and other sums as may be fixed by the Treasury by warrant (*z*).

SUB-SECT 2.—*Rates of Postage.*

Control of Treasury over rates.

1357. The Treasury may within certain limits (*a*), by warrant (*b*), fix the rates of postage (*c*) and other sums to be charged in respect

warrant under the Post Office Act, 1908 (8 Edw. 7, c. 48), but, if not so revoked or altered, they remain in force (*ibid.*, s. 92 (d)).

(*t*) *Ibid.*, s. 82 (1).

(*u*) 8 Edw. 7, c. 48.

(*v*) "Post Office regulations" are regulations for the time being in force made under the Post Office Act, 1908 (8 Edw. 7, c. 48), by warrant of the Treasury, whether made upon the recommendation of the Postmaster-General or otherwise (*ibid.*, s. 89). The matters authorised or required to be effected by Post Office Regulations are:—Rates of postage (see the text, *supra*, and pp. 638, 639, *post*); conditions of transit (see p. 642, *post*); circulars or marks on newspapers not chargeable as letters (p. 639, *post*); re-direction of postal packets (p. 639, *post*), and of privileged letters (p. 641, *post*); postal arrangements with foreign States (p. 657, *post*); stamping paper provided privately (p. 640, *post*); collection and delivery of letters not by post (p. 631, *ante*); detention of book-packets (p. 643, *post*); indecent communications (p. 644, *post*); newspaper supplements (p. 647, *post*); literature for the blind (p. 638, *post*); money orders (p. 648, *post*); postal orders (p. 648, *post*); and gratuities to masters of vessels (p. 656, *post*). See the warrants thereat severally referred to; as to the effect thereof, see Post Office Guide. See also note (*p*), p. 642, *post*. As to proof of Post Office regulations, see Post Office Act, 1908 (8 Edw. 7, c. 48), s. 36; see title EVIDENCE, Vol. XIII., p. 525, note (*q*).

(*w*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 82 (2).

(*x*) See note (*h*), p. 630, *ante*.

(*y*) "Postage" means the duty chargeable for the transmission of postal packets (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 89). All duties of postage and other sums in respect of postal packets payable in pursuance of the Post Office Act, 1908 (8 Edw. 7, c. 48), or any warrant or regulations made thereunder, are chargeable as stamp duties, and all enactments relating to stamp duties apply thereto (*ibid.*, s. 10). As to provisions under the Finance Act, 1911 (1 & 2 Geo. 5, c. 48), s. 20, for enabling the Post Office to exercise powers in relation to stamps etc., see title REVENUE.

(*z*) Post Office Act, 1908 (8 Edw. 7, c. 48), ss. 1, 2.

(*a*) See p. 638, *post*.

(*b*) See note (*s*), p. 636, *ante*. A warrant under the Post Office Act, 1908 (8 Edw. 7, c. 48), may, subject to the limitations therein contained, revoke and alter any existing rate of postage or other sums, and any existing warrant and regulation made under any Act thereby repealed (*ibid.*, s. 92 (d)).

(*c*) See note (*y*), *supra*.

SECT. 2. Postage.

of postal packets (*d*) under the Post Office Act, 1908 (*e*); and may regulate the scale of weights and the circumstances according to which those rates and sums are to be charged, and the power of the Postmaster-General, with or without the consent of the Treasury, to remit any such rates or sums (*f*).

Scale of inland rates.

1358. In the British Islands the minimum rate for an inland (*g*) letter must be one penny; the maximum prepaid rate for (1) an inland post-card (*h*), one halfpenny; (2) a reply post-card, double that sum; (3) an inland book packet, one halfpenny for every two ounces in weight, or for any fractional part of two ounces above the first or any additional two ounces; (4) each inland registered newspaper, whether with or without a supplement or supplements, and whether single or in a packet of two or more, one halfpenny; but for an inland packet of two or more registered newspapers, with or without a supplement or supplements, the maximum rate is the prepaid postage for an inland book packet of the same weight (*i*).

Special rates.

1359. A Treasury warrant may also fix special rates and regulations for the transmission by post of postal packets consisting of books and papers impressed for the use of the blind (*j*).

Foreign and colonial rates and control of Treasury.

1360. Rates of postage between the United Kingdom and British possessions and foreign countries are fixed by the Postal Union Convention, except in the case of the very few countries which are not parties to the Postal Union, when the rates are the subject of special agreement (*k*). The Treasury is by statute (*l*) authorised to make regulations, by warrant, for carrying into effect the provisions of the Postal Union Convention, so far as they relate to foreign States, and any other arrangements, with respect to the conveyance by post of postal packets between the British Islands and places out of the British Islands, or between places out of the British Islands (*m*).

(*d*) See note (*h*), p. 630, *ante*.

(*e*) 8 Edw. 7, c. 48.

(*f*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 2.

(*g*) "Inland," used in relation to any postal packet or description thereof, means, in the case of the British Islands, posted therein and addressed to some place therein; in the case of a British possession, posted therein and addressed to some place therein; used in relation to postage, it means the postage charged on the packet (*ibid.*, s. 89).

(*h*) See note (*i*), p. 643, *post*.

(*i*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 2 (1) (a), (b).

(*j*) *Ibid.*, s. 2 (1) (d); see Inland Post Warrant, 1903 (Stat. R. & O. Rev., Vol. X., Post Office, p. 8), as amended by Inland Post Amendment (No. 9) Warrant, 1907 (Stat. R. & O., 1907, p. 876) (rates of postage), and Inland Post Amendment (No. 10) Warrant, 1908 (Stat. R. & O., 1908, p. 714) (special conditions relating to literature for the blind).

(*k*) A meeting of all States belonging to the Union is held about every five years, and between the meetings the business of the Union is transacted by the International Postal Bureau at Berne. The Convention originally made at Berne in 1875 is revised at the successive meetings; the last revision took place at Rome in 1906.

(*l*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 4.

(*m*) See p. 657, *post*. As to the maximum rate of prepaid postage on newspapers, not being inland postage, see p. 646, *post*.

Regulations as to exemptions.

1361. Post Office regulations (*n*) may determine (1) what circulars or what commercial, legal, and other similar documents (*o*), and (2) what marks or indications referring to the contents of a registered newspaper (*p*), when written or printed on the newspaper or its cover, shall not be charged with postage as letters (*q*).

Such regulations may also make provisions respecting the re-direction of postal packets, and the transmission of postal packets so re-directed, either free of charge or subject to such postage as may be specified in the regulations (*r*).

SUB-SECT. 3.—*Payment of Postage.*

Mode of payment.

1362. Postage is usually prepaid by means of stamps. When an inland letter or packet (other than Votes or Parliamentary Proceedings (*s*)) in the British Islands is not prepaid or is insufficiently prepaid, the postage charged thereon is, subject to any Treasury Warrant under the Post Office Act, 1908) (*t*), double the postage otherwise chargeable on the deficiency (*u*).

Where postage not, or insufficiently, prepaid.

1363. Where the postage or any other sum chargeable on any postal packet (*v*) is not prepaid by the sender, or is insufficiently prepaid, the postage or sum, or the deficiency, as the case may be, must be paid by the addressee on the delivery thereof to him; or, if the postal packet is refused, or the addressee is dead or cannot be found, by the sender (*w*). In such case of non-prepayment or insufficient prepayment, if the addressee, on receiving the packet and paying the amount due, desires to reject it, and to compel the sender thereof to pay the amount due, the Postmaster-General, on the application of the addressee, and subject to Post Office regulations (*x*), may charge the postage or other sum, or deficiency, as the case may be, to the sender, with the additional postage of returning the packet to him: the sender must then pay the said charges, and on payment thereof by him the Postmaster-General must repay the addressee (*a*).

Postage may be prepaid in certain cases by money (*b*).

(*n*) See p. 636, *ante*; and see Post Office Guide.
(*o*) See Inland Post Amendment (No. 7) Warrant, 1906 (Stat. R. & O., 1906, p. 526).
(*p*) See p. 646, *post*; see Inland Post Warrant, 1903, s. 30.
(*q*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 2 (3).
(*r*) *Ibid.*, s. 2 (4); see Inland Post Warrant, 1903, ss. 40—44.
(*s*) See p. 641, *post*.
(*t*) 8 Edw. 7, c. 48.
(*u*) *Ibid.*, s. 2 (2). As to parcels and for detailed rates of postage, see Post Office Warrants, the effect of which appears in the Post Office Guide.
(*v*) See note (*h*), p. 630, *ante*.
(*w*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 3 (1).
(*x*) See p. 636, *ante*; and see Post Office Guide.
(*a*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 3 (2). But the addressee is none the less liable to pay the postage or other sum chargeable on a packet or any deficiency thereon on the delivery thereof to him (*ibid.*, s. 3 (3)), unless he refuses to accept the packet without opening it.
(*b*) See Inland Post Amendment (No. 1) Warrant, 1904 (Stat. R. & O., 1904, p. 589), and Post Office Guide. As to telegrams, see title TELEGRAPHS AND TELEPHONES.

SECT. 2. Postage.

SUB-SECT. 4.—*Recovery of Postage.*

Recovery similar to revenue duties.

1364. All postage (*c*) and other sums payable under the Post Office Act, 1908 (*d*), in respect of postal packets (*e*), may be recovered in like manner as any duties granted to His Majesty by an Act relating to His Majesty's revenue (*f*) are recoverable by law (*g*).

Sums not exceeding £20.

Sums not exceeding £50.

Any sum not exceeding £20, due from any person for postage or in respect of postal packets, may be recovered in the United Kingdom summarily as a civil debt (*h*); any such sum, not exceeding £50, may be recovered in Ireland, without prejudice to any other mode of recovery, in the civil bill court (*i*).

Procedure on recovery.

1365. In proceedings for the recovery of postage or other sums in respect of postal packets, the production of any postal packet in respect of which such recovery is sought, having thereon a Post Office stamp denoting that the packet has been refused or rejected, or that the addressee was dead or could not be found, is *primâ facie* evidence of the fact denoted (*k*); and the person from whom such postal packet purports to have come is, until the contrary be proved, deemed to be the sender of the packet (*l*). The official mark of any sum on any postal packet as due to the Post Office, British, colonial, or foreign, in respect of that packet, must in every British court, within or without the United Kingdom, be received as evidence of the liability of the packet to the sum so marked, and the sum is recoverable in any such court as postage due to His Majesty (*m*).

Powers of Inland Revenue as to stamping stationery.

1366. The Commissioners of Inland Revenue may, under regulations made or sanctioned by the Treasury, stamp any paper sent to them for the purpose of being stamped as covers or envelopes of letters or packets, with stamps denoting the several rates of postage on payment of the amount of the stamps required to be impressed on the paper, and, unless the amount exceeds £10, on payment of such added fee as the Treasury may direct (*n*).

SUB-SECT. 5.—*Exemptions from Postage.*

Statutory exceptions:—

1367. There are certain statutory exemptions from the liability to payment of postage (*o*). Petitions and addresses forwarded to His

Petition to the King.

(*c*) See note (*y*), p. 637, *ante*.
(*d*) 8 Edw. 7, c. 48.
(*e*) See note (*h*) p. 630, *ante*.
(*f*) See title REVENUE.
(*g*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 7 (1). In the Channel Islands and Isle of Man, as a debt due to the Crown (*ibid.*).
(*h*) *Ibid.*, s. 7 (2). As to recovery of debts summarily, see title MAGISTRATES, Vol. XIX., pp. 609, 610.
(*i*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 7 (3).
(*k*) *Ibid.*, s. 8 (1).
(*l*) *Ibid.*, s. 8 (2).
(*m*) *Ibid.*, s. 9.
(*n*) *Ibid.*, s. 11; see title REVENUE. As to the application of enactments relating to stamp duties to postage, see note (*y*), p. 637, *ante*.
(*o*) See note (*y*), p. 637, *ante*.

Majesty by post are exempt from postage (*p*). Members of each House of Parliament may receive by post petitions and addresses to His Majesty and petitions addressed to either House of Parliament, not exceeding thirty-two ounces in weight, exempt from postage, provided the same are sent without covers, or in covers open at the sides (*q*).

Petitions to members of Parliament.

1368. The postage charged upon any Votes or Parliamentary Proceedings sent by post within the British Islands, not prepaid or insufficiently prepaid, is, subject to any Warrant of the Treasury under the Post Office Act, 1908 (*r*), the postage or deficiency which would otherwise be chargeable on them (*s*).

Votes or Parliamentary Proceedings.

1369. Certain seamen and soldiers (*a*) are privileged to send and receive letters, not exceeding half an ounce in weight, by post, or by private ships between the British Islands and places beyond the seas, on their own private concerns, at a postage of one penny for each letter when prepaid, subject in the case of letters sent by private ship to the payment of the gratuities payable to the master of the ship (*b*). The enjoyment of the privilege is subject to the following provisions:—On any such letter sent by (*c*), or to be received by (*d*), any such privileged person, postage must be duly prepaid on the letter being posted, unless sent from parts beyond the seas; on such letters sent or received from parts beyond the seas, if the postage of one penny is not prepaid, postage of twopence is charged to the receiver (*e*). In the case of letters sent by a privileged person the writer's name, his class or description in the vessel, regiment, corps, or detachment, to which he belongs, must appear with the direction on the letter, and the name of such vessel, regiment, corps, or detachment, and the signature of the officer commanding it, must be written on the letter by the said officer in his own handwriting (*f*). Any such letter to be received

Seamen and soldiers.

Provisions as to privilege.

(*p*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 5 (1).
(*q*) *Ibid.*, s. 5 (2).
(*r*) 8 Edw. 7, c. 48; see p. 636, *ante*.
(*s*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 5 (3).
(*a*) The privileged persons are the following, while actually employed in His Majesty's service whether at home or abroad:—For all purposes, every non-commissioned officer (not being a warrant officer); every bandmaster, schoolmaster, and soldier in any of His Majesty's regular forces within the meaning of the Army Act, any special reservists within the meaning of the Territorial and Reserve Forces Act, 1907 (1 Edw. 7, c. 9), Part III. (see title ROYAL FORCES); every seaman in His Majesty's Navy or Indian Marine Service; and, as regards re-direction, every officer, commissioned or not, in the said regular forces, every commissioned officer in the special reserve of officers, and every non-commissioned officer in any body of special reservists, and every officer, commissioned or not, in the said Navy or Marine Service, and every midshipman and master's mate in His Majesty's Navy (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 6 (4)). As to the military and naval forces generally, see title ROYAL FORCES. For various offences arising out of the abuse of this privilege, see p. 660, *post*.
(*b*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 6 (1).
(*c*) *Ibid.*, s. 6 (2) (a).
(*d*) *Ibid.*, s. 6 (2) (c).
(*e*) *Ibid.*, s. 6 (2) (f).
(*f*) *Ibid.*, s. 6 (2) (b).

SECT. 2. Postage.

by a privileged person must be directed to that person, and the vessel, regiment, corps, or detachment to which he belongs must be specified in the direction (*g*); and must not be delivered to any person except the privileged person to whom it is addressed, or to some person authorised in writing to receive the letter by the officer in command (*h*).

SECT. 3.—*Conditions of Transit of Postal Packets.*

SUB-SECT. 1.—*In General.*

General conditions.

1370. All postal packets (*i*) must be posted (*k*), forwarded, conveyed, and delivered (*l*) subject to such provisions, conditions, prohibitions, and restrictions respecting the time and mode of posting and delivery, and of the payment of postage (*m*) and other sums in respect thereof chargeable under the Post Office Act, 1908 (*n*), or any warrant or regulations made thereunder, and respecting the registration of, and giving receipts for, and giving and obtaining certificates of posting and delivery of any postal packet, and the sums to be paid in addition to any other postage for that registration, receipt, or certificate, and respecting stamps, covers, form, dimensions, maximum weight, inclosures, the use of packets (other than letters) for making communications, and otherwise, as may be directed by Post Office regulations (*o*).

SUB-SECT. 2.—*Liability for Loss.*

Liability for loss.

1371. The Postmaster-General is not liable for the loss of a postal packet, or for any injury to the packet (*p*), in the course of its transmission by post (*q*).

Registered postal packets.

Postal packets may be registered (*r*) upon payment of a small fee, and registration ensures a hand to hand check throughout the transmission.

Certificates of posting.

A certificate of the posting of an unregistered inland parcel and

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(*g*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 6 (2) (d).

(*h*) *Ibid.*, s. 6 (2) (e). A Treasury Warrant under the Post Office Act, 1908 (8 Edw. 7, c. 48), with respect to rates of postage, must, if necessary, provide for the delivery of letters of privileged persons on their own private affairs, not exceeding, in the case of privileged persons other than such commissioned and warrant officers and midshipmen and master's mates as mentioned in note (*a*), p. 641, *ante*, half an ounce in weight, free from any postage in respect of re-direction (*ibid.*, s. 6 (3)).

(*i*) See note (*h*), p. 630, *ante*.

(*k*) As to proof of posting, see p. 659, *post*. As to certificate of posting, see note (*g*), p. 646, *post*.

(*l*) As to proof of delivery, see p. 659, *post*.

(*m*) As to definition of "postage" see note (*y*), p. 637, *ante*.

(*n*) 8 Edw. 7, c. 48.

(*o*) *Ibid.*, s. 12.

(*p*) See *Lane* v. *Cotton* (1701), 1 Ld. Raym. 646, approved in *Whitfield* v. *Le Despencer* (*Lord*) (1778), 2 Cowp. 754 (bank-note stolen by letter-sorter).

(*q*) For definition, see Post Office Act, 1908 (8 Edw. 7, c. 48),.s. 90 (a). As to the effect of delay or loss in the post upon formation or revocation of contract, payment etc., see p. 658, *post*.

(*r*) For particulars of these several services, see the Postal Guide. They are sanctioned, so far as necessary, by Treasury Warrant. For service by registered post, see p. 658, *post*.

of an insured foreign or colonial parcel can also be obtained, and a certificate of the delivery of most articles of registered or insured foreign or colonial correspondence.

An inland postal packet may also be sent by express messenger throughout its entire course, in which case it can be traced from hand to hand (*s*).

SECT. 3. **Conditions of Transit of Postal Packets.**

Express packets.

1372. The registration of, or giving a receipt for, a postal packet (*a*), or the giving or obtaining of a certificate of posting or delivery of a postal packet (*b*), does not, however, make the Postmaster-General or the Post Office revenue in any manner liable for the loss of the packet or its contents (*c*). Nevertheless, subject to certain rules, and within certain limits, the Postmaster-General voluntarily and as an act of grace pays compensation, according to a published scale (*d*), for loss of, or damage to, registered packets, parcels and express packets, and certain insured foreign and colonial postal packets (*e*). On the same footing he pays compensation in certain cases for the loss of, or damage to, insured inland parcels (*f*).

Registration does not make liable.

Compensation paid voluntarily.

SUB-SECT. 3.—*Order of Despatch.*

1373. Where the despatch or delivery from a post office (*g*) of letters (*h*) would be delayed by the despatch or delivery therefrom at the same time of book packets, pattern or sample packets, and post cards (*i*), or any of them, those packets, or cards, or any of them, may, subject and according to Post Office regulations, be detained in the Post Office until the despatch or delivery next following that by which they would ordinarily be despatched or delivered (*k*).

Order of despatch.

(*s*) See Inland Post Warrant, 1903. Postal packets which contain coin and certain other articles, or which are marked "registered," must be registered (*ibid.*, ss. 62—67), as amended by Inland Post Amendment (No. 11) Warrant, 1910 and (No. 14) 1911 (Stat. R. & O., 1910, p. 608; 1911, p. 328).

(*a*) See note (*h*), p. 630, *ante*.

(*b*) See Inland Post Warrant, 1903, ss. 68, 69, as amended by Inland Post Amendment (No. 13) Warrant, 1911 (Stat. R. & O. 1911, p. 327), and Post Office Guide.

(*c*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 13. As to the liability of railways in respect of parcels, see p. 654, *post*.

(*d*) See Inland Post Warrant, 1903, ss. 70—73, and the rates of compensation in Inland Post Amendment (No. 3) Warrant, 1905 (Stat. R. & O., 1905, p. 366). See, generally, Post Office Guide.

(*e*) As to express delivery, posting, mileage, and extra distance fees, see Inland Post Warrant, 1903, ss. 48—61, as amended by Inland Post Amendment (No. 6) Warrant, 1906 (Stat. R. & O. 1906, p. 525), and Post Office Guide. As to conveyance of foreign and colonial postal packets, see Post Office Guide.

(*f*) See Post Office Guide.

(*g*) For definition of "post office," see note (*g*), p. 630, *ante*.

(*h*) The Inland Post Warrant, 1903, s. 79, defines a letter as any postal packet which is not a post-card, halfpenny packet, newspaper, or parcel; for a definition of "halfpenny packet," see Inland Post Amendment (No. 7) Warrant, 1906 (Stat. R. & O., 1906, p. 526).

(*i*) Post-card (*ibid.*) means a card of the authorised dimensions bearing either an impressed or an adhesive stamp denoting a rate or duty of postage, and, except where the context otherwise requires, includes a "reply post-card" (*see ibid.*, and *ibid.*, ss. 15—18).

(*k*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 15, largely following the Inland Post Warrant, 1903, s. 75.

SECT. 3. Conditions of Transit of Postal Packets.

SUB-SECT. 4.—*Return of Postal Packets.*

No obligation to return.

1374. The Postmaster-General's duty is to deliver the postal packet as addressed, and delivery cannot be countermanded or directed by the sender. When delivery cannot be effected or is refused, the Postmaster-General is under no obligation to return the postal packet to the sender by post (*l*).

In practice letters and parcels are always returned by post free of charge when the sender's name and address can be ascertained (*m*). For the purpose of return, the Postmaster-General is authorised to open a letter or other closed postal packet (*n*). Post-cards, halfpenny packets and newspapers are only returned by post if they bear a request to that effect, and in that case a second postage is charged (*o*).

SUB-SECT. 5.—*Abuse of Postal Facilities.*

Regulations as to abuse of postal facilities.

1375. Post Office regulations may be made for preventing the sending or delivery by post of indecent or obscene prints, paintings, photographs, lithographs, engravings, books, or cards, or of other indecent or obscene articles, or of letters, newspapers, supplements, publications, packets, or post-cards having thereon, or on the the covers thereof, any words, marks, or designs of an indecent, obscene, libellous, or grossly offensive character (*p*).

Powers as to postal packet sent in contravention of regulations.

1376. If any postal packet (*q*) is posted or sent by post in contravention of the Post Office Act, 1908 (*r*), or of any warrant or regulations made thereunder, the transmission thereof may be refused; the packet may, if necessary, be detained and opened in the post office. It must either be returned to the sender thereof, or forwarded to its destination, in either case charged with such additional postage at a rate not exceeding the letter rate of postage, or without any additional charge, as Post Office regulations may direct (*s*).

Contraband goods.

1377. The Postmaster-General may detain any postal packet (*q*) suspected to contain any contraband goods and forward the packet to the Commissioners of His Majesty's Customs (*t*).

(*l*) As to alleging property in a postal packet in an indictment, see p. 669, *post*.

(*m*) See *Re Struve's Trusts*, [1912] W. N. 149; and p. 659, *post*.

(*n*) The implied authority is the Post Office Act, 1908 (8 Edw. 7, c. 48), s. 56 (2); see titles CONSTITUTIONAL LAW, Vol. VII., p. 69, note (*i*); CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 488, note (*n*).

(*o*) See Inland Post Warrant, 1903, s. 46.

(*p*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 16, and Inland Post Warrant, 1903, s. 6; see, as to the punishment for sending or enclosing such matters, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 539; see also *R.* v. *De Marny*, [1907] 1 K. B. 388 (a prosecution under the now repealed Post Office (Protection) Act, 1884 (47 & 48 Vict. c. 76), s. 4.

(*q*) See note (*h*), p. 630, *ante*.

(*r*) 8 Edw. 7, c. 48.

(*s*) See *ibid.*, s. 17.

(*t*) See *ibid.*, s. 18, and title REVENUE. The Commissioners, in the presence of the person to whom the packet is addressed, or if, after notice in writing from them requiring his attendance, left at or forwarded by post to the address on the packet, he fails to attend, then in his absence, may

SECT. 4.—*General Regulation of Business.*

SECT. 4. General Regulation of Business.

1378. The terms and conditions respecting the early closing of Post Office business are subject to the approval of the Postmaster-General (*u*). No closing order can apply to any shop where the only trade or business carried on is Post Office business (*v*). Where Post Office business is carried on in any shop in addition to any other business, if the shop is a telegraph office, there is no obligation to close on the weekly half-holiday so far as relates to the transaction of Post Office business (*w*). Where the Postmaster-General certifies that the exigencies of the postal service require that Post Office business be transacted in such a shop at times when under the Shop Act, 1911 (*x*), the shop must otherwise be closed for the weekly half-holiday, or under conditions not authorised by that Act, the shop is exempted from that Act for the purpose of the transaction of Post Office business, to the extent certified to be necessary by the Postmaster-General (*y*). Early closing.

1379. Weights and measures supplied by the Post Office and used for Post Office business cannot be tested and condemned under the Weights and Measures Act, 1878 (*z*). Weights and measures.

1380. Post Office buildings are not liable to be rated (*a*). Rates.

1381. Notices and lists ordered by the Registration Acts (*b*) to be affixed near post offices (*c*) must nevertheless not be affixed in or on any post office or any place or property belonging to or used by or on behalf of the Postmaster-General without his authority. Where he thinks that such affixing would obstruct or inconvenience the business of the post office, he may refuse that authority (*d*). Exhibiting notices.

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open and examine the packet. If they find any contraband goods, they may detain the packet and its contents for the purpose of prosecution; if they find none, they must either deliver the packet to the addressee upon his paying the postage, if any, chargeable thereon, or, if he is absent, forward the packet to him by post (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 18).

(*u*) Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 2: see title FACTORIES AND SHOPS, Vol. XIV., p. 511.

(*v*) Or where the only trade or business is Post Office business together with any of the following:—Sale of medicines, refreshments, tobacco or newspapers, retail of intoxicating liquors, or railway bookstall or refreshment room business (Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 2 (5), Sched.).

(*w*) Shop Act, 1911 (1 & 2 Geo. 5, c. 54), s. 10 (1) (a).

(*x*) *Ibid.*, s. 2.

(*y*) *Ibid.*, s. 10 (1) (b). Save as above stated, the Shop Act, 1911 (1 & 2 Geo. 5, c. 54), does not apply to Post Office business, nor to any premises wherein it is transacted (*ibid.*, s. 10 (2)).

(*z*) 41 & 42 Vict. c. 49; *R.* v. *Kent Justices* (1889), 24 Q. B. D. 181 (where a postmaster traded also as a baker); see title WEIGHTS AND MEASURES.

(*a*) *Smith* v. *Birmingham Guardians* (1857), 7 E. & B. 483; see *Mersey Docks* v. *Cameron, Jones* v. *Mersey Docks* (1865), 11 H. L. Cas. 443, and title RATES AND RATING.

(*b*) See title ELECTIONS, Vol. XII., pp. 193 *et seq.*

(*c*) By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 9; see title ELECTIONS, Vol. XII., p. 261.

(*d*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 80. As to the offence of affixing advertisements, notices, etc., to post offices, or painting or disfiguring etc., post office letter boxes, see p. 666, *post*.

SECT. 4. General Regulation of Business.

Private posting box.

1382. When it appears to the Postmaster-General that any post office letter box (*e*), by reason of being on the premises of any private person or otherwise, is so situate as not to afford the same security against the improper removal of postal packets (*f*) therefrom or other fraud as exists in the case of other post office letter boxes, he may declare such box to be a private posting box. He must affix upon or near it a notice of its being and of the effect of its being a private posting box. A postal packet put therein is not, for the purpose of any enactment, law, or contract, whereby the due posting of a postal packet is evidence of the receipt thereof by the addressee, deemed to have been duly posted (*g*).

SECT. 5.—*Newspapers.*

SUB-SECT. 1.—*In General.*

Rates for newspapers.

1383. It is not compulsory to send newspapers by post (*h*). Where they are sent by post, they are carried within the British Islands (*i*) at a special postal rate if they are registered (*k*).

For newspapers sent to places outside the British Islands, except in the case of Canada and Newfoundland (*l*), there is no special rate. They are carried as printed papers. But the maximum prepaid rate for a single newspaper sent by post between the British Islands and places out of the British Islands, or between places out of the British Islands, whether through the British Islands or not, is 3*d.*, exclusive of any additional charge made by any British possession or foreign country (*m*).

Special rates to Canada and Newfoundland.

By Treasury Warrant a specially low rate has been fixed for British newspapers, magazines, and trade journals sent, under certain conditions, to the Dominion of Canada and to Newfoundland (*n*). To enjoy this privilege the publications in question must be registered (*o*).

SUB-SECT. 2.—*Registration.*

1384. Provision is made by statute (*o*) for the registration of

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(*e*) See note (*g*), p. 630, *ante*.

(*f*) As to definition of "postal packet," see note (*h*), p. 630, *ante*.

(*g*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 81 (1). A certificate purporting to be signed by the Postmaster-General or any secretary or assistant secretary of the Post Office, to the effect that any box or receptacle is or was provided by the permission or under the authority of the Postmaster-General for the purpose of receiving postal packets, is in any legal proceedings evidence of the facts therein stated (*ibid.*, s. 81 (2)). As to proof of posting generally, see p. 659, *post*.

(*h*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 20 (3). As to the law relating to newspapers generally, see title PRESS AND PRINTING.

(*i*) As to definition of "British Islands," see note (*i*), p. 631, *ante*.

(*k*) As to registration, see the text, *infra*.

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

(*m*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 2 (1) (c). As to definition of "British possession," see note (*k*), p. 631, *ante*.

(*n*) Foreign and Colonial Post Warrant, 1907, ss. 5, 24—29 (Stat. R. & O., 1907, p. 887), and Foreign and Colonial Post Amendment (No. 6) Warrant, 1909 (Stat. R. & O., 1909, p. 644).

(*o*) Post Office Act, 1908 (8 Edw. 7, c. 48), ss. 20—22.

newspapers (*p*). For the purpose of registration any publication consisting wholly or in great part of political or other news, or of articles relating thereto or to other current topics, with or without advertisements, is deemed a newspaper, provided that it be printed and published in the British Islands, and published in numbers at intervals of not more than seven days, and that it have the full title and date of publication printed at the top of the first page, and the whole or part of the title and the date of publication printed at the top of every subsequent page (*q*). For the same purpose certain publications are deemed to be newspaper supplements (*r*), provided that all sheets of a supplement must be put together in some one part of the newspaper, whether gummed or stitched up with the newspaper or not (*s*).

Definition of "newspaper."

1385. The proprietor or printer of any newspaper within this description, or of any publication which, regard being had to the proportion of advertisements to other matters therein, is not within this description, but which was stamped as a newspaper before the 15th June, 1855, may register it at the General Post Office in London, at such time in each year and in such form and with such particulars as the Postmaster-General directs, paying on each registration such fee not exceeding 5*s.* as Post Office regulations direct (*t*).

Newspapers not within definition.

1386. The Postmaster-General may revise the register and remove therefrom any publication not being a newspaper (*u*). His decision is final as to the admission to or removal from the register of a publication, save that the Treasury may, if they think fit, on the application of any person interested, reverse or modify the decision and order accordingly (*x*).

Register.

(*p*) As to the postal rate for registered newspapers, see p. 638, *ante*, and Post Office Guide.

(*q*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 20 (1).

(*r*) For this purpose a supplement is a publication consisting wholly or in great part of matter like that of a newspaper, or of advertisements, printed on a sheet or sheets or a piece or pieces of paper, or consisting wholly or in part of engravings, prints, or lithographs illustrative of articles in the newspaper; the publication in every case being published with the newspaper, and having the whole or part of the title of the newspaper printed at the top of every page, or at the top of every sheet or side on which any such engraving, print, or lithograph appears (*ibid.*, s. 20 (2)). In the case of supplements consisting wholly of engravings, prints, or lithographs illustrative of newspaper articles, these provisions may be modified by Post Office regulations (*ibid.*, s. 20 (2) (a)).

(*s*) *Ibid.*, s. 20 (2) (b).

(*t*) *Ibid.*, s. 21 (1).

(*u*) *Ibid.*, s. 21 (2). Any publication for the time being on the register is a registered newspaper for the purposes of the Post Office Act, 1908 (8 Edw. 7, c. 48) (*ibid.*, s. 21 (4)). A registered newspaper is deemed a newspaper for the purposes of postal arrangements with the Governments of British possessions or foreign States (*ibid.*, s. 22); see p. 657, *post.*

(*x*) *Ibid.*, s. 21 (3). Newspapers registered for transmission in the British Islands at the newspaper rate of postage are deemed to be also registered for transmission to Canada and Newfoundland at the special rate of postage (Foreign and Colonial Post Warrant, 1907, ss. 5, 24—29 (Stat. R. & O., 1907, p. 889); Foreign and Colonial Post Amendment (No. 6) Warrant, 1909 (Stat. R. & O., 1909, p. 644)); as to special rates, see

SECT. 6. Money Orders.

SECT. 6.—*Money Orders.*

SUB-SECT. 1.—*In General.*

Money orders.

1387. So long as the Treasury think fit, the Postmaster-General has power (*a*) to provide for the remission of small sums of money through the Post Office by means of money orders (*b*). He may demand and receive for the use of His Majesty in respect of such orders, such rates of poundage, as may be fixed by Post Office regulations (*c*); all poundage so received is deemed part of the Post Office revenue (*d*).

SUB-SECT. 2.—*Provisions as to Money Orders.*

General regulations as to money orders.

1388. Post Office regulations may make provisions with respect to money orders, and to the payment thereof, and to the persons by or to whom they are to be paid, and the times and mode of payment (*e*). Subject to such regulations the Postmaster-General may repay the amount of any money order to the person to whom the order is issued, or his executors or administrators, whether the order remains in the possession of that person or not. Upon such repayment all liability on the part of the Postmaster-General, or any officer of the Post Office, or the Post Office revenue, or the Consolidated Fund, in respect of the money order ceases absolutely as against the payee of the money order, and the holder thereof, and every other person whomsoever (*f*). No action or other legal proceeding can be instituted against the Postmaster-General or any officer of the Post Office, or any person whomsoever, in respect of any compliance with such regulations, or otherwise in relation thereto, or in respect of the payment of such orders being refused or delayed by any accidental neglect, omission, or mistake, on the part of any officer of the Post Office, or for any other cause whatsoever, without fraud or wilful misbehaviour on the part of any such officer (*g*).

SECT. 7.—*Postal Orders.*

Postal orders.

1389. The Postmaster-General, with the consent of the Treasury, may authorise any of his officers (*h*), or, if the regulations so

p. 646, *ante*). Other newspapers, magazines, and trade journals may be registered for similar transmission to Canada or Newfoundland if they comply with certain conditions (Foreign and Colonial Post Warrant, 1907, ss. 5, 24—29 (Stat. R. & O., 1907, p. 889); Foreign and Colonial Post Amendment (No. 6) Warrant, 1909 (Stat. R. & O., 1909, p. 644).

(*a*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 23 (1).

(*b*) For payment of taxes by post office orders in Scotland and, where directed by the Treasury, in parishes in England, see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 99, and title REVENUE.

(*c*) See Money Order Regulations, 1903 (Stat. R. & O. Rev., Vol. X., Post Office, p. 130), as amended by Money Order Amendment (No. 2) Regulations 1908 (Stat. R. & O., 1908, p. 753); and Post Office Guide.

(*d*) As to Post Office revenue, see p. 633, *ante*.

(*e*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 23 (2). As to Post Office regulations generally, see p. 636, *ante*.

(*f*) See title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 567.

(*g*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 23 (4). As to the general liability of such officers, see p. 629, *ante*, and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*h*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 24 (1).

provide, any person holding office under the Crown (*i*), to issue postal orders. Postal orders are money orders for a prescribed amount not exceeding 21*s.* (*k*), issued in a special form to be prescribed by the regulations, and payable in the manner and subject to the conditions thereby prescribed (*l*). SECT. 7. **Postal Orders.**

1390. A bank which, in collecting for any principal, has received payment or been allowed by the Postmaster-General in account in respect of a postal order, or a document purporting to be a postal order, incurs no liability to anyone except that principal by reason of having received the payment or allowance, or having held or presented the order or document for payment. The principal for whom such order or document has been so held or presented is not, however, relieved from liability in respect of his possession of such order or document or of the proceeds thereof (*m*). Banking practice.

SECT. 8.—*Additional Postal Facilities.*

SUB SECT. 1.—*In General.*

1391. The Postmaster-General is empowered to make special arrangements with local authorities and with private persons for the provision of additional postal facilities when he is of opinion that such provision at the expense of the taxpayers cannot be justified. Arrangements with local authorities and private persons.

(*i*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 24 (3). Such person is, for the purpose of the issue and payment of postal orders, deemed an officer of the Postmaster-General and of the Post Office (see definition of "officer," note (*a*), p. 630, *ante*, and see note (*t*), p. 664, *post*).

(*k*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 24 (1) (a). The poundage must not exceed 2*d.* The order must not be issued until its amount and poundage have been paid to the issuing officer (*ibid.*, s. 24 (1) (b)).

(*l*) *Ibid.*, s. 24 (1). After three months from the last day of the month of issue, the order is payable only on payment in manner prescribed of a commission equal to the original poundage (*ibid.*, s. 24 (1) (c)). No interest is payable in respect of a postal order (*ibid.*, s. 24 (2)).

(*m*) *Ibid.*, s. 25. See title BANKERS AND BANKING, Vol. I., p. 601; Post Office Act, 1908 (8 Edw. 7, c. 48), repealing and re-enacting in substance the Post Office (Money Orders) Act, 1880 (43 & 44 Vict. c. 33), and the Post Office (Money Orders) Act, 1883 (46 & 47 Vict. c. 58). Neither a postal order nor any other kind of money order is a negotiable instrument. If, therefore, a postal order is lost or stolen in the post, neither the finder nor any holder for value has a good title to payment as against the rightful owner. A postal order is an imperfect instrument until either the name of the payee is entered in it, or it is crossed for payment to a banker (Postal Order (Inland) Regulations, 1905, s. 9 (Stat. R. & O., 1905, p. 383)); see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 567. The finder of an order not so filled up or crossed has, therefore, no claim to payment. The postal order system may by arrangement be extended to a British possession, foreign State, or British protectorate, and when such an arrangement is made, the provisions of the Post Office Act, 1908 (8 Edw. 7, c. 48), with respect to postal orders, so far as is consistent with the tenor thereof, and subject to modification by Post Office regulations, apply (*ibid.*, s. 87). In such case the form of the order, and the amount (not exceeding 21*s.*) may be prescribed by Post Office Regulations (*ibid.*, s. 87 (b)). As to offences in respect of money orders, see p. 664, *post*.

SECT. 8. Additional Postal Facilities.

SUB-SECT. 2.—*Indemnity to Postmaster-General.*

Indemnity against loss by private person.

1392. The Postmaster-General may contract with, or take security from, any person applying to him to establish any post or telegraph office or to extend the accommodations of the postal or telegraphic service to any place, for indemnifying the Postmaster-General against any loss he may sustain thereby (*n*).

SUB-SECT. 3.—*Arrangements with Local Authorities.*

Arrangements with local authorities.

1393. If a borough council (*o*) or urban district council (*p*) considers that it would be beneficial to the inhabitants of its borough or district, and if a rural district council (*q*), or a parish council (*r*), or, in the case of a parish not having a parish council, a parish meeting (*s*), considers that it would be for the benefit, in the case of a rural district council, of any contributory place or places within its district, and in the case of a parish council or parish meeting, of its parish, that any post or telegraph office should be established or any additional postal or other facilities provided by the Postmaster-General (*t*), then that council or meeting may undertake to pay to the Postmaster-General any loss he may sustain by reason of the establishment or maintenance of the office, or the provision of the facilities (*u*).

(*n*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 48. The indemnity may be either for the whole or for part of the loss sustained, and for such time as the Postmaster-General may think necessary.

(*o*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 293 *et seq.*

(*p*) *Ibid.*, pp. 262 *et seq.*

(*q*) *Ibid.*, pp. 329 *et seq.*

(*r*) *Ibid.*, p. 249.

(*s*) *Ibid.*, pp. 254 *et seq.*

(*t*) In or for the purposes of the borough or district in the case of borough or urban district councils; and whether within or without the area to be benefited, in the case of rural district councils or parish councils or meetings (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 49 (2), (3)). But a rural district council cannot proceed in respect of any office or facilities outside the contributory place proposed to be charged without the consent of the parish council, or, if there is no parish council, the parish meeting, of any parish wholly or partly situated in the contributory place (*ibid.*, s. 49 (3)). See title LOCAL GOVERNMENT, Vol. XIX., pp. 331, 335.

(*u*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 49 (2), (3). These provisions do not apply to the Channel Islands (*ibid.*, s. 49 (10)), and special provisions are made for Scotland, Ireland, and the Isle of Man (*ibid.*, s. 49 (8), (9), (11)). Under *ibid.*, s. 49 (4), any expenses thus incurred under this section, in the case of borough councils, may be paid out of the borough fund or rate (see title LOCAL GOVERNMENT, Vol. XIX., pp. 319 *et seq.*); in the case of urban district councils (not boroughs), out of the rate out of which the general expenses of the council under the Public Health Act, 1875 (38 & 39 Vict. c. 55), are defrayed (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 49 (4)); see title LOCAL GOVERNMENT, Vol. XIX., pp. 281 *et seq.* Any expenses incurred in pursuance of an undertaking thus given may in the case of a rural district council be defrayed as special expenses legally incurred in respect of the contributory place or places, and must be apportioned between those places if more than one (subject to the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 229—231), and, in the case of a parish council or parish meeting, as expenses thereof within the provisions of the Local Government Act, 1894 (56 & 57 Vict. c. 23) (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 49 (5), (6)); see title LOCAL GOVERNMENT, Vol. XIX., pp. 242 *et seq.*

SECT. 8. Additional Postal Facilities.

Larger and better premises.

1394. Any borough council or any urban district council, if it considers that it would be beneficial to the inhabitants of the same that any new post office should be on a more expensive site, or of a larger size, or of a more ornate building, or otherwise of a more expensive character than the Postmaster-General would otherwise provide, may contribute towards the new post office, either by a grant of money, or, with the consent of the Local Government Board (*v*), by the appropriation of land belonging to the council, or by the purchase of land for the purpose (*w*).

SECT. 9.—*Conveyance of Mails.*

SUB-SECT. 1.—*In General.*

Mails generally.

1395. Statutory provision is made for the conveyance of mails (*x*) inland (*a*) and by ship (*b*).

SUB-SECT. 2.—*Inland.*

By railway.

1396. The Postmaster-General may require railway companies to convey mails either by the trains which they run for their own purposes (*c*), or by trains run at times fixed by him (*d*). In the latter case six months' notice must be given to the company by the Postmaster-General (*e*).

(*v*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 282, 283.

(*w*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 49 (1). For this purpose by *ibid.*, s. 49 (7), a borough council may borrow under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 106, and any Act amending the same (see title LOCAL GOVERNMENT, Vol. XIX., p. 317); the council of an urban district (not a borough) may borrow as under the Public Health Act, 1875 (38 & 39 Vict. c. 55); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*x*) For the purpose of the Post Office Act, 1908 (8 Edw. 7, c. 48), "mail" includes every conveyance by which postal packets are carried, whether it be a carriage, coach, cart, horse, or any other conveyance, and also a person employed in conveying or delivering postal packets, and also any vessel employed by or under the Post Office for the transmission of postal packets by contract or otherwise in respect of postal packets transmitted by the vessel (*ibid.*, s. 89). For the purposes of the Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), "mails" (*ibid.*, s. 5 (1)) includes parcels within the meaning of the Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74); see p. 653, *post*. See note (*r*), p. 654, *post*.

(*a*) As to definition of "inland," see note (*g*), p. 638, *ante*.

(*b*) As to Mail Ships Act, 1891 (54 & 55 Vict. c. 31), and Orders in Council under the Act now in force, see title SHIPPING AND NAVIGATION.

(*c*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 18.

(*d*) Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98), s. 1; see *R.* (*Postmaster-General*) v. *Great Northern* (*Ireland*) *Rail. Co.*, [1907] 2 I. R. 242 (mandamus to compel Irish train running under notice from Postmaster-General to await arrival of mails from Holyhead); and see title CARRIERS, Vol. IV., pp. 70, 71. As to railways generally, see title RAILWAYS AND CANALS.

(*e*) Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98), s. 1. Agreements with railway companies may be altered upon increase or decrease of service (*ibid.*, s. 7), and terminated upon six months' notice (*ibid.*, s. 8), or without notice, if full and fair compensation be paid, unless the railway company was in default in performing its service (*ibid.*, s. 9). Refusal or neglect to carry mails incurs a forfeit of £20 for each offence (*ibid.*, s. 12), apart from forfeit of bond given as security (*ibid.*, s. 13). Such bond cannot contain a proviso excusing the company for non-performance due to the neglect or default of a post office servant (*A.-G.* v. *London*

SECT. 9. Conveyance of Mails.

Sorting carriages, fitted up as the Postmaster-General may direct, are to be provided at the request of the Postmaster-General (*f*).

Sorting carriages.

Mail coaches.

His Majesty's mail coaches must, if required, be carried instead of the carriages of the company (*g*). The mails need not be accompanied by an officer of the Post Office (*h*). Where mails are conveyed by special train the Postmaster-General may require the whole train to be appropriated thereto exclusively of all other traffic except such as he may sanction (*i*).

Remuneration of railway companies.

The remuneration of railway companies, except for the carriage of parcels, is determined, in default of agreement, by the Railway and Canal Commissioners (*k*).

Steam vessels.

Where railway companies wholly or partly work steam vessels for communication between any towns or ports, the statutory provisions as to conveyance of mails by railways, so far as applicable, extend thereto (*l*).

Tramway company.

A tramway company (*m*) must, if required by the Postmaster-General (*n*), perform all reasonable services in regard to the conveyance of mails as he may direct (*o*).

Tramroads.

Tramroads (*p*) are, for the purpose of conveying mails, deemed to

and North Western Rail. Co. (1859), John. 28). An agreement between railways that one of them shall carry no mails is not illegal (*Shrewsbury and Birmingham Rail. Co.* v. *London and North Western Rail. Co.* (1851), 17 Q. B. 652).

(*f*) Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98), s. 3; Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74), s. 3 (5).

(*g*) Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98), s. 4.

(*h*) Post Office (Duties) Act, 1847 (10 & 11 Vict. c. 85), s. 16: and see title CARRIERS, Vol. IV., p. 71. An officer accompanying mails can recover damages for negligence against the company in spite of having no contract with them (*Collett* v. *London and North Western Rail. Co.* (1851), 16 Q. B. 984; see title CARRIERS, Vol. IV., p. 46, and title NEGLIGENCE, Vol. XXI., pp. 426, 427).

(*i*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 36.

(*k*) Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98), s. 6; Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), s. 1. As to remuneration generally, see titles CARRIERS, Vol. IV., p. 71; RAILWAYS AND CANALS. As to the Railway and Canal Commissioners, see titles COURTS, Vol IX., pp. 217 *et seq.*; RAILWAYS AND CANALS.

(*l*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 20.

(*m*) This includes every company, body, or person owning or working any tramway authorised by Act of Parliament passed after the 1st January, 1893 (Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), s. 2); a tramway means one authorised by an Act to be constructed wholly along public roads or streets without any deviation therefrom (*ibid.*, s. 5 (1)); see title TRAMWAYS AND LIGHT RAILWAYS.

(*n*) He cannot require carriage of mails in excess of certain weights; see Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), s. 2 (1) (a).

(*o*) Mails must be so carried as neither to interfere with the custody of the Post Office officer in charge of them, nor to inconvenience passengers (*ibid.*, s. 2 (1) (b)). In a carriage for passengers only and not for goods, the officer may not carry mails except as a passenger (*ibid.*, s. 2 (1) (c)); where goods are carried, the above-mentioned Acts as to conveyance of mails by railway apply (*ibid.*, s. 2 (1) (d)). Remuneration is determined by agreement, or, in default thereof, by the Railway and Canal Commissioners (*ibid.*, s. 2 (2). As to the Railway and Canal Commissioners, see titles COURTS, Vol. IX., pp. 217 *et seq.*; RAILWAYS AND CANALS.

(*p*) If authorised by an Act of Parliament passed after the 1st January, 1893

be railways, and the statutory provisions as to conveyance of mails by railways apply accordingly (*q*).

SECT. 9. Conveyance of Mails.

Arrangement with railway companies as to parcels.

1397. Under an arrangement confirmed by statute (*r*), to which all the important railway companies of the United Kingdom (*s*) were parties, parcels are conveyed (*t*), with or without notice, and with or without a person appointed by the Postmaster-General (*a*), by any trains by which passengers, goods or parcels are conveyed (*b*), and the remuneration is a sum equal to a certain proportion of the postage payable on every parcel conveyed throughout any part of its course by railway, and is payable in one sum to the London Railway Clearing Committee, which divides it amongst the companies according to certain rules (*c*). This amount of remuneration may on notice be varied by agreement or arbitration before the Railway and Canal Commission (*d*), and the whole arrangement may be determined on twelve months' notice by either the Postmaster-General or the railway companies (*e*). Notices to or on behalf of the railway companies are given to or by the secretary to the London Railway Clearing Committee (*f*). The railway companies must provide special parcel sorting vans if required (*g*); and must afford all reasonable facilities for the receipt and delivery of the sacks or other receptacles containing parcels at any of their stations without requiring them to be booked or interposing any other delay, and must transfer them to and from the vehicles of the Postmaster-General at the outwards and inwards railway stations (*h*).

(Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), s. 3)). A tramroad is defined (*ibid.*, s. 5 (1)) as any tramroad or tramway which is not a tramway as defined in note (*m*)), p. 652, *ante*, and includes a tramway constructed under the Tramways (Ireland) Acts, 1860 to 1891, or the Railways (Ireland) Act, 1890 (53 & 54 Vict. c. 52); see title TRAMWAYS AND LIGHT RAILWAYS.

(*q*) Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), s. 3.

(*r*) See preamble to Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74), and *ibid.*, s. 2. The arrangement was for twenty-one years and thereafter till determined by twelve months' notice on either side (*ibid.*, s. 2 (4)).

(*s*) See *ibid.*, Sched. I.; as to other companies becoming parties, see *ibid.*, s. 9. The provisions of the Act apply, as far as they can, to any steam vessels worked by such railway companies (*ibid.*, s. 13).

(*t*) Parcels are defined (*ibid.*, s. 17) as meaning all such postal packets as by Treasury regulations made in pursuance of the Post Office Acts (see Post Office Act, 1908 (8 Edw. 7, c. 48), s. 91 (1)), are defined to be parcels (see note (*m*), p. 633, *ante*).

(*a*) Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74), s. 3 (1). Any servant of the Postmaster-General appointed to take charge of the parcels during such conveyance must be carried free, and there is special provision for payment of damages in case of his injury (*ibid.*, s. 3 (3)). Assistance must, if required, be given to him, and he must not be interfered with (*ibid.*, s. 3 (4)).

(*b*) The convenient and punctual working of mail and express trains must not be prejudiced thereby (*ibid.*, s. 3 (1)).

(*c*) Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74), ss. 5, 6, Sched. III.

(*d*) *Ibid.*, s. 2 (2), (3); see title COURTS, Vol. IX., pp. 217 *et seq.*; RAILWAYS AND CANALS.

(*e*) Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74), s. 2 (4).

(*f*) *Ibid.*, s. 12 (3).

(*g*) *Ibid.*, s. 3 (5).

(*h*) *Ibid.*, s. 3 (2). As to "outwards" and "inwards," see *R.* v. *London and North Western Rail. Co.* (1896), 74 L. T. 624.

SECT. 9.
Conveyance of Mails.
Conditions.

1398. The Postmaster-General must observe certain conditions in the distribution and delivery of the parcels (*i*). With regard to security and compensation for loss or otherwise the parcels are treated as letters sent by post. The companies are not liable in respect of the conveyance or loss of or damage to parcels, but must take all reasonable care for their security (*k*).

Application of Customs Acts.

1399. The Customs Acts (*l*) apply to foreign parcels (*m*), subject to variation by Treasury regulations (*n*).

Parcels by tramways.

1400. The conveyance of parcels by tramways is subject to the same regulation as the conveyance of mails thereby (*o*).

SUB-SECT. 3.—*By Ship.*

Obligation of master of vessel outward bound.

1401. Every master of a vessel (*p*) outward bound (*q*) must receive on board his vessel every mail bag (*r*) tendered to him by an officer of the Post Office (*s*) for conveyance; having received it, he must deliver it, on arriving at the port or place of his destination, without delay (*t*). If he fails to do so, he incurs a forfeit of £200 (*a*).

Obligation of master of inward bound vessel.

1402. Every master of a vessel inward bound (*b*) must collect all

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(*i*) Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74), s. 7 (1), (2), (3).

(*k*) *Ibid.*, s. 7 (5). They may refuse to carry any explosive or dangerous article not carried as a railway parcel by passenger train (*ibid.*, s. 7 (4)); see titles CARRIERS, Vol. IV., p. 27; EXPLOSIVES, Vol. XIV., pp. 385, 386; RAILWAYS AND CANALS.

(*l*) See title REVENUE.

(*m*) Foreign parcels are those either posted in, and sent to a place out of, the United Kingdom, or posted in a place out of, and sent to a place in, the United Kingdom, or in transit through the United Kingdom to a place outside the United Kingdom (Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74), s. 17). Parcels sent between the United Kingdom and the Channel Islands or Isle of Man are subject to Treasury regulations as to customs charges (*ibid.*, s. 15).

(*n*) *Ibid.*, s. 14 (1), (2).

(*o*) See p. 652, *ante;* parcels are included in "mails" (see note (*x*), p. 651, *ante*). See, however, the limitations as to weight (Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), s. 2 (1) (a)), and see *Clogher Valley Tramway Co.* v. *R.* (1892), 30 L. R. Ir. 316 (tramway not a railway within Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74), special Act).

(*p*) These words include every person, except a pilot, having command or charge of a vessel, whether the vessel is a ship of war or other vessel (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 89).

(*q*) These words include vessels bound as well from any port in the United Kingdom as from any port in a British possession. "British possession" does not include the Channel Islands or Isle of Man (*ibid.*, s. 89); see note (*k*), p. 631, *ante*.

(*r*) A "mail bag" includes a bag, box, parcel, or other envelope or covering in which postal packets in course of transmission by post are conveyed, whether it does or does not contain any such packets (*ibid.*).

(*s*) See note (*a*), p. 630, *ante*.

(*t*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 26 (1).

(*a*) *Ibid.*, s. 26 (2). For a case of injunction restraining refusal to receive mail bags (before the Post Office Act, 1908 (8 Edw. 7, c. 48), see *A.-G.* v. *Cunard Steamship Co.* (1886), 3 T. L. R. 262.

(*b*) These words include vessels bound as well to any port in the British Islands as to any port in a British possession (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 89); and see note (*k*), p. 631, *ante*.

postal packets (*c*) on board his vessel being within the exclusive privilege of the Postmaster-General (*d*), and not being shipowners' letters (*e*). He must enclose them in some bag or other covering, sealed with his seal, and addressed to the Postmaster-General, and without delay deliver those packets to the proper officer of the Post Office (*f*) demanding them, or, if no such demand is made, then at the post office with which he can first communicate (*g*).

The master of every such vessel must, at the port where the vessel reports, sign, in the presence of the proper officer of the Post Office (*f*) or other person authorised by the Postmaster-General (*h*), a declaration of compliance with the above provisions. Until he has performed the duties above mentioned, he must not break bulk or make entry of any part of her cargo in any port (*i*).

1403. Such master incurs a forfeit of £200 if he does not duly deliver any postal packets (*c*) as above required (*k*); of £50 if he refuses or wilfully neglects to make the declaration above required (*l*), and of £20, recoverable summarily, if he breaks bulk or makes entry (*m*) before the postal packets on board his vessel have been delivered as above required (*n*). Penalty.

1404. An officer of customs (*o*) must not allow any inward bound vessel (*p*) to report until the above-mentioned declaration has been made and produced to him. He may refuse to permit bulk to be broken on board such a vessel or entry to be made of any part of her cargo (*m*) until the postal packets (*c*) on board the vessel have been delivered as above required. He may search every such vessel for postal packets which may be on board contrary to statute (*q*), and may seize the same and forward them to the nearest post office (*r*). He incurs a forfeit of £50 if he permits Duty of customs officer.

(*c*) For definition of "postal packet," see note (*h*), p. 630, *ante*.

(*d*) See p. 631, *ante*.

(*e*) "Shipowners' letters" under the Post Office Act, 1908 (8 Edw. 7, c. 48), s. 30 (1), include letters of the owners, charterers, or consignees of vessels inward bound, and of the owners, consignees, or shippers of goods on board those vessels; see p. 660, *post*.

(*f*) See note (*a*), p. 630, *ante*.

(*g*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 27 (1).

(*h*) Such officer or other person present must also sign the declaration (*ibid.*, s. 27 (2)).

(*i*) *Ibid.* The declaration may be in the form contained in *ibid.*, Sched. I., which affirms the due delivery to the Post Office of all mail bags, packets etc. on board the vessel, except such packets as are exempted by law. As to what constitutes "breaking bulk" or "making entry," see title SHIPPING AND NAVIGATION.

(*k*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 27 (3).

(*l*) *Ibid.*, s. 27 (4).

(*m*) See note (*i*), *supra*.

(*n*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 27 (5). As to penalty for master of vessel opening mail bag, see p. 662, *post*.

(*o*) As to officers of customs, see title REVENUE.

(*p*) See note (*b*), p. 654, *ante*.

(*q*) See pp. 631—633, *ante*.

(*r*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 29 (1).

SECT. 9. Conveyance of Mails.

any vessel to report before the above-mentioned requisites have been complied with (*a*).

Shipowners' letters.

1405. Shipowners' letters (*b*), provided that the letters brought by any one vessel to any one person do not collectively exceed six ounces in weight (*c*), and that the owner, charterer, or consignee be described as such on the address and superscription (*d*), and that, in the case of owners, shippers, or consignees of goods, it also appears by the ship's manifest (*e*) that they have goods on board the vessel (*f*), must, if required to be delivered at the port of the vessel's arrival, be delivered to the owners, charterers, consignees, or shippers, by the master free of inland postage, and the persons to whom they are to be delivered are entitled to the delivery thereof before the delivery of the other letters to the Post Office (*g*); if delivered elsewhere in the British Islands must be delivered by post on payment of inland postage only (*h*). Delivery in either case is subject to the previous payment to the Post Office of the gratuities payable to masters of vessels bringing the letters (*i*).

Allowances to masters of vessels.

1406. Post Office regulations (*j*) may provide for the allowance to masters of vessels (*k*) in respect of postal packets (*l*), or any description thereof, conveyed by them on behalf of the Post Office, and also to pilots, seamen, and others in respect of postal packets, or any description thereof, brought by them to any post office from any vessels, of such gratuities under such conditions and restrictions as the Postmaster-General may from time to time think fit (*m*).

SUB-SECT. 4.—*Exemption from Tolls.*

Exemption from tolls.

1407. Carriages or horses conveying mail bags (*n*) are exempt from toll at places where tolls are otherwise demandable (*o*).

(*a*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 29 (2).

(*b*) For definition of "shipowners' letters," see note (*e*), p. 655, *ante*.

(*c*) Except in the case of letters brought by vessels coming from Ceylon, the Mauritius, India, or the Cape of Good Hope, into any port of the British Islands for an owner, charterer, or consignee of such a vessel, in which case they may be collectively twenty ounces in weight (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 30 (2) (a)). An officer of customs, on finding any shipowners' letters to exceed these limits of weight, may seize and take to the nearest post office so many of the letters as will reduce the remainder within the limits (*ibid.*, s. 30 (3)).

(*d*) *Ibid.*, s. 30 (2) (b). For the criminal offence of abusing this privileged exemption, see p. 660, *post*.

(*e*) As to a ship's manifest, see title SHIPPING AND NAVIGATION.

(*f*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 30 (2) (c).

(*g*) *Ibid.*, s. 30 (1) (a).

(*h*) *Ibid.*, s. 30 (1) (b).

(*i*) *Ibid.*, s. 30 (1).

(*j*) See p. 636, *ante*.

(*k*) For definition of "master," see note (*p*), p. 654, *ante*.

(*l*) For definition of "postal packet," see note (*h*), p. 630, *ante*.

(*m*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 31.

(*n*) For definition of "mail bag," see note (*r*), p. 654, *ante*.

(*o*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 79 (1); see a case previous to the Act (*Northam Bridge Co.* v. *R.* (1886), 55 L. T. 759). See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 65. The privilege of Post Office officials does not apply to a ferry (not being an ancient legal

SECT. 10.—*Establishment of Posts in British Possessions.*

SECT. 10. Establishment of Posts in British Possessions.

1408. The legislature of any British possession (*p*) may by any enactment make such provision as may seem fit for the establishment, maintenance, and regulation of posts within the possession, and for charging rates of postage, and for appropriating the revenue derived therefrom (*q*). Where any such enactment for establishing, maintaining, and regulating posts within the possession has come into operation (*r*), the powers and privileges of the Treasury and the Postmaster-General in relation to such posts shall cease after that date (*s*).

Posts in British possessions.

SECT. 11.—*Arrangements with Foreign Countries.*

1409. Where an arrangement has been made by His Majesty with any foreign State with respect to the conveyance by post of any postal packets (*t*) between the British Islands and places out of the British Islands, or between places out of the British Islands whether through the British Islands or not, the Treasury may, by warrant, make such regulations as may seem to them necessary for carrying the arrangement into effect, and may make provisions as to the charges for the transit of postal packets, single or in bulk, and the scale of weights to be adopted, and the accounting for and paying over to any foreign State of any money received by the Postmaster-General (*a*).

Arrangements with foreign countries.

Part IV.—Communications by Post.

SECT. 1.—*Legal Effect.*

1410. The legal effect of communications by post (*b*) has been dealt with in respect of the following matters elsewhere :—formation

Letters in contract, libel etc.

ferry) which a statutory corporation is authorised to work but not obliged to maintain (*A.-G.* v. *Londonderry Bridge Commissioners*, [1903] 1 I. R. 339). As to the offence of demanding toll, see p. 667, *post*. Tolls leviable in Scotland or Ireland in respect of mails must be accounted for and paid by the Postmaster-General out of moneys provided by Parliament (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 79 (4)).

(*p*) For definition of "British possession," see note (*k*), p. 631, *ante*.

(*q*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 85 (1). As to newspapers, see note (*u*), p. 647, *ante*.

(*r*) Where there is in the possession any post established by the Postmaster-General, the enactment does not come into operation until His Majesty's consent thereto given by Order in Council is declared in the possession, or until such later date as the Order may fix (*ibid.*, s. 85 (2)).

(*s*) *Ibid.*, s. 86.

(*t*) For definition of "postal packet," see note (*h*), p. 630, *ante*.

(*a*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 4. As to Treasury warrants and regulations, see p. 636, *ante* ; as to postal orders, see note (*m*), p. 649, *ante* ; as to newspapers, see note (*u*), p. 647, *ante*.

(*b*) As to criminal law, see p. 659 *et seq.*, *post*.

SECT. 1. Legal Effect.

of contract by post (*c*); copyright (*d*) and property (*e*) in letters; publication of libel by letter (*f*), postcard (*g*), or telegram (*h*); payment by post (*i*); address of communications to a company (*k*), payment of dividend warrant (*l*), and notice of allotment of shares (*m*) by post; service of process in general (*n*) by post; and service of notices and other documents upon companies (*o*), in trustee matters (*p*), mortgages (*q*), landlord and tenant notices (*r*), or in bankruptcy cases (*s*) by post.

SECT. 2.—*Evidence.*

Evidence and proof.

1411. The admissibility in evidence of letters in general (*t*), and of letters marked "private and confidential" (*u*) or "without

(*c*) See title CONTRACT, Vol. VII., pp. 352 (contracts made through the post), 353 (acceptance made through post: demand of acceptance "by return of post"; effect of delivery to postman: agency of Post Office: delay and loss in post), 354 (revocation of offer by post). As to posting notice of allotment of shares, see the text, *infra*. As to proof of posting, delivery etc., see pp. 643, *ante*, 659, *post*. As to inference to be drawn from failure to answer letter, see title EVIDENCE, Vol. XIII., p. 458.

(*d*) See title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 138 (right to restrain publication of letter).

(*e*) See *ibid.*, p. 138 (right to recover possession of letter); see note (*b*), p. 669, *post*. See also title EVIDENCE, Vol. XIII., p. 448 (possession of letter with seals broken, presumed knowledge of contents). As to forwarding of letters, see p. 644, *ante*, and note (*l*), p. 663, *post*.

(*f*) See title LIBEL AND SLANDER, Vol. XVIII., pp. 660 (letter addressed to plaintiff and opened by third party: letter placed in wrong envelope), 661 (transmission by post as evidence of receipt); as to which see also title EVIDENCE, Vol. XIII., pp. 441, 556.

(*g*) See title LIBEL AND SLANDER, Vol. XVIII., p. 661. For definition of "post-card," see note (*i*), p. 643, *ante*.

(*h*) See title LIBEL AND SLANDER, Vol. XVIII., p. 661.

(*i*) See title CONTRACT, Vol. VII., p. 449. As to effect of loss of cheque in post, see *ibid.*, and title EVIDENCE, Vol. XIII., p. 556, note (*c*); see also pp. 642, 643, *ante*.

(*k*) See title COMPANIES, Vol. V., p. 83.

(*l*) See *ibid.*, p. 529. As to whether posting of a warrant may be payment of a dividend, see *Thairlwall* v. *Great Northern Railway*, [1910] 2 K. B. 509.

(*m*) See title COMPANIES, Vol. V., p. 173.

(*n*) See titles COUNTY COURTS, Vol. VIII., pp. 619 *et seq.*; MAYOR'S COURT, LONDON, Vol. XX., p. 291; PRACTICE AND PROCEDURE.

(*o*) See title COMPANIES, Vol. V., pp. 83, 306, 307, 309, 561.

(*p*) As to service of request to a trustee under the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 35, see *Re Struve's Trusts*, [1912] W. N. 149; title TRUSTS AND TRUSTEES.

(*q*) As to sufficient address and service of notice under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 67, see title MORTGAGE, Vol. XXI., pp. 251, 252.

(*r*) As to service of notice by superior landlord upon undertenant or lodger by registered post, see title DISTRESS, Vol. XI., p. 147; *Jarvis* v. *Hemmings*, [1912] 1 Ch. 462; and p. 643, *ante*.

(*s*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 291 (effect of notice by post), 320 (service by post).

(*t*) See title EVIDENCE, Vol. XIII., p. 439.

(*u*) See title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 138.

prejudice" (*a*), and the proof of the posting (*b*), date (*c*), delivery (*d*), and receipt (*e*) of letters are also dealt with elsewhere. SECT. 2. Evidence.

Part V.—Offences.

SECT. 1.—*In General.*

1412. Various offences against the Post Office are defined by statute (*f*). Some of these have been mentioned elsewhere as part of the general criminal law (*g*); others are set out in the following paragraphs. Offences defined by statute.

(*a*) See title EVIDENCE, Vol. XIII., pp 457, 557 *et seq.*

(*b*) See *ibid.*, pp. 441 (how far conclusive by statute and orders), 556 (general proof of posting), 557 (copy in letter-book, evidence of posting as against owner). As to a solicitor's bill of costs "sent by the post" see *Browne* v. *Black*, [1912] 1 K. B. 316, C. A., and title SOLICITORS; as to transmission of case stated to court within three days, see *Holland* v. *Peacock*, [1912] 1 K. B. 154; title MAGISTRATES, Vol. XIX., p. 653, note (*r*), As to sending (within seven days) notice of defence of written warranty under Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s 20 (1), see *Retail Dairy Co., Ltd.* v. *Clarke*, [1912] 2 K B. 388. As to certificate of posting, see note (*g*), p. 646, *ante*.

(*c*) See title EVIDENCE, Vol. XIII., pp 556 (postmark evidence of time and place of posting), 557 (date of letter *primâ facie* evidence of date of writing).

(*d*) See *ibid.*, pp. 441 (delivery of letter unsealed, presumed posting unsealed), 448 (possession of letter with seals broken, presumed knowledge of contents), 556 (general proof). As to liability for non-delivery, see p. 642, *ante*.

(*e*) See title EVIDENCE, Vol. XIII., p. 441 (receipt presumed on proof of proper addressing and posting). As to posting in ordinary course of business, see *ibid.*; see also *ibid.*, p. 458 (failure to answer, not necessarily an admission of truth of contents). As to proof of publication of libel, see title LIBEL AND SLANDER, Vol. XVIII., pp. 660, 661.

(*f*) Chiefly by the Post Office Act, 1908 (8 Edw. 7, c. 48), ss. 50—69. Most of the cases hereafter cited were decided under statutes repealed and re-enacted by that Act.

(*g*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 488 (opening or delaying postal packets by Post Office officer), 539 (sending indecent or obscene prints, words etc.), 644, 645 (stealing postal packet; stealing or embezzling postal packet by Post Office officer), 746 (imitating paper etc. used for stamp duties), 747 (possession of paper, plates or dies), 748, 749 (forging dies, stamps etc.); and see title REVENUE. See also as to various other statutory penalties under the Post Office Act, 1908 (8 Edw. 7, c. 48), p. 633, *ante* (evasion of postage), note (*e*), p. 651, *ante* (refusal or neglect to carry mails), pp. 654, 655, *ante* (offence by shipmaster), p. 655, *ante* (offence by customs officer), p. 633, *ante* (infringement of postal monopoly), p. 630, *ante* (for non-surrender of uniform). For offences in sending threatening letters, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 596 (threat to murder), 664 *et seq.* (demand of money etc. by threatening letter), 666 (threat to accuse of crime), 668 (threat to publish libel). For offences in respect of telegrams, see title TELEGRAPHS AND TELEPHONES.

2. Infringement of Postal Monopoly.

SECT. 2.—*Infringement of Postal Monopoly.*

Infringement of postal monopoly.

1413. Infringement of the Postmaster-General's monopoly (*h*) is an offence punishable on summary conviction (*i*) by fine (*k*).

SECT. 3.—*Abuse of Exemption of Privileged Persons' Letters.*

Abuse of exemption of privileged persons' letters.

1414. A fine not exceeding £5 for each offence, recoverable summarily (*l*), is incurred by every person who, (1) not having at the time the command of any vessel, regiment, corps, or detachment to which a privileged person belongs (*m*), writes his name upon a letter in order that it may be sent at a lower rate of postage than by law established (*n*); or (2) procures a privileged person to obtain (*o*), or being a privileged person obtains (*p*), the signature of his commanding officer upon a letter which is not from that privileged person and upon his private concerns only, in order to avoid the payment of the postage by law established; or (3) wilfully addresses a letter to a privileged person which is intended for another person or concerns the affairs of another person, with intent to evade the payment of the legal postage (*q*); or (4) being a commanding officer authorised to write (*r*) upon the letter of a privileged person, wilfully writes his name upon a letter that is not from and on the private concerns only of a privileged person (*s*).

SECT. 4.—*Abuse of Exemption of Shipowners' Letters.*

Falsely superscribing shipowners' letters.

1415. A fine not exceeding £10 for each offence, recoverable summarily (*l*), is incurred by every person who, with intent to evade any postage (*t*), falsely superscribes a letter as being the owner or charterer or consignee of the vessel conveying the letter, or as the owner or the shipper or the consignee of goods shipped thereon (*u*).

Wilful retention of privileged letter.

1416. A fine not exceeding £5, recoverable summarily (*l*), is incurred by every person, who being either the master or one of

(*h*) As to which, see p. 631, *ante*.

(*i*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 34; p. 633, *ante*. As to summary proceedings, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*k*) See p. 633, *ante*. Such fines and forfeitures are incurred whether the letter is sent simply or with anything else, or the incidental service is performed in respect to a letter either sent or to be sent singly or together with some other letter or thing. In any proceeding for the recovery of such fines or forfeitures, it lies upon the person proceeded against to prove that the act in respect of which the fine or forfeiture is alleged to have been incurred was done in conformity with the Act (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 34 (6)).

(*l*) As to summary proceedings, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*m*) See p. 641, *ante*.

(*n*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 6 (6) (a).

(*o*) *Ibid.*, s. 6 (6) (b).

(*p*) *Ibid.*, s. 6 (7).

(*q*) *Ibid.*, s. 6 (6) (c).

(*r*) See p. 641, *ante*.

(*s*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 6 (5).

(*t*) See note (*y*), p. 637, *ante*.

(*u*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 30 (4); see pp. 652, 656 *ante*.

the officers or crew of a vessel inward bound (*a*), or a passenger thereof, knowingly has in his baggage or in his possession or custody any postal packet (*b*), except a postal packet not within the privilege of the Postmaster-General (*c*), after the master has sent any part of the postal packets on board his vessel to the Post Office (*d*).

SECT. 4. **Abuse of Exemption of Ship-owners' Letters.**

1417. If such person detains any such packet after demand made either by an officer of customs (*e*) or by any person authorised by the Postmaster-General to demand the postal packets on board the vessel, he is liable for every postal packet on summary conviction to a fine not exceeding £10 (*f*).

Punishment.

SECT. 5.—*Fraudulent Retention of Mail-bag or Postal Packet.*

1418. Anyone is guilty of a misdemeanour (*g*) who fraudulently retains, or wilfully secretes (*h*) or keeps, or detains (*i*), or, when required by an officer of the Post Office (*k*), neglects or refuses to deliver up—

Fraudulent retention of mail bag or postal packet

(1) Any postal packet (*l*) which is in course of transmission by post (*m*) and which ought to have been delivered to any other person; or

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(*a*) As to what is an "inward bound" vessel, see note (*b*), p. 654, *ante*.

(*b*) For definition of "postal packet," see note (*h*), p. 630, *ante*.

(*c*) See p. 631, *ante*.

(*d*) See pp. 654, 655, *ante*.

(*e*) See title REVENUE.

(*f*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 32.

(*g*) *Ibid.*, s. 53.

(*h*) See, as to secreting, *R.* v. *Wynn* (1848), 2 Car. & Kir. 859; (1849), 1 Den. 365, C. C. R., where a letter-sorter, to avoid detection of his mistake in sorting, threw unopened letters down a water-closet.

(*i*) Compare *R.* v. *Poynton* (1862), Le. & Ca. 247 (undelivered letter kept in postman's pocket with intent to steal or secrete), and see *Meirelles* v. *Banning* (1831), 2 B. & Ad. 909 (assignee of bankrupt demanding letters). As to civil proceedings in detinue, see title TROVER AND DETINUE.

(*k*) For definition of "officer," see note (*a*), p. 630, *ante*, and note (*l*), p. 664, *post*.

(*l*) For definition of "postal packet," see note (*h*), p. 630, *ante*. For the effect of fictitious letters for the purpose of testing persons' honesty, see *R.* v. *Young* (1846), 2 Car. & Kir. 466 (letter to fictitious address), overruling *R.* v. *Gardner* (1845), 1 Car. & Kir. 628. As to evidence of an article being a postal packet, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 684, note (*m*).

(*m*) "Transmission by post" for this purpose time runs from the time of delivery to a post office to the time of delivery to the addressee (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 90 (a)). Delivery to a letter carrier or other authorised person is delivery to a post office (*ibid.*, s. 90 (b)); delivery at the house or office of the person to whom the packet is addressed, or to him or to his servant or agent or other person considered to be authorised to receive the packet, according to the usual manner of delivering that person's postal packets, is delivery to the person addressed (*ibid.*, s. 90 (c)). As to evidence of the posting of a letter, see title EVIDENCE, Vol. XIII., p. 556; pp. 643, 658, *ante*. As to what constitutes posting in the ordinary way, see title EVIDENCE, Vol. XIII., p. 441; and *R.* v. *Rathbone* (1841), 2 Mood. C. C. 242; Car. & M. 220; *R.* v. *Shepherd* (1856), Dears. C. C. 606. As to posting as publication of libel, see title LIBEL AND SLANDER, Vol. XVIII., p. 661; p. 658, *ante*.

SECT. 5. Fraudulent Retention of Mail-bag or Postal Packet.

(2) Any postal packet (*n*) in course of transmission by post (*o*) or any mail-bag (*p*) which shall have been found by him or by any other person (*q*).

1419. The punishment for this offence is fine and imprisonment with or without hard labour (*r*).

Punishment.

SECT. 6.—*Sending Dangerous Substance by Post.*

Sending dangerous substance by post.

1420. Any person is guilty of a misdemeanour (*s*) who sends or attempts to send a postal packet (*t*) which encloses any explosive, dangerous, noxious, or deleterious substance, any filth, sharp instrument not properly protected, any living creature which is either noxious or likely to injure other postal packets in course of conveyance or an officer of the Post Office (*u*), or any article or thing whatsoever which is likely so to injure such other packets or officer (*v*).

Punishment.

The punishment for this offence is, on summary conviction, a fine not exceeding £10, and, on conviction on indictment (*w*), imprisonment for a period not exceeding twelve months with or without hard labour (*a*).

SECT. 7.—*Interference with Letters.*

Interference with letters: by master of a vessel;

1421. A master of a vessel (*b*) who either opens a sealed mail-bag (*c*) with which he is entrusted for conveyance, or takes out of a mail-bag with which he is entrusted for conveyance any postal packet (*d*) or other thing, incurs a forfeit of £200 (*e*). Any person to whom postal packets have been entrusted by the master of a vessel to bring on shore who breaks the seal or in any manner wilfully opens them, is liable on summary conviction to a fine not exceeding £20 (*f*).

(*n*) See note (*h*), p. 630, *ante*.
(*o*) See note (*m*), p. 661, *ante*.
(*p*) See note (*r*), p. 654, *ante*.
(*q*) As to stealing or receiving stolen postal packets or mail-bags, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 645, 684.
(*r*) The Post Office Act, 1908 (8 Edw. 7, c. 48), s. 53, which substantially re-enacts the Post Office (Offences) Act, 1837 (7 Will. 4 & 1 Vict. c. 36), ss. 31, 42, does not specify the amount of the fine and imprisonment.
(*s*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 63 (1).
(*t*) See note (*h*), p. 630, *ante*.
(*u*) See note (*a*), p. 630, *ante*, and note (*t*), p. 664, *post*.
(*v*) See title EXPLOSIVES, Vol. XIV., p. 395. As to sending by post prints, articles etc. which are indecent or obscene, or have indecent words, marks, or designs, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 539. Detention in the post office of any postal packet contravening this section does not exempt the sender from proceedings which might have been taken in case of due delivery by post (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 63 (3)). See also title MAGISTRATES, Vol. XIX., pp. 586, 587.
(*w*) Indictment includes an information (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 89).
(*a*) *Ibid.*, s. 63 (2).
(*b*) See note (*p*), p. 654, *ante*.
(*c*) See note (*r*), p. 654, *ante*.
(*d*) See note (*h*), p. 630, *ante*.
(*e*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 28 (1); see pp. 654, 655, *ante*.
(*f*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 28 (2).

SECT. 7. Interference with Letters.

by person not a parent or guardian.

1422. Any person not in the employment of the Postmaster-General (*g*) is (*h*) guilty of a misdemeanour, who, not being a parent, or in the position of parent or guardian, of the addressee of the letter (*i*), wilfully and maliciously, with intent to injure any other person, either opens, or causes to be opened, any letter (*k*) which ought to have been delivered to that other person, or does any act or thing whereby the due delivery of the letter to that other person is prevented or impeded (*l*).

Punishment.

The punishment for this offence is a fine not exceeding £50, or imprisonment for a term not exceeding six months with or without hard labour. Prosecutions for this offence cannot be instituted without the direction or consent of the Postmaster-General (*m*).

SECT. 8.—*Negligence or Misconduct of Letter Carriers.*

Offences by letter carriers

1423. Any person employed to convey or deliver a mail-bag (*n*) or a postal packet (*o*), in course of transmission by post (*p*), is liable on summary conviction to a fine not exceeding £20 who while so employed, or while in possession or custody of the mail-bag or postal packet—

(1) Leaves it, or suffers any person, not being the guard or person employed for that purpose, to ride in the place appointed for the guard in or upon any carriage used for its conveyance (*q*), or to ride in or upon a carriage so used and not licensed to carry passengers, or upon a horse used for its conveyance on horseback; or

(1) Leaving mail unguarded;

(2) Is guilty of any act of drunkenness; or

(2) drunkenness;

(3) Is guilty of carelessness, negligence, or other misconduct, whereby the safety of the mail bag or postal packet is endangered; or

(3) negligence;

(4) Without authority collects, receives, conveys, or delivers a postal packet otherwise than in the ordinary course of post; or

(4) collecting postal packets without authority;

(5) Gives false information of an assault or attempt at robbery upon him; or

(5) false information as to assault;

(*g*) See note (*a*), p. 630, *ante*, and note (*t*), p. 664, *post*.

(*h*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 54 (1).

(*i*) *Ibid.*, s. 54 (2).

(*k*) "Letter" here means a postal packet (see note (*h*), p. 630, *ante*) in course of transmission by post (see note (*m*), p. 661, *ante*), and any other letter which has been delivered by post (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 54 (4)).

(*l*) See *Stapleton* v. *Foreign Vineyard Association* (1864), 11 L. T. 77 (where the court refused to restrain the Postmaster-General from delivering, or the company from receiving and opening, letters directed to the ex-manager of a company at that company's premises); and *Hermann Loog* v. *Bean* (1884), 26 Ch. D. 306, C. A. (where an ex-manager who had resided on the company's premises was compelled by injunction to withdraw a direction to the Postmaster-General that letters so directed should be forwarded to his private address).

(*m*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 54 (1), (3).

(*n*) See note (*r*), p. 654, *ante*.

(*o*) See note (*h*), p. 630, *ante*.

(*p*) See note (*m*), p. 661, *ante*.

(*q*) As to railways, see pp. 652, 653, *ante*.

SECT. 8. **Negligence or Misconduct of Letter Carriers.**

(6) loitering;

(6) Loiters on the road or passage, or wilfully mis-spends his time so as to delay the progress or arrival of a mail bag or postal packet in course of transmission by post (*r*), or does not use due care and diligence safely to convey a mail-bag or postal packet at the due rate of speed (*s*).

SECT. 9.—*Fraudulent Issue of Money Orders.*

Fraudulent issue of money orders.

1424. Any officer of the Post Office (*t*) is guilty of a felony who grants or issues any money order (*u*) with a fraudulent intent (*a*).

SECT. 10.—*Sending or Making Paper etc. in Imitation of Post Office Paper.*

Sending or making paper etc. in imitation of Post Office paper.

1425. A fine of 40*s*., recoverable summarily, is incurred by any person who, without due authority—

(1) Makes, issues, or sends by post or otherwise any envelope, wrapper, card, form, or paper in imitation of one issued by the Postmaster-General or any foreign or colonial postal authority, or having thereon any words, letters, or marks, which signify or imply, or may reasonably lead the recipient to believe, that a postal packet (*b*) bearing them is sent on His Majesty's service; or

(2) Makes on any envelope, wrapper, card, form, or paper for the purpose of being issued or sent by post or otherwise, or otherwise

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(*r*) See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 488, as to wilful detaining or delaying of postal packets. For actions against Post Office officers for non-delivery of letters, see *Rowning* v. *Goodchild* (1773), 2 Wm. Bl. 906; *Smith* v. *Powdich* (1774), 1 Cowp. 182. For the effect of delay upon formation of contract and other matters, see p. 658, *ante*.

(*s*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 57.

(*t*) See note (*a*), p. 630, *ante*. Proof of appointment is unnecessary (*R.* v. *Borrett* (1833), 6 C. & P. 124; *R.* v. *Rees* (1834), 6 C. & P. 606; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 389). As to the inference to be drawn from evidence of employment, see *R.* v. *Goodwin* (1828), 1 Lew. C. C. 100; *R.* v. *Townsend* (1841), Car. & M. 178 (son of letter carrier acting during father's illness); *R.* v. *Reason* (1853), Dears. C. C. 226 (person assisting in letter-sorting at postmaster's request); *R.* v. *Milner* (1850), 4 Cox, C. C. 275; *R.* v. *Simpson* (1850), 4 Cox, C. C. 276. On the other hand, see *R.* v. *Pearson* (1831), 4 C. & P. 572 (person cleaning boots and assisting in tying up bags, not an officer); *R.* v. *Glass* (1846), 2 Car. & Kir. 395 (where the prisoner's act was not done in the course of duty as a Post Office servant).

(*u*) See p. 648, *ante*. A money order is an "order for the payment of money," and a "valuable security" within the meaning of the Post Office Act, 1908 (8 Edw. 7, c. 48), and any other law relating to forgery or stealing (*ibid.*, s. 59 (1)); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 641, 642, 697 (larceny of valuable security), 667, 668 (extortion), 684—686 (restitution), 719 (forging orders). Fraudulent obliteration or alteration of a money order is, as in the case of a cheque (see *ibid.*, p. 727), felony under the Post Office Act, 1908 (8 Edw. 7, c. 48), s. 59 (2).

(*a*) *Ibid.*, s. 58 (1). Re-issuing a money order previously paid is deemed an issuing of an order with fraudulent intent (*ibid.*, s. 58 (2)). The punishment for this offence is, at the discretion of the court, penal servitude for not less than three nor more than seven years, or imprisonment with or without hard labour for not more than two years (*ibid.*, s. 58 (1)).

(*b*) See note (*h*), p. 630, *ante*.

used, any mark in imitation of or similar to or purporting to be any stamp or mark of any post office under the Postmaster-General or any foreign or colonial postal authority, or any words, letters, or marks which signify or imply, or may reasonably lead the recipient thereof to believe, that a postal packet bearing them is sent on His Majesty's service; or

(3) Issues or sends by post or otherwise any envelope, wrapper, card, form, or paper so marked (*c*).

SECT. 10. **Sending or Making Paper etc. in Imitation of Post Office Paper.**

SECT. 11.—*Fictitious Stamps.*

1426. A fine not exceeding £20 (*d*), recoverable summarily, is incurred by any person who— Fictitious stamps.

(1) Makes, knowingly utters, deals in, sells, knowingly uses for any postal purpose, or without showing lawful excuse has in his possession, any fictitious stamp (*e*); or Making stamps.

(2) Makes, or without showing lawful excuse has in his possession, any die, plate, instrument, or materials for making any fictitious stamp (*f*). Making dies.

A prosecution for this offence can only be begun by order of the Inland Revenue Commissioners (*d*). A conviction is subject to the like right of appeal as in the case of a penalty under the Acts relating to the Excise (*g*). Appeal.

SECT. 12.—*Unauthorised Notice as to Carrying on Post Office Business.*

1427. A fine not exceeding 40*s.* (*h*), recoverable summarily, is incurred by any person who, without authority from the Postmaster-General, places or maintains in or on any house, wall, door, Unauthorised notices as to carrying on Post Office business.

(*c*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 64; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 748.

(*d*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 65.

(*e*) "Fictitious stamp" here means any facsimile or imitation or representation, whether on paper or otherwise, of any stamp for denoting any rate of postage, including any stamp for denoting a rate of postage of any British possession or of any foreign country (*ibid.*, s. 65 (4)); for definition of "British possession," see note (*k*), p. 631, *ante*. As to forgery, fraudulent printing, and erasing of stamps etc., see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 746, 747; as to defacing unused adhesive stamps, and as to fraudulent practices not specially provided for by law in respect of any duty (*ibid.*, s. 21), see Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), ss. 20, 21; title REVENUE.

(*f*) A newspaper proprietor and printer, who ordered and kept in his possession a die for making uncoloured illustrations of a current colonial postage stamp in an illustrated stamp catalogue or newspaper, was held to have the die in his possession without lawful excuse, under the (repealed) Post Office (Protection) Act, 1884 (47 & 48 Vict. c. 76), s. 7 (c) (*Dickins v. Gill*, [1896] 2 Q. B. 310). Any stamp, die, plate, instrument, or materials found in the offender's possession are forfeited and may be seized (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 65 (3)). As to forged postal orders, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 746, note (*b*); as to possession of forged stamps, search warrants etc., see *ibid.*, p. 747, note (*c*); and title REVENUE.

(*g*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 65 (2); see title REVENUE.

(*h*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 66. An offence continuing after a previous conviction is punishable with a fine not exceeding 5*s.* for every day during which it continues (*ibid.*, s. 66 (2)).

SECT. 12. Unauthorised Notice as to Carrying on Post Office Business.

window, box, post, pillar or other place belonging to him or under his control, any of the following words, letters, or marks:—

(1) The words "post office" or "postal telegraph office"; or

(2) The words "letter box," with words, letters, or marks which signify or imply, or may reasonably lead the public to believe, that it is a post office letter box (*i*); or

(3) Words, letters, or marks which signify or imply, or may reasonably lead the public to believe, that any house or place is a post office, or that any box is a post office letter box (*i*).

Notices must be removed.

1428. Every person required by a notice given by the Postmaster-General to remove or efface the same, or to remove or effectually to close up any letter box belonging to such person or under his control, which has been a post office letter box (*i*), must comply with the request (*j*).

SECT. 13.—*Unauthorised Affixing of Notices to Post Office.*

Affixing notices without authority.

1429. Anyone is liable on summary conviction to a fine not exceeding 40*s.* who, without due authority, affixes or attempts to affix any placard, advertisement, notice (*k*), list (*l*), document, board or thing in or on, or paints or tars, any post office (*m*), post office letter box (*i*), telegraph post (*n*), or other property belonging to or used by or on behalf of the Postmaster-General, or who in any way disfigures any such office, box, post, or property (*o*).

SECT. 14.—*Injury to Letter Boxes.*

Injury to letter boxes.

1430. Anyone is guilty of a misdemeanour (*p*) who places or attempts to place in or against any post office letter box (*a*) any fire, match, light, filth or fluid, or any explosive, dangerous, noxious or deleterious substance, or who commits a nuisance in or against any post office letter-box (*a*), or does or attempts to do anything likely to injure the box, appurtenances, or contents.

Punishment.

The punishment for this offence is upon summary conviction a fine not exceeding £10, and on conviction on indictment (*b*) imprisonment for a period not exceeding twelve months with or without hard labour.

(*i*) See note (*g*), p. 630, *ante*.

(*j*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 66 (1) (c).

(*k*) As to notices in post offices, see p. 645, *ante*.

(*l*) As to lists in post offices, see p. 645, *ante*, and title ELECTIONS, Vol. XII., p. 261.

(*m*) See note (*g*), p. 630, *ante*.

(*n*) "Telegraph post" means a post, pole, standard, stay, strut, or other above-ground contrivance for carrying, suspending, or supporting a telegraph as defined by the Telegraph Act, 1869 (32 & 33 Vict. c. 73) (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 89). See title TELEGRAPHS AND TELEPHONES, and, as to injury to telegraphic apparatus, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 787. As to nuisance by telegraph wires, see title NUISANCE, Vol. XXI., p. 516.

(*o*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 62.

(*p*) *Ibid.*, s. 61; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 259; and, as to malicious damage, see *ibid.*, pp. 773, 775.

(*a*) See note (*g*), p. 630, *ante*; see title MAGISTRATES, Vol. XIX., pp. 586, 587.

(*b*) Indictment includes an information (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 89).

SECT. 15.—*Obstruction of Officer of the Post Office.*

SECT. 15. Obstruction of Officer of the Post Office.

1431. A fine not exceeding 40*s.* (*c*), recoverable summarily, is incurred by any person who wilfully obstructs, or incites anyone to obstruct, an officer of the Post Office (*d*) in the execution of his duty, or who whilst in any post office (*e*), or within any premises belonging thereto or used therewith, obstructs the course of business of the post office (*f*). Obstructing officer.

Any such offender may be required by any officer of the Post Office to leave a post office or any such premises; if he refuses or fails to comply with such requirement, he is liable on summary conviction to a further fine not exceeding £5, and may be removed by any officer. All constables must on demand remove or assist in removing such offender (*g*). Removal of person obstructing.

SECT. 16.—*Demanding Toll for Mails.*

1432. A fine not exceeding £5 for each offence, recoverable summarily, is incurred by any person who, being a toll collector or receiver, or other person employed to receive the tolls or rates at a gate or bar erected upon a highway, bridge, or post road, demands toll for any mail (*h*) or any person, horse or carriage going for or employed to go for any mail bag (*i*), or does not permit any such mail, person, horse, or carriage to pass without delay, or wilfully delays or obstructs any such mail, person, horse, or carriage at or in passing a gate or bar; or who being a ferryman, or other person employed to receive the tolls at a ferry, demands any toll for any mail, or does not, within fifteen minutes after demand made, convey the mail (if it be possible or safe to do so) across the ferry to the usual landing-place (*k*). Demanding toll.

SECT. 17.—*Soliciting to Commit Offences.*

1433. Any person is guilty of a misdemeanour (*l*) who solicits or endeavours to procure any other person to commit an offence punishable on indictment under the Post Office Act, 1908 (*m*). Soliciting to commit offences.

(*c*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 67 (1).

(*d*) See note (*a*), p. 630, *ante*; and see note (*t*), p. 664, *ante*.

(*e*) See note (*g*), p. 630, *ante*.

(*f*) Any hawker, newsvendor, or idle or disorderly person stopping or loitering on the flagway or pavement opposite the General Post Office in London, or any part thereof, is liable on summary conviction to a fine not exceeding £5 (Post Office Act, 1908 (8 Edw. 7, c. 48), s. 68 (3)). As to obstruction in neighbourhood of London General Post Office by hackney carriages (*ibid.*, s. 68 (1), (2)), see titles MARKETS AND FAIRS, Vol. XX., p. 59, note (*i*); STREET AND AERIAL TRAFFIC. As to obstruction of post office business by notices, see p. 645, *ante*.

(*g*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 67 (2). As to the powers of a constable, see title POLICE, pp. 497 *et seq.*, *ante*.

(*h*) See note (*x*), p. 651, *ante*.

(*i*) See note (*r*), p. 654, *ante*.

(*k*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 79 (2), (3); see p. 656, *ante*, and title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 65.

(*l*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 69; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 260.

(*m*) 8 Edw. 7, c. 48; see pp. 659 *et seq.*, *ante*, and title CRIMINAL LAW AND

SECT. 17. Soliciting to Commit Offences.

Punishment.

The punishment for this offence is imprisonment with or without hard labour for any term not exceeding two years (*n*).

Part VI.—Legal Proceedings.

SECT. 1.—*Recovery of Fines and Forfeitures.*

Recovery of fines and forfeitures.

1434. A fine or forfeiture imposed by the Post Office Act, 1908 (*o*), whether recoverable on summary conviction or not, may be recovered with costs by any person who sues for the same in the High Court. He may sue for the maximum amount, but can recover only such sum as the court awards (*p*). Proceedings must be commenced within one year next after the fine or forfeiture was incurred (*q*).

Power of Postmaster-General to compromise.

The Postmaster-General may compromise and compound any legal proceeding commenced by his authority, or under his control, against any person to recover any fine or forfeiture incurred under the Post Office Act, 1908 (*o*), on such terms and conditions as the Postmaster-General in his absolute discretion thinks proper, with full power for him, or any of his officers or agents duly authorised, to accept any fine or forfeiture so incurred or alleged to be incurred, or any part thereof, without legal proceedings (*r*).

SECT. 2.—*Summary Proceedings.*

Summary proceedings.

1435. All offences under the Post Office Act, 1908 (*o*), which are punishable on summary conviction, may be prosecuted, and all fines and forfeitures recoverable on summary conviction may be recovered, in the United Kingdom, in manner provided by the Summary Jurisdiction Acts (*s*). Any person convicted on summary conviction may

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PROCEDURE, Vol. IX., pp. 488, 539, 644, 645. See *R.* v. *James* (1890), 24 Q. B. D. 439, C. C. R. (prisoner inducing postman to intercept letters, accessory before the fact); Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), s. 1); as to accessories before and after the fact, and as to incitements to crime, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 257, 258, 260.

(*n*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 69.

(*o*) 8 Edw. 7, c. 48.

(*p*) *Ibid.*, s. 70 (1). As to recovery of fines and forfeitures outside the United Kingdom, see *ibid.*, s. 70 (3). As to recovery of unpaid postage not exceeding £20, see p. 640, *ante*. By the Post Office Act, 1908 (8 Edw. 7, c. 48), s. 75, fines, forfeitures, and other sums recovered must, notwithstanding anything in any other Act, be paid into the Exchequer, unless applied as an appropriation in aid under the Public Accounts and Charges Act, 1891 (54 & 55 Vict. c. 24), s. 2; see title REVENUE. As to the practice of the High Court, see title PRACTICE AND PROCEDURE.

(*q*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 70 (2). As to time limits of actions generally, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 33 *et seq.*

(*r*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 76. As to compounding penal actions otherwise, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 504; as to compounding civil actions, see title PRACTICE AND PROCEDURE.

(*s*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 71 (1); as to Isle of

appeal in England to a court of quarter sessions (*t*). Any sum, recoverable summarily as a civil debt (*u*), is recoverable in manner provided by these Acts.

SECT. 2. Summary Proceedings.

SECT. 3.—*Indictments.*

Indictments.

1436. In any indictment (*a*) or legal proceeding for any offence or any malicious, injurious, or fraudulent act or thing in respect of the Post Office or the Post Office revenue, or any property under the management or control of the Postmaster-General, it is enough to allege such property to belong to His Majesty's Postmaster-General (*b*), and to allege such act or thing to have been done with intent to injure or defraud him, without naming the particular Postmaster-General, and without alleging or proving upon trial or otherwise that such property was of any value (*c*). In any indictment or legal proceeding under the Post Office Act, 1908 (*d*), against any officer of the Post Office, it is enough to allege that the alleged offender was an officer of the Post Office at the time of the committing of the offence, without stating further the nature or particulars of his employment (*e*).

SECT. 4.—*Proceedings apart from Post Office Act*, 1908.

Proceedings apart from Post Office Act, 1908.

1437. When proceedings are taken before any court in respect of an offence under the Post Office Act, 1908 (*d*), which is also an offence under some other Act or at common law, the court may direct that, instead of such proceedings being continued, proceedings be taken under such other Act or at common law (*f*).

Man and elsewhere, see *ibid.* As to summary procedure, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*t*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 71 (2); as to Scotland and Ireland, see *ibid.* As to appeals to quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*u*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 71 (4), which see as to Ireland. Sums not exceeding £20 due from any Post Office officer or his sureties in respect of moneys received in the discharge of his duty may be recovered summarily as a civil debt (*ibid.*, s. 78). As to recovery of civil debts summarily, see title MAGISTRATES, Vol. XIX., pp. 609 *et seq.* As to recovery of postage, and evidence in proceedings therefor, see p. 640, *ante*.

(*a*) See note (*w*), p. 662, *ante*.

(*b*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 648, note (*d*), 684, note (*p*). As to property in a letter where the writer regains possession of it, see *Oliver* v. *Oliver* (1861), 11 C. B. (N. S.) 139, and p. 658, *ante*. As to venue, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp 284, 288, note (*l*). As to evidence of an article being a postal packet, see *ibid.*, p. 684, note (*m*).

(*c*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 73 (1).

(*d*) 8 Edw. 7, c. 48.

(*e*) *Ibid.*, s. 73 (2); and see note (*a*), p. 630, *ante*, and note (*t*), p. 654, *ante*.

(*f*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 77.

POUND AND POUND-BREACH.

See ANIMALS.

POWER OF APPOINTMENT.

See POWERS.

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END OF VOL. XXII.

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