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THE
LAWS OF ENGLAND.

VOLUME III.

THE
LAWS OF ENGLAND

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1887-86, 1886-92, and 1895-1905,

AND OTHER LAWYERS.

VOLUME III.

BILLS OF SALE.
BONDS.
BOUNDARIES, FENCES AND PARTY-WALLS.
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BUILDING SOCIETIES.
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Urban Authorities, Parish Councils, and Vestries . . . . . ,, LOCAL GOVERNMENT.
Ecclesiastical Law Generally . . . ,, ECCLESIASTICAL LAW.
Religious Services . . . . . ,, ECCLESIASTICAL LAW.

BYE-LAWS.

See COMPANIES; LOCAL GOVERNMENT; OPEN SPACES AND RECREATION GROUNDS; PUBLIC HEALTH ETC.; RAILWAYS AND CANALS; and other titles *passim*.

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See TELEGRAPHS AND TELEPHONES.

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See DEPENDENCIES AND COLONIES.

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CAPTURE.

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CARDS.

See GAMING AND WAGERING; REVENUE.

CARGO.

See SHIPPING AND NAVIGATION.

CARRIAGE BY SEA.

See SHIPPING AND NAVIGATION.

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 –1811
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—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., 1 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)
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
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., 1813—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
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Part I.—The Bills of Sale Acts.

SECT. 1.—*The Statutes.*

Introduction of registration of bills of sale.

1. The registration of bills of sale was introduced by the Bills of Sale Act, 1854 (*a*); and by the Bills of Sale Act, 1866 (*b*), renewal of registration was required every five years.

Acts now in force.

These Acts are repealed, and bills of sale are now regulated by the Bills of Sale Act, 1878 (*c*), called the principal Act (*d*), and the Bills of Sale Act (1878) Amendment Act, 1882 (*e*), in the text hereafter called the amending Act, which statutes may be cited together as the Bills of Sale Acts, 1878 and 1882 (*f*).

The Bills of Sale Acts, 1890 and 1891 (*g*), provide that certain instruments hypothecating imported goods are not to be deemed bills of sale within the meaning of the principal and amending Acts (*h*).

SECT. 2.—*Objects of the Statutes.*

Difference in object of Acts.

2. The Bills of Sale Acts, 1854 and 1878, were intended to prevent false credit being given to people allowed to remain in possession of goods which apparently are theirs, the ownership of which they have parted with (*i*).

The purpose of the amending Act was essentially different. It was to prevent needy persons being entrapped into signing complicated documents which they might often be unable to comprehend, and so being subjected by their creditors to the enforcement of

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(*a*) 17 & 18 Vict. c. 36.
(*b*) 29 & 30 Vict. c. 96, s. 4.
(*c*) 41 & 42 Vict. c. 31, "an Act to consolidate and amend the law for preventing frauds upon creditors by secret bills of sale of personal chattels."
(*d*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 3.
(*e*) 45 & 46 Vict. c. 43.
(*f*) *Ibid.*, s. 1.
(*g*) 53 & 54 Vict. c. 53; 54 & 55 Vict. c. 35.
(*h*) See p. 19, *post.*
(*i*) *Charlesworth* v. *Mills*, [1892] A. C. 231, *per* Lord HALSBURY, L.C., at p. 235.

SECT. 2. Objects of the Statutes.

harsh and unreasonable provisions (*j*). With this object in view, a particular form of words was insisted on, which should plainly express the nature of the contract as to the loan and the security for the loan (*k*). The Acts were not intended to apply to transactions other than those expressly pointed out (*k*).

SECT. 3.—*Application of the Statutes.*

SUB-SECT. 1.—*To what Places.*

Places to which Acts apply.

3. The principal Act and the amending Act do not extend to Scotland or Ireland (*l*), nor do they include bills of sale of goods in foreign parts or at sea (*m*).

A bill of sale given in England over goods in Scotland or Ireland is not affected by the Acts (*n*).

SUB-SECT. 2.—*To what Bills of Sale.*

Bills of sale to which principal Act applies.

4. The principal Act applies to all bills of sale executed on or after January 1, 1879 (*o*), and any renewals of registration of bills of sale, registered under the repealed Acts of 1854 and 1866, must be made in the same manner as the renewal of registration under the principal Act (*p*).

How far it is retrospective.

The principal Act also extends a rule of construction to all instruments including fixtures or growing crops, executed before its commencement, and then subsisting and in force (*q*). With these exceptions the principal Act does not affect bills of sale executed before its commencement, as regards which the Acts repealed continue in force (*r*).

Operation of amending Act.

5. The amending Act commenced and came into operation on November 1, 1882 (*s*).

Unless the context otherwise requires, it does not apply to any bill of sale duly registered before the commencement of the Act, so long as registration is not avoided by non-renewal or otherwise (*t*).

It is not retrospective so as to apply to bills of sale executed more than seven days before its commencement (*a*); nor does it make void, against the grantor, bills of sale subject to the Bills of Sale Act, 1854 (*b*), of which registration has not been renewed (*c*).

(*j*) *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *North Central Wagon Co.* (1888), 13 App. Cas. 554, *per* Lord HERSCHELL, L.C., at p. 560.

(*k*) *Charlesworth* v. *Mills*, [1892] A. C. 231, *per* Lord HALSBURY, L.C., at p. 235.

(*l*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 24; Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 18. The corresponding Irish Acts are the Bills of Sale (Ireland) Act, 1879 (42 & 43 Vict. c. 50), and the Bills of Sale (Ireland) Act (1879) Amendment Act, 1883 (46 Vict. c. 7).

(*m*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.

(*n*) *Coote* v. *Jecks* (1872), L. R. 13 Eq. 597; *Brookes* v. *Harrison* (1880), 6 L. R. Ir. 85, 332.

(*o*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 3.

(*p*) *Ibid.*, s. 23.

(*q*) *Ibid.*, s. 7; and see p. 24, *post*.

(*r*) *Ibid.*, s. 23.

(*s*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 2.

(*t*) *Ibid.*, s. 3.

(*u*) *Ibid.*; *Hickson* v. *Darlow* (1883), 23 Ch. D. 690.

(*b*) 17 & 18 Vict. c. 36.

(*c*) *Cookson* v. *Swire* (1884), 9 App. Cas. 653.

SECT. 3. Application of the Statutes.

But the amending Act regulates the removal and sale of chattels under any bill of sale by way of security for the payment of money, whether registered before or after its commencement (*d*); and empowers relief to be given, in certain cases, against the removal or sale of goods under a bill of sale executed and registered before, as well as after, the Act came into operation (*e*).

SUB-SECT. 3.—*Bills of Sale absolute, and by way of Security.*

Two classes of bills of sale.

6. The amending Act, which, so far as is consistent with the tenor thereof, is to be construed as one with the principal Act, does not apply to bills of sale given otherwise than by way of security for the payment of money (*f*), limiting, to this extent, the partial repeal of the principal Act (*g*).

Two classes of bills of sale have thus been created, the first comprising absolute bills of sale, to which the principal Act continues to apply (*h*), the second, bills of sale given to secure the payment of money, as to which both Acts are to be construed together (*f*).

Part II.—What is a Bill of Sale.

SECT. 1.—*General Principles.*

SUB-SECT. 1.—*Documents of Transfer.*

Description of bill of sale.

7. A bill of sale has been described as an instrument in writing whereby one transfers to another the property he has in goods and chattels (*i*), or as a document given with respect to the transfer of chattels, used in cases where possession is not intended to be given (*k*).

Meaning of bill of sale in Acts.

The principal Act declares that the expression "bill of sale,"

(*d*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 13; and see p. 70, *post*.

(*e*) *Ex parte Cotton* (1883), 11 Q. B. D. 301.

(*f*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 3.

(*g*) *Ibid.*, ss. 10, 15, repealing Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), ss. 8, 10, 20.

(*h*) *Swift* v. *Pannell* (1883), 24 Ch. D. 210.

(*i*) *Allsopp* v. *Day* (1861), 7 H. & N. 457.

(*k*) *Johnson* v. *Diprose*, [1893] 1 Q. B. 512, *per* Lord ESHER, M.R., at p. 515. The term "bill of sale" had formerly a wider meaning. A bill of sale denoted a sale, and was not a power to sell (*Simpson* v. *Wood* (1852), 21 L. J. (EX.), *per* PARKE, B., at p. 153); and included a grant of goods by way of bargain and sale with delivery (Bridgman's Conveyances (1725), 541), or followed by livery of seisin of the goods (Wood's Conveyancing (1762), Vol. 2, 690), either absolutely, or on a condition to become void on payment of money (Fidell's Guide to Conveyances (1654), 123). It was applied to grants of property other than goods, as of a sailor's wages (Chitty's Law of Commerce (1824), Vol. 4, 208), or of the produce and advantage of goods on shipboard (*Bucknal* v. *Roiston* (1709), Prec. in Ch. 285). A bill of sale, and a bargain and sale, whether of goods or other personalty, were precisely of the same kind in their operation and technical import, but where the instrument had reference to things of a real nature it was usually styled a bargain and sale, and where to things merely personal, as household goods etc., a bill of sale (Wilde's Supp. to Barton's Conveyancing (1826), Vol. 2, p. 52).

SECT. 1. General Principles.

which has the same meaning in the principal and amending Acts (*l*), shall, unless there be something in the subject or context repugnant to such construction, include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred (*m*).

Certain documents not bills of sale.

But the expression "bill of sale" does not include the following documents—that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented (*n*).

Dealings by the owner of chattels only affected.

The Acts apply only to bills of sale given by the owner of chattels, and do not extend to dealings with chattels by a person other than the owner (*o*).

When a document is a bill of sale.

8. It is not every document drawn up at the time when a transaction is carried out for the purpose of transferring goods from one person to another that is a bill of sale (*p*).

But a document included in the expression "bill of sale," or deemed to be a bill of sale by the principal Act (*q*), and intended to be an instrument of transfer of chattels, or to embody the terms of the contract between the parties, upon which it is necessary to rely to prove title, will, in general, be within the Acts, unless excepted by their express terms (*r*).

It was not intended to interfere with transactions other than those expressly pointed out (*s*); and unless a document is within the terms of the Acts it is not affected, though in the result the Acts are evaded (*t*).

SUB-SECT. 2.—*Documents with Delivery of Possession.*

Delivery of possession.

9. The operation of both the principal and amending Acts is confined (*a*) to bills of sale, whether the same be absolute or subject

(*l*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 3.
(*m*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.
(*n*) *Ibid.*; and see pp. 16 *et seq.*, *post*.
(*o*) *McEntire* v. *Crossley, Brothers Ltd.*, [1895] A. C. 457.
(*p*) *Charlesworth* v. *Mills*, [1892] A. C. 231.
(*q*) See p. 14, *post*.
(*r*) *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *North Central Wagon Co.* (1888), 13 App. Cas. 554.
(*s*) *Charlesworth* v. *Mills*, *supra*, *per* Lord HALSBURY, L.C., at pp. 235, 236.
(*t*) *Ramsden* v. *Lupton* (1873), L. R. 9 Q. B. 17.
(*a*) *Re Hall, Ex parte Close* (1884), 14 Q. B. D. 386.

or not subject to any trust, whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale (*b*).

Sale and delivery.

Transactions, the object and effect of which is the immediate delivery of chattels to the grantee, are not affected by the Bills of Sale Acts (*c*). Thus, they do not apply to a sale and actual delivery of chattels, though accompanied by a document within the definition of a bill of sale (*d*), or to pledges of goods, where immediate possession is transferred to the pledgee, though the transaction is recorded in a document regulating the rights of the parties (*e*), and constructive possession may be sufficient, though actual possession is not taken contemporaneously (*f*).

Pledges and pawns.

Common law lien.

Nor do the Acts apply to a document conferring on the holder of a common law lien rights of disposition of, or charges on, goods in his possession (*g*).

SUB-SECT. 3.—*Transactions without Writing.*

Oral contracts.

10. The Bills of Sale Acts affect documents but not transactions, and leave unimpeached titles or rights acquired by oral contract completed without writing (*h*). They do not require that any transaction shall be put into writing, but they do require that if a transaction be put into writing, and be of a particular character, it shall be registered (*i*).

Documents confirming oral transaction.

If the real bargain between the parties is reduced into writing the Bills of Sale Acts apply to the written contract (*j*). If, however, the bargain is complete without any writing, so that the property intended to be dealt with passes independently, the Acts have no application to a document referring to or confirming the

(*b*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 3.

(*c*) *Charlesworth* v. *Mills*, [1892] A. C. 231.

(*d*) *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18.

(*e*) *Re Hardwick, Ex parte Hubbard* (1886), 17 Q. B. D. 690; memorandum of deposit of warrant for warehoused goods deliverable to lender (*Re Cunningham & Co., Ltd., Attenborough's Case* (1885), 28 Ch. D. 682); letters of hypothecation accompanying pledge or pawn tickets (*Re Hall, Ex parte Close* (1884), 14 Q. B. D. 386); verbal charge on warehoused goods with delivery order (*Grigg* v. *National Guardian Assurance Co.*, [1891] 3 Ch. 206); memorandum of terms under which furniture was warehoused as security, the lender taking possession after paying warehouse rent (*Wilkinson* v. *Girard Frères* (1891), 7 T. L. R. 266). For form of such a pledge, see Encyclopædia of Forms, Vol. VIII., p. 794.

(*f*) As the delivery of the key of a warehouse where the goods were stored (*Hilton* v. *Tucker* (1888), 39 Ch. D. 669); or of the key of a plate chest (*Bowker* v. *Williamson* (1889), 5 T. L. R. 382); joint possession of grantor and grantee (*Ramsay* v. *Margrett*, *supra*).

(*g*) *Lord* (*Trustee of*) v. *Great Eastern Rail. Co.*, [1908] 2 K. B. 54, *per* COZENS-HARDY, M.R., at p. 60. But if a right is claimed apart from possession the Acts apply (*ibid.*). An unpaid seller's lien over chattels is not affected by the Acts (*Re Vulcan Ironworks Co.*, [1888] W. N. 37); though they apply to an express lien, granted by written contract, for unpaid purchase-money over chattels of which the seller has parted with possession (*Coburn* v. *Collins* (1887), 35 Ch. D. 373).

(*h*) *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *North Central Wagon Co.* (1888), 13 App. Cas. 554.

(*i*) *United Forty Pound Loan Club* v. *Berton*, [1891] 1 Q. B. 28, n.

(*j*) *Newlove* v. *Shrewsbury* (1888), 21 Q. B. D. 41.

SECT. 1. General Principles.

transaction (*k*); and the fact that such a document is drawn up, and is not registered, does not invalidate the transaction (*l*).

The existence of a document which does not express, or which is not intended to express, the real agreement between the parties does not necessarily exclude proof of title under an independent oral contract (*m*).

SECT. 2.—*Bills of Sale, Assignments, and Transfers.*

Bills of sale and assignments.

11. The expression "bills of sale and assignments," which is included in the statutory interpretation of the term "bill of sale," does not add to it. Bills of sale, if absolute, are subject only to the principal Act, but if given by way of security for the payment of money, are subject both to the principal Act and to the amending Act (*n*). For this reason certain of the instruments included in the statutory expression "bill of sale" cannot now be used except in cases where the disposition of property is intended to be absolute (*o*).

Transfers.

12. Transfers, which are also included in the statutory expression "bill of sale," are instruments which, though not in form bills of sale, purport to deal with chattels in the same way as a bill of sale (*p*).

SECT. 3.—*Declarations of Trust without Transfer.*

Declarations of trust.

13. Declarations of trust of chattels personal may be made by parol (*q*), but a declaration of trust of chattels without transfer, if contained in a document, may be a bill of sale (*r*). If a bill of

(*k*) *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, *per* Lord ESHER, M.R., at p. 23: "if a document is intended by the parties to it to be a part of the bargain to pass the property in the goods, then, whatever the form of the document may be, even if it be only a simple receipt for the purchase-money, it is, by s. 4, to be deemed to be a bill of sale, though it is not so in fact. But, if the document is not intended to be part of the bargain to pass the property in the goods—if the bargain is complete without it, so that the property passes independently of it—then it is not to be deemed to be that which it is not in fact—a bill of sale." The test in each case is whether the document must be used in evidence to prove the title claimed (*Haydon* v. *Brown* (1888), 59 L. T. 810), unless the writing when produced does not affect the rights of the parties, or make them different from what they would have been before, or from what they would have been if no writing had been referred to (*Charlesworth* v. *Mills*, [1892] A. C. 231, *per* Lord HALSBURY, at p. 239).

(*l*) A document following an oral agreement to assign to bankers to secure advances goods deposited with auctioneers for sale, is not within the Acts (*London and Yorkshire Bank* v. *White* (1895), 11 T. L. R. 570). Nor is a sale of goods by oral agreement, coupled with delivery and payment of price, accompanied by an unregistered inventory and receipt (*Shepherd* v. *Pulbrook* (1888), 59 L. T. 288).

(*m*) *Newlove* v. *Shrewsbury* (1888), 21 Q. B. D. 41, where proof of a verbal transfer as security was not excluded by the existence of a written receipt as on sale; *Parker* v. *Lyon* (1888), 5 T. L. R. 10, where a verbal grant of lien for purchase-money, paid on a sale by deed, was upheld.

(*n*) See p. 5, *ante*." The substance, and not only the form, of the instrument is regarded, and if in fact given to secure the payment of money a bill of sale is subject to both Acts (*Madell* v. *Thomas*, [1891] 1 Q. B. 230; *Re Watson, Ex parte Official Receiver* (1890), 25 Q. B. D. 27).

(*o*) *Re Townsend, Ex parte Parsons* (1886), 16 Q. B. D. 532.

(*p*) *Re Hardwick, Ex parte Hubbard* (1886), 17 Q. B. D. 690, *per* Lord ESHER, M.R., at p. 696.

(*q*) See title TRUSTS AND TRUSTEES.

(*r*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.

sale is made or given subject to any declaration of trust, not contained in the body thereof, such declaration of trust is to be deemed to be part of the bill of sale, and must be written on the same paper or parchment therewith and registered (*s*).

SECT. 3. Declarations of Trust without Transfer.

Declarations of trust without transfer were formerly resorted to as security for advances; and undertakings to hold goods in trust, and to pay over the proceeds when received, have been held to be bills of sale (*t*).

Imported goods.

An instrument charging or creating any security on, or declaring trusts of, imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being reshipped for export or delivered to a purchaser, not being the person giving or executing such instrument, is not to be deemed a bill of sale (*a*).

SECT. 4.—*Inventories of Goods, Receipts, and other Assurances.*

When receipts are bills of sale.

14. The principal Act includes "inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels," in the expression "bill of sale" (*b*). The controlling words are "other assurances of personal chattels," and inventories and receipts do not come within the Act, unless they are assurances on which the title claimed depends (*c*).

It is questionable whether an invoice and receipt, which are separate instruments and not intended to be operative in connection with each other, can be regarded as an inventory of goods with receipt thereto attached (*d*). But an inventory and receipt may be as solemn an assurance as a deed (*e*), and an inventory and receipt, or receipt alone, if embodying and intended to embody the terms of the contract, may be a bill of sale (*f*).

When oral contract complete.

Where, however, there is a complete and effectual oral contract of sale or charge, independent of any document, an instrument of the kind mentioned, though drawn up contemporaneously with the transaction, will not affect the parties' rights, or require registration as a bill of sale (*g*).

Thus, where chattels are bought by oral contract and paid for, the buyer stipulating that a receipt shall be drawn up by a solicitor,

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(*s*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (3).

(*t*) *Re Steele, Ex parte Conning* (1873), L. R. 16 Eq. 414; *R.* v. *Townshend* (1884), 15 Cox, C. C. 466.

(*a*) Bills of Sale Act, 1890 (53 & 54 Vict. c. 53), s. 1, as amended by the Bills of Sale Act, 1891 (54 & 55 Vict. c. 35), s. 1.

(*b*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.

(*c*) *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *North Central Wagon Co.* (1888), 13 App. Cas. 554, 569.

(*d*) *Ibid., per* Lord MACNAGHTEN, at p. 568.

(*e*) *Re Baum, Ex parte Cooper* (1878), 10 Ch. D. 313.

(*f*) *Re Hood, Ex parte Burgess* (1893), 42 W. R. 23, where a receipt by the sheriff on a private sale by order of the Court, containing the terms on which the sheriff sold, was held a bill of sale, there being no sale independently of the receipt.

(*g*) *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18.

In the following cases inventories and receipts, or receipts alone, were held not to be assurances or bills of sale: *Allsopp* v. *Day* (1861), 7 H. & N. 457; *Byerley* v. *Prevost* (1871), L. R. 6 C. P. 144 (receipts); *Graham* v. *Wilcockson* (1876), 46 L. J. (EX.) 55 (receipt with memorandum); *Woodgate* v. *Godfrey* (1879), 5 Ex. D. 24; *Marsden* v. *Meadows* (1881), 7 Q. B. D. 80

SECT. 4. Inventories of Goods etc.

the buyer's title is complete, though afterwards the seller gives a receipt in the form of an assurance (*h*).

Other assurances of personal chattels.

15. The words "other assurances of personal chattels," which control the preceding words of the section, also extend them to documents of the same kind, but not precisely within the earlier expressions. Thus, an express lien for unpaid purchase-money, given by written agreement, over chattels sold and delivered to the purchaser, is an assurance within the Act (*i*); though an unpaid seller's lien, arising by operation of law, is not affected (*j*).

Liens.

Auctioneer's memorandum.

So also, a memorandum of the sale of goods in an auctioneer's book, signed by his clerk for the purchaser, and by the auctioneer himself for the seller, without which the contract for sale would not have been enforceable, may be an assurance within the Act, requiring registration (*k*).

SECT. 5.—*Powers of Attorney, Authorities, or Licences to take Possession as Security for any Debt.*

SUB-SECT. 1.—*In General.*

Bill of sale under power of attorney.

16. Powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt (*l*) are bills of sale within

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(receipts and inventories on sales by sheriff); *Haydon* v. *Brown* (1888), 59 L. T. 810 (the like, including goods not subject to the execution); *Fox* v. *Barnett* (1886), 2 T. L. R. 233 (receipt on sale); *Parnacott* v. *Dieudonné* (1885), 2 T. L. R. 98 (receipt and inventory on sale by trustee in liquidation); *Preece* v. *Gilling* (1885), 53 L. T. 763 (receipt on sale of furniture); *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *North Central Wagon Co.* (1888), 13 App. Cas. 554 (inventory and receipt on sale of wagons); *Hay* v. *Nathan* (1886), 3 T. L. R. 11 (receipt on sale); *Shepherd* v. *Pulbrook* (1888), 59 L. T. 288 (list and receipt, sent after agreement to sell); *Newlove* v. *Shrewsbury* (1888), 21 Q. B. D. 41 (receipt given on oral contract of sale); *Jones* v. *Tower Furnishing Co.* (1889), 61 L. T. 84 (receipt and inventory on sale by sheriff under private contract); *Grace* v. *Gard* (1889), 6 T. L. R. 74 (inventory and memorandum on sale); *Clapham* v. *Ives* (1904), 91 L. T. 69 (valuation, inventory, and lease); *Lock* v. *Heath* (1892), 8 T. L. R. 295 (inventory attached to deed poll after gift); *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18 (receipt for purchase-money of goods acknowledging that the goods were the purchaser's); *Stammers* v. *Margrett* (1905), 21 T. L. R. 342 (inventory and receipt on sale by sheriff).

In the following cases inventories and receipts or receipts alone were held to be bills of sale: *Re Walden, Ex parte Odell* (1878), 10 Ch. D. 76 (inventory with receipt attached); *Re Baum, Ex parte Cooper* (1878), 10 Ch. D. 313 (inventory with receipt attached); *Re Hood, Ex parte Burgess* (1893), 42 W. R. 23 (receipt by the sheriff on a private sale by order of the court containing the terms on which the sheriff sold, there being no sale independent of the receipt); *Phillips* v. *Gibbons* (1857), 5 W. R. 527 (receipt for goods sold, and left in seller's possession); *Snell* v. *Heighton* (1883), 1 Cab. & El. 95 (receipt); *French* v. *Bombernard* (1888), 60 L. T. 48 (inventory and receipt on sale under distress).

(*h*) *Ramsay* v. *Margrett*, *supra*.

(*i*) *Coburn* v. *Collins* (1887), 35 Ch. D. 373.

(*j*) *Re Vulcan Ironworks Co.*, [1888] W. N. 37.

(*k*) *Re Roberts* (1887), 36 Ch. D. 196, where no part of the price was paid, the buyer being given six months' credit by the contract, and the whole of the goods remained on the seller's premises, and in his apparent possession. See title AUCTION AND AUCTIONEERS, Vol. I., p. 506.

(*l*) A licence to seize chattels cannot be assigned so as to give the assignee a right of seizure (*Re Davis, Ex parte Rawlings* (1888), 22 Q. B. D. 193). A licence to seize is revoked by bankruptcy (*Thompson* v. *Cohen* (1872), L. R. 7

the principal Act (*m*). As bills of sale by way of security for payment of money are now required to be in accordance with a scheduled form (*n*), the instruments enumerated will not be valid securities. But a bill of sale may be executed under a power of attorney, even though given to the proposed grantee, and the Court will refuse to restrain the attorney from executing a bill of sale in proper form (*o*). SECT. 5. Powers of Attorney etc.

17. Authorities and licences to take possession otherwise than as security for any debt are not bills of sale (*p*), though, if by way of security, it is immaterial that when the authority or licence was given no debt existed, if the intention was to secure a future debt (*q*). Licences.

Only such licences or authorities to take possession are bills of sale as are consistent with possession of the goods remaining with the grantor, and if it is intended that possession should at once be given to the grantee the Acts do not apply (*r*). Thus, if an authority is given to sell goods which are handed over, a document accompanying the transaction is not necessarily a bill of sale, there being no licence to seize goods which are already delivered (*s*). But it is otherwise when the authority or licence is to seize and sell chattels to pay a debt (*t*), and a licence to sell has been said to import a licence to seize (*a*). Licences accompanied by possession

If the authority is not to take, but only to retain possession of, goods already in the possession of the grantee, the document containing such authority is not a bill of sale, even though it defines the rights of the parties (*b*). Nor is a document a bill of sale which confers on the holder of a common law lien rights of disposition of, or charges on, goods in his possession (*c*). Authority to retain possession. Right of lien.

But a document purporting to give a lien on goods not in the grantee's possession, and on which there is no common law right of lien, is void as an authority or licence to take possession as security for a debt (*c*).

18. Although ordinary powers of distress are not within the Acts (*d*), powers of seizure contained in leases, by way of distress for recovery of a debt, may be licences to seize; thus, a brewer's Licence to distrain.

Q. B. 527), and has no operation against property acquired by a bankrupt after discharge (*Collyer* v. *Isaacs* (1881), 19 Ch. D. 342).

(*m*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.

(*n*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9; and see p. 34, *post*.

(*o*) *Furnivall* v. *Hudson*, [1893] 1 Ch. 335.

(*p*) *Re Garrud, Ex parte Newitt* (1881), 16 Ch. D. 522.

(*q*) *Stevens* v. *Marston* (1890), 60 L. J. (Q. B.) 192.

(*r*) *Re Hardwick, Ex parte Hubbard* (1886), 17 Q. B. D. 690 (authority to sell goods deposited as security).

(*s*) *Charlesworth* v. *Mills*, [1892] A. C. 231 (authority to auctioneers to sell and repay advances). Such an authority, if for valuable consideration, is irrevocable (*ibid.*, at p. 243). See titles AGENCY, Vol. I., p. 228; AUCTION AND AUCTIONEERS, Vol. I., p. 504.

(*t*) *Re Townsend, Ex parte Parsons* (1886), 16 Q. B. D. 532.

(*a*) *Johns* v. *Ware*, [1899] 1 Ch. 359, at p. 363.

(*b*) *Spencer* v. *Midland Rail. Co.* (1895), 11 T. L. R. 542.

(*c*) *Lord (Trustee of)* v. *Great Eastern Rail. Co.*, [1908] 2 K. B. 54, *per* COZENS-HARDY, M.R., at p. 60.

(*d*) *Re Roundwood Colliery Co.*, [1897] 1 Ch. 373.

SECT. 5. Powers of Attorney etc.

lease containing a power to seize stock in trade and effects of the lessee in default of payment of the brewer's account is a bill of sale (*e*).

Licence to seize in building contracts.

19. An instrument containing a stipulation, common in building agreements, whereby all materials brought upon the premises for the purposes of building are to be considered as immediately attaching to the land, with power to the landowner of seizure on the builder's default, is not a bill of sale (*f*); for such a licence to seize is not generally given as security for any debt (*g*). And an agreement providing that all materials brought upon the land are to become the property of the landowner is not a bill of sale, as his interest in the materials is legal, as distinguished from a right in equity to personal chattels (*h*).

But a mortgage of a building lease, together with plant and materials then or thereafter brought on the land, with power on default to sell them separately, is a bill of sale of the plant and materials (*i*).

SUB-SECT. 2.—*Hiring Agreements.*

Licence to seize in hiring agreements.

20. Licences to seize are frequently inserted in hire-purchase agreements (*k*). The Bills of Sale Acts do not apply to an ordinary business agreement for the hire or hire-purchase of chattels which, until the stipulated payments have been made, are not the property of the hirer (*l*). In such cases the hirer is not the owner of the chattels; and as the licence to seize merely empowers the owner to retake possession of his own property, it is not a bill of sale (*m*).

Independent sale and hiring.

The same result follows when the owner of chattels sells them, and afterwards, by independent contract, hires them back from the purchaser, even though a right is given to repurchase for an equivalent to the sum paid (*n*).

The decisions as to what is to be regarded as an independent sale and hiring have not been free from difficulty (*o*). It would appear

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(*e*) *Stevens* v. *Marston* (1890), 60 L. J. (Q. B.) 192. See further, p. 15, *post*.

(*f*) *Brown* v. *Bateman* (1867), L. R. 2 C. P. 272; *Blake* v. *Izard* (1867), 16 W. R. 108; *Reeves* v. *Barlow* (1884), 12 Q. B. D. 436. As to such stipulations, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 152, 177; BUILDING CONTRACTS ETC., pp. 260 *et seq.*, *post*.

(*g*) *Re Garrud, Ex parte Newitt* (1881), 16 Ch. D. 522.

(*h*) *Reeves* v. *Barlow*, *supra*. See further p. 14, *post*.

(*i*) *Climpson* v. *Coles* (1889), 23 Q. B. D. 465; *Church* v. *Sage* (1892), 67 L. T. 800.

(*k*) For hire-purchase, see title BAILMENT, Vol. I., p. 554; for forms of hire-purchase agreements, see Encyclopædia of Forms, Vol. VI., pp. 449 *et seq.*

(*l*) *Re Hawkins, Ex parte Emerson* (1871), 41 L. J. (BCY.) 20; *Re Robertson, Ex parte Crawcour* (1878), 9 Ch. D. 419.

(*m*) *McEntire* v. *Crossley Brothers, Ltd.*, [1895] A. C. 457.

(*n*) *Victoria Dairy Co.* v. *West* (1895), 11 T. L. R. 233; *Clapham* v. *Ives* (1904), 91 L. T. 69.

(*o*) *Re Walden, Ex parte Odell* (1878), 10 Ch. D. 76; *Brown* v. *Blaine* (1884), 1 T. L. R. 158; *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *North Central Wagon Co.* (1888), 13 App. Cas. 554, *Gapp* v. *Bond* (1887), 19 Q. B. D. 200; *Redhead* v. *Westwood* (1888), 59 L. T. 293; *French* v. *Bombernard* (1888), 60 L. T. 48; *Jones* v. *Tower Furnishing Co.* (1889), 61 L. T. 84; *Re Yarrow, Ex parte Collins* (1889), 61 L. T. 642; *Re Watson, Ex parte*

that if there is a real completed sale, the Acts will not apply to a separate and distinct hiring or hire-purchase agreement, even though a receipt or other document is given on the sale, and though the whole transaction may result in an equivalent of the price being returned to the buyer by means of instalments of hire (*p*). But if the real transaction is a loan of money intended to be secured by a sale and hiring agreement, the document or documents embodying the arrangement will be within the Acts (*q*).

Where the contract is for a loan to be secured by a sale and hiring agreement of chattels, even if the property passes by the sale, it does so subject to the terms of the hiring agreement, which is thus part of the buyer's title, and within the Acts as a licence to seize (*a*).

Each case must be determined according to the proper inference to be drawn from the facts; and whatever form the transaction may take, the Court will decide according to its real substance (*b*). Thus, the grantor of chattels by deed purporting absolutely to dispose of them, followed by a hiring, is not estopped from showing that the real bargain was a loan on the security of chattels (*c*).

Assignment of rights under hiring agreement.

An assignment by the owner of goods, let on hire, of all his rights under the hiring agreement is not a bill of sale (*d*), though an assignment of, or charge upon, the goods themselves would be (*e*).

Purchase from hirer.

A purchaser from the hirer of goods, let on hire, acquires no title against the true owner where the hire-purchase agreement does not operate as a contract to buy as well as sell (*f*).

SECT. 6.—*Agreements.*

Agreements to give a bill of sale.

21. An agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, is conferred, is a bill of sale (*g*). A written agreement to give a bill of sale, or purporting to confer a charge (*h*), when relied on to support a title to chattels, was a bill of sale within the Bills of Sale Act, 1854 (*i*), which did not expressly mention this class of documents, and is within the express words of the principal Act. Consequently, a written agreement to give a bill of sale, or by way of charge,

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Official Receiver (1890), 25 Q. B. D. 27; *Madell* v. *Thomas*, [1891] 1 Q. B. 230; *Beckett* v. *Tower Assets Co.*, [1891] 1 Q. B. 638; *Re Linton, Ex parte Finlay* (1893), 10 MORT. 258; *Wheatley's Trustee* v. *Wheatley, Ltd.* (1901), 85 L. T. 491; *Maas* v. *Pepper*, [1905] A. C. 102.

(*p*) *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *North Central Wagon Co.* (1888), 13 App. Cas. 554.

(*q*) *Maas* v. *Pepper, supra.*

(*a*) *Beckett* v. *Tower Assets Co., supra.*

(*b*) *Re Watson, Ex parte Official Receiver* (1890), 25 Q. B. D. 27.

(*c*) *Madell* v. *Thomas, supra.*

(*d*) *Re Davis, Ex parte Rawlings* (1888), 22 Q. B. D. 193; *Re Isaacson, Ex parte Mason*, [1895] 1 Q. B. 333.

(*e*) *Jarvis* v. *Jarvis* (1893), 63 L. J. (CH.) 10.

(*f*) *Helby* v. *Matthews*, [1895] A. C. 471.

(*g*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.

(*h*) *Re Steele, Ex parte Conning* (1873), L. R. 16 Eq. 414.

(*i*) *Re Jeavons, Ex parte Mackay* (1873), 8 Ch. App. 643; *Edwards* v. *Edwards* (1876), 2 Ch. D. 291.

SECT. 6. Agreements.

will not now give a title to chattels, unless the requirements of the Acts are complied with (*j*), but an application to restrain the execution of a bill of sale under a power of attorney given for valuable consideration will not be granted (*k*).

An oral agreement to give a bill of sale is not within the Acts, nor do they invalidate a duly registered bill of sale given in pursuance of an agreement within them (*l*).

Only equitable right affected.

The right affected by the Acts is a right in equity, as distinguished from a right in law, and if a legal right is given, this provision of the Act does not apply (*m*).

SECT. 7.—*Instruments with Power of Distress.*

Attornment clause in a mortgage.

22. Certain instruments giving a power of distress are deemed to be bills of sale (*n*).

Before the principal Act came into force, an attornment clause inserted in a mortgage deed gave an additional security by way of distress on chattels for both principal and interest (*o*), and was not within the Bills of Sale Acts (*p*). This right of distress could be exercised, not only on the goods of the borrower, but on those of a stranger, as, for example, the grantee of a bill of sale given by a tenant to the mortgagor (*q*).

Such an attornment clause is included in the principal Act (*r*), which applies whether the distress be on the goods of a third party

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(*j*) *Jarvis* v. *Jarvis* (1893), 63 L. J. (CH.) 10; *Furnivall* v. *Hudson*, [1893] 1 Ch. 335.

(*k*) *Furnivall* v. *Hudson*, *supra*.

(*l*) *Re Hemingway*, *Ex parte Hauxwell* (1883), 23 Ch. D. 626.

(*m*) *Reeves* v. *Barlow* (1884), 12 Q. B. D. 436, where an instrument providing that all materials brought on the land were to become the property of the building owner was held not to be a bill of sale, the building owner's interest being a legal, and not an equitable, right; *Morris* v. *Delobbel-Flipo*, [1892] 2 Ch. 352, where an agreement giving an agent a retainer for advances on goods coming into his possession was held to confer a legal and not an equitable right, as it depended on possession; *Spencer* v. *Midland Rail. Co.* (1895), 11 T. L. R. 542, where an agreement providing that all goods stored on a railway company's premises should be deemed to be in their possession and subject to a lien was held not to be a bill of sale; *Lord* (*Trustee of*) v. *Great Eastern Rail. Co.*, [1908] 2 K. B. 54, where a similar agreement, affecting goods not in the company's possession, was held to be a bill of sale as conferring an equitable right.

(*n*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 6: "Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress: Provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent."

(*o*) *Re Betts*, *Ex parte Harrison* (1881), 18 Ch. D. 127.

(*p*) *Morton* v. *Woods* (1869), L. R. 4 Q. B. 293.

(*q*) *Kearsley* v. *Philips* (1883), 11 Q. B. D. 621.

(*r*) *Green* v. *Marsh*, [1892] 2 Q. B. 330. As to the validity in bankruptcy of an attornment clause in a mortgage, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 293.

or of the borrower (*s*), and whether the power of distress is express, or is claimed as incident to the demise (*t*).

Exclusion of mining leases.

Mining leases are expressly excluded from the operation of the Act, and this protection extends to a power of distress in a mining lease on goods upon premises near to and worked with those demised (*a*).

Landlord's power of distress.

23. The powers of distress which exist at common law, or are reserved to landlords in any usual form of lease, are not affected by the Acts (*b*). If, however, with the object of securing a debt, a power of distress is given, so general as to be outside the scope of ordinary leases or agreements between landlord and tenant, the instrument is to be deemed to be a bill of sale (*c*).

But the instrument is only "deemed to be" a bill of sale of any personal chattels which may be seized or taken under the power of distress (*d*). It need not therefore be in the statutory form, not being in fact a bill of sale, though, for the purpose of registration, it is treated as one, and if unregistered is void so far as regards chattels which may be seized or taken under the power (*d*).

Where no personal chattels are taken, the relationship of borrower and lender as landlord and tenant is not affected, nor are the terms of the agreement between them, except so far as the agreement purports to give a power of distress (*e*). Thus, the lender as landlord may recover possession when rent reserved under the agreement is in arrear (*f*).

Demise by mortgagee in possession.

24. It is provided that a demise by a mortgagee in possession to the mortgagor, at a fair and reasonable rent, is not to be deemed to be a bill of sale (*g*), but this proviso extends only to cases where the mortgagee, being in actual possession, has subsequently demised to the mortgagor, and does not give protection where actual possession has not been taken, the only demise being by the mortgage deed; for an attornment clause does not of itself make the mortgagee a mortgagee in possession within the meaning of the proviso (*h*).

Demise as further security.

A lease in good faith to a mortgagor by a mortgagee in actual possession is protected, but not a lease to secure money. Thus, where a mortgagor, under a mortgage with an attornment clause, being in arrear with interest, undertakes in writing to hold as tenant to the mortgagee at a fair rent, but the mortgagee does not take actual possession, the intention being further to secure the mortgage debt,

(*s*) *Green* v. *Marsh*, [1892] 2 Q. B. 330.
(*t*) *Re Willis, Ex parte Kennedy* (1888), 21 Q. B. D. 384. Compare *Hall* v. *Comfort* (1886), 18 Q. B. D. 11.
(*a*) *Re Roundwood Colliery*, [1897] 1 Ch. 373.
(*b*) *Re Willis, Ex parte Kennedy, supra*, at p. 397.
(*c*) *Pulbrook* v. *Ashby* (1887), 56 L. J. (Q. B.) 376 (brewer's lease giving power to distrain for current account); *Stevens* v. *Marston* (1890), 60 L. J. (Q. B.) 192 (lease giving landlords the same right of distress for current account and advances as for rent in arrear).
(*d*) *Green* v. *Marsh, supra.*
(*e*) *Stevens* v. *Marston, supra.*
(*f*) *Mumford* v. *Collier* (1890), 25 Q. B. D. 279.
(*g*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 6.
(*h*) *Re Willis, Ex parte Kennedy, supra*; *Green* v. *Marsh, supra.*

SECT. 7. Instruments with Power of Distress.

and not to create a real demise, the instrument is a bill of sale, and a distress levied by the mortgagee on goods of strangers is avoided (*i*).

Fair and reasonable rent.

In determining what is a fair and reasonable rent, the question probably is whether the rent fixed be so excessive, considering the nature of the property, as to lead to the conclusion that it was not intended to create a real rent or a real tenancy, but that the demise was a mere device to enable the mortgagee to obtain an additional security (*k*).

Part. III.—Instruments not within the Expression "Bill of Sale."

SECT. 1.—*Assignments for the Benefit of Creditors.*

What assignments are included.

25. The principal Act provides that the expression "bill of sale" shall not include certain documents, the first being assignments for the benefit of the creditors of the person making or giving the same (*l*).

Such assignments, to be within the exception, must be available for creditors generally who choose to come in (*m*), none being excluded from the benefits of the deed (*n*). But a deed of assignment is none the less for the benefit of creditors because a time limit is fixed within which they must accede (*o*). An assignment of chattels to secure a composition is, if for the benefit of creditors generally, also within the exception (*p*).

But if the deed is for the benefit of certain creditors only, it is a bill of sale (*q*); and so is a licence to seize chattels given to a creditor, with an authority to pay himself and other creditors (*r*).

SECT. 2.—*Marriage Settlements.*

What settlements are included

26. Marriage settlements are not bills of sale, within the principal Act (*s*). The exception includes instruments which create a trust

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(*i*) *Green* v. *Marsh*, [1892] 2 Q. B. 330.

(*k*) *Re Bowes, Ex parte Jackson* (1880), 14 Ch. D. 725.

(*l*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4; and see p. 6, *ante*. As to assignments for the benefit of creditors, which are now regulated by the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), and the principles of law applicable under that Act, together with the validity of deeds of arrangement as against creditors and in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 325—337.

(*m*) *General Furnishing and Upholstery Co.* v. *Venn* (1863), 2 H. & C. 153.

(*n*) *Paine* v. *Matthews* (1885), 53 L. T. 872; *Boldero* v. *London and Westminster Discount Co.* (1879), L. R. 5 Ex. D. 47. Compare *Spencer* v. *Slater* (1878), 4 Q. B. D. 13.

(*o*) *Hadley & Son* v. *Beedom*, [1895] 1 Q. B. 646.

(*p*) *Hodges* v. *Preston* (1899), 80 L. T. 847; *Beevor* v. *Savage* (1867), 16 L. T. 358.

(*q*) *R.* v. *Creese* (1874), 43 L. J. (M. C.) 51.

(*r*) *Re Townsend, Ex parte Parsons* (1886), 16 Q. B. D. 532.

(*s*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4; and see p. 6, *ante*. For

for the purpose of carrying out provision for a marriage. Thus, an informal ante-nuptial memorandum of agreement for a marriage settlement is protected (*a*). And a transfer of chattels after marriage, carrying out an ante-nuptial contract, is within the exception, as for example an assignment of chattels, acquired after marriage, in pursuance of a covenant contained in a marriage settlement to transfer to trustees all the settlor's after-acquired property except business assets (*b*).

Post-nuptial settlements.

27. Post-nuptial settlements are not marriage settlements within the exception (*c*). When absolute transfers, they require attestation and registration under the provisions of the principal Act (*d*). Unless a post-nuptial settlement is an assurance of chattels by way of security for the payment of money, it is excluded from the operation of the amending Act (*e*).

Apparent possession of husband.

28. When two persons are together in the enjoyment of chattels, the law refers possession to the one who has the legal title (*f*). Thus, chattels settled by a husband on his wife, which are in her possession in the home where she and her husband live together, are, in general, deemed to be in her possession, and not in the apparent possession of her husband, in which case the principal Act does not affect them (*g*).

SECT. 3.—*Mercantile Transfers.*

SUB-SECT. 1.—*Transfers of Ships.*

Transfers of ships.

29. Transfers or assignments of any ship or vessel or any share thereof are not bills of sale, within the Acts (*h*), even though not in the form given by the Merchant Shipping Act, 1894 (*i*), or registered thereunder (*j*).

The exception applies to a transfer or assignment of anything ordinarily called a vessel, and not only of what is technically so called, and includes a dumb barge worked by oars, but not a mere boat (*k*).

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marriage settlements generally, see titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

(*a*) *Wenman* v. *Lyon & Co.*, [1891] 2 Q. B. 192. As to the validity of marriage settlements against creditors, apart from the Bills of Sale Acts, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 277; FRAUDULENT AND VOIDABLE CONVEYANCES.

(*b*) *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, affirmed in H. L., *sub nom. Clough* v. *Samuel*, [1905] A. C. 442.

(*c*) *Fowler* v. *Foster* (1859), 28 L. J. (Q. B.) 210; *Ashton* v. *Blackshaw* (1870), L. R. 9 Eq. 510.

(*d*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), ss. 8, 10; *Casson* v. *Churchley* (1884), 53 L. J. (Q. B.) 335.

(*e*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 3.

(*f*) *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18.

(*g*) *Re Satterthwaite, Ex parte Trustee* (1895), 2 Mans. 52; *Shepherd* v. *Pulbrook* (1888), 4 T. L. R. 642.

(*h*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4; and see p. 6, *ante*.

(*i*) 57 & 58 Vict. c. 60, s. 24; Sched. I., Part I., Form A. See Encyclopædia of Forms, Vol. XIV., p. 53.

(*j*) *Union Bank of London* v. *Lemanton* (1878), 3 C. P. D. 243. See further, title SHIPPING AND NAVIGATION.

(*k*) *Gapp* v. *Bond* (1887), 19 Q. B. D. 200.

SECT. 8. **Mercantile Transfers.**

The transfer of an unfinished ship is also protected, including materials preparing for its completion, but not actually on board (*l*). The statutory form of mortgage of a ship with its appurtenances, under the Merchant Shipping Act, 1894 (*m*), covers all articles and materials necessary for the ship, and on board when the mortgage is given; and registration as a bill of sale is unnecessary to protect articles and materials afterwards substituted for them (*n*).

SUB-SECT. 2.—*Transfers in the Ordinary Course of Business.*

Transfers of goods.

30. Transfers of goods in the ordinary course of business of any trade or calling are also excluded from the statutory interpretation of bills of sale, as are also bills of sale of goods in foreign parts or at sea (*o*), bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented (*p*).

Transfers not within the exception.

31. Disposing of goods by bill of sale is not a transfer of goods in the ordinary course of business (*q*). Nor is a pledge by a trader of stock in trade, bought on credit and not paid for, a transfer in the ordinary course of business of any trade or calling within the exception (*r*).

The exception does not apply to an agreement by the owner of a sugar plantation by which it is agreed, in consideration of a loan, to deliver to the lender the crop of sugar when made, for the purpose of sale and payment of the debt out of the proceeds, the transaction being considered a borrowing on special agreement which, though not uncommon, is not in the ordinary course of business (*s*).

Hypothecations etc.

32. A letter of hypothecation accompanying a deposit of goods is not, as has been seen, a bill of sale (*t*); and a document charging goods in the ordinary course of mercantile business, even though the goods are not actually delivered (*u*), or an agreement for a vendor's lien on bills of lading and goods in transit or in the hands of consignees (*w*), is within the exception.

But an agreement, not in the ordinary course of business, agreeing to hold goods at a creditor's disposal and to give a transfer when required, is a bill of sale (*x*).

(*l*) *Re Softley, Ex parte Hodgkin* (1875), L. R. 20 Eq. 746.

(*m*) 57 & 58 Vict. c. 60, s. 31 (1), and Sched. I., Part I., Form B.; see Encyclopædia of Forms, Vol. XIV., pp. 55—59.

(*n*) *Coltman* v. *Chamberlain* (1890), 25 Q. B. D. 328.

(*o*) See p. 6, *ante*.

(*p*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.

(*q*) *R.* v. *Thomas* (1870), 22 L. T. 138.

(*r*) *Re Hall, Ex parte Close* (1884), 14 Q. B. D. 386. Compare the pledge of a bill of lading (*Re Hodgson, Ex parte Brett* (1875), 1 Ch. D. 151).

(*s*) *Tennant* v. *Howatson* (1888), 13 App. Cas. 489.

(*t*) See p. 7, *ante*. For form of such letter, see Encyclopædia of Forms, Vol. VIII., p. 796.

(*u*) *Re Slee, Ex parte North-Western Bank* (1872), L. R. 15 Eq. 69.

(*w*) *Re Love, Ex parte Watson* (1877), 5 Ch. D. 35.

(*x*) *Re Steele, Ex parte Conning* (1873), L. R. 16 Eq. 414; *R.* v. *Townshend* (1884), 15 Cox, C. C. 466.

Letters given to bankers for advances on goods in the hands of third parties, with their receipts attached, stating that the borrowers hold the goods in the third parties' hands on the lenders' account and under lien to them, are within the exception, as documents used in the ordinary course of business as proof of the possession or control of goods, and protect, without registration, goods returned to the borrowers by the third parties, as well as those still in their hands (*y*).

Imported goods.

An instrument charging or creating any security on, or declaring trusts of, imported goods, given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being reshipped for export, or delivered to a purchaser not being the person giving or executing such instrument, is not a bill of sale within the meaning of the principal and amending Acts (*z*). As regards such goods the operation of the law of reputed ownership in bankruptcy remains unaffected (*a*).

SECT. 4.—*Debentures.*

When securities of companies are bills of sale.

33. Debentures issued by any mortgage, loan, or other incorporated company (*b*), and secured upon the capital stock or goods, chattels, and effects of such company, are excluded from the provisions of the amending Act (*c*).

A trading company may give a bill of sale as security for goods sold or work done (*d*), and such a bill of sale by a company has been said to be within the Bills of Sale Acts (*e*). But mortgages or charges created by an incorporated company, for the registration of which provision is made by the Companies Clauses Act, 1845, or the Companies Acts (*f*), are not bills of sale within the principal Act, which must be construed with the amending Act (*g*).

(*y*) *Re Hamilton, Young & Co., Ex parte Carter*, [1905] 2 K. B. 772. For forms of such letters, see Encyclopædia of Forms, Vol. II., pp. 479 *et seq.*

(*z*) Bills of Sale Act, 1891 (54 & 55 Vict. c. 35), s. 1.

(*a*) Bills of Sale Act, 1890 (53 & 54 Vict. c. 53), s. 2. As to reputed ownership, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 173 *et seq.*

(*b*) The words "other incorporated companies" include any company authorised to raise or secure money on loan or mortgage (*Re Standard Manufacturing Co.*, [1891] 1 Ch. 627). The protection of the section extends to a floating charge affecting chattels in England, given by a company registered in Guernsey, not keeping or being by law required to keep any register of mortgages or charges (*Clark* v. *Balm, Hill & Co.*, [1908] 1 K. B. 667). But debentures issued by a society registered under the Industrial and Provident Societies Acts are not protected, there being no provision made by those statutes for the registration of debentures of such a society (*Great Northern Rail. Co.* v. *Coal Co-operative Society*, [1896] 1 Ch. 187). For such societies, see title INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.

(*c*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 17. As to the general law relating to debentures, see title COMPANIES.

(*d*) *Shears* v. *Jacob* (1866), L. R. 1 C. P. 513. A company may be described as of its registered office. Directors attesting the affixing of a company's seal are not attesting witnesses (*Deffell* v. *White* (1866), L. R. 2 C. P. 144).

(*e*) *Re Cunningham & Co., Ltd., Attenborough's Case* (1885), 28 Ch. D. 682.

(*f*) By Companies Act, 1907 (7 Edw. 7, c. 50), s. 10, repealing and replacing as from June 30, 1908, Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14 (1). See title COMPANIES.

(*g*) *Re Standard Manufacturing Co., supra*; *Read* v. *Joannon* (1890), 25 Q. B. D. 300; *Richards* v. *Kidderminster Overseers*, [1896] 2 Ch. 212.

SECT. 4. **Debentures.**

A document which is a debenture in the common acceptation of the term, creating or acknowledging a debt, and accompanied by a charge on the property of the company, is within the exception (*h*).

Securities for floating balance.

It is doubtful whether the expression "debenture" can include a memorandum of deposit as security for a floating balance, not admitting any specific debt, or containing a promise to pay, and charging specific property as distinguished from a general charge on assets (*i*).

Deed of charge.

A deed of charge on the assets of a company to secure debentures is not a bill of sale within the Acts (*j*). Such a covering deed is probably a debenture within the exception (*k*), but even if it is not it may operate as an equitable charge in favour of debenture-holders over property purporting to be assigned (*l*).

Transfer.

A transfer by the grantee of an unregistered charge on chattels, given by a company, is ineffectual under the Acts to give the transferee a valid title to the chattels (*m*).

Part IV.—Subject-matter of Bills of Sale.

SECT. 1.—*In General.*

Meaning of personal chattels.

34. The Bills of Sale Acts relate only to personal chattels, which term has a special meaning attached to it. By the principal Act (*n*) personal chattels comprise four classes of things: (1) Articles capable of complete transfer by delivery; (2) growing crops, when assigned or charged separately from the land; (3) fixtures, when assigned or charged separately from the land; and (4) trade machinery, which for the purposes of the Acts is to be deemed personal chattels (*o*).

(*h*) *Levy* v. *Abercorris Slate and Slab Co.* (1887), 37 Ch. D. 260; *Edmonds* v. *Blaina Furnaces Co.* (1887), 36 Ch. D. 215. Compare *Topham* v. *Greenside Glazed Fire-Brick Co.* (1887), 37 Ch. D. 281.

(*i*) *Topham* v. *Greenside Glazed Fire-Brick Co.*, *supra*.

(*j*) *Richards* v. *Kidderminster Overseers*, [1896] 2 Ch. 212; *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627. See *Brocklehurst* v. *Railway Printing Co.*, [1884] W. N. 70; *Jenkinson* v. *Brandley Mining Co.* (1887), 19 Q. B. D. 568, where there was no express trust for debenture-holders.

(*k*) *Richards* v. *Kidderminster Overseers*, *supra*.

(*l*) *Ross* v. *Army and Navy Hotel Co.* (1886), 34 Ch. D. 43.

(*m*) *Jarvis* v. *Jarvis* (1893), 63 L. J. (CH.) 10.

(*n*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4: "The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any Government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale."

(*o*) *Ibid.*, s. 5; and see pp. 22 *et seq.*, *post*

SECT. 1. In General.

The subject-matter of bills of sale is confined to things which come under one or other of these four classes.

What things are excluded.

Personal chattels do not include chattel interests in real estate, or fixtures, except trade machinery, or growing crops when assigned together with any freehold or leasehold interest in the land or building to which they are affixed or on which they grow. The Act also excludes from the meaning of personal chattels choses in action, and shares or interests in Government securities, or in the capital or property of incorporated or joint-stock companies, and any stock or produce upon any farm which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from the farm where they are at the time when the bill of sale is made (*p*). Further, the machinery and effects excluded from the definition of trade machinery in the principal Act are not deemed personal chattels (*q*).

Limitation of meaning.

35. The description of personal chattels in the principal Act is only applicable for the purposes of the Bills of Sale Acts (*r*). Thus, growing crops or fixtures, though separately assigned, are not goods within the doctrine of reputed ownership in bankruptcy, while trade debts, which are choses in action and as such excluded from the definition of personal chattels in the principal Act, are within that rule (*s*). And it is only for the purposes of the Bills of Sale Acts that trade machinery is deemed to be personal chattels (*t*).

Specific chattels of which grantor is true owner.

36. The subject-matter of bills of sale by way of security is restricted by certain provisions of the amending Act which require, in order that a bill of sale by way of security should have effect against persons other than the grantor, that the personal chattels to which it relates should be capable of specific description, and should be specifically described in the schedule annexed to the bill of sale (*a*), and that the grantor should be the true owner of such personal chattels at the time of its execution (*b*). These provisions are subject to certain exceptions in the case of growing crops, fixtures, plant, and trade machinery (*c*).

What may be assigned by way of security.

37. As a bill of sale by way of security for money is void unless it is in accordance with the form required by the amending Act (*d*), and as, according to this statutory form, the bill of sale must be an assignment of the chattels and things described in the schedule (*e*), articles which do not come within the description of personal chattels cannot be included in a bill of sale by way of security (*f*).

(*p*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.
(*q*) *Ibid.*, s. 5.
(*r*) *Meux* v. *Jacobs* (1875), L. R. 7 H. L. 481.
(*s*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 173, 174.
(*t*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 5.
(*a*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 4.
(*b*) *Ibid.*, s. 5.
(*c*) *Ibid.*, s. 6; and see pp. 22 *et seq.*, *post*.
(*d*) *Ibid.*, s. 9.
(*e*) *Ibid.*, Schedule. The expression "chattels and things" in the scheduled form seems to be synonymous with "personal chattels" as defined in the principal Act.
(*f*) *Cochrane* v. *Entwistle* (1890), 25 Q. B. D. 116.

SECT. 1. In General.

Thus, a bill of sale by way of security which includes tillages, tenant right, valuation, or chattels real in its schedule, is not in accordance with the statutory form, and is therefore void (*g*); and if any of the other articles excluded from the definition of personal chattels, as for instance book debts, are comprised in such bill of sale, the result would seem to be the same.

Deeds.

Deeds, however, may be included in the schedule of a bill of sale by way of security, if they are assigned as chattels personal, that is, merely as parchment and wax, and not with the intention of creating a charge upon the land (*h*).

Choses in action.

38. The assignment of a share in a partnership, including plant and stock (*i*), the assignment of rights under a hire agreement with authority to exercise all the powers it confers (*k*), or the assignment of a reversionary right to chattels subject to a prior life interest (*l*), are all assignments of choses in action, to which the Bills of Sale Acts do not apply. But the assignment of a debt arising under an unregistered mortgage of chattels appears to confer no security on the chattels without registration (*m*).

Void bill of sale may be valid in other respects.

39. Although an instrument purporting to assign by way of security property other than personal chattels is void as a bill of sale, it may, nevertheless, be valid as regards property not deemed to be personal chattels within the meaning of the principal Act, as, for example, machinery and effects excluded from the definition of trade machinery (*n*).

SECT. 2.—*Chattels capable of Complete Transfer by Delivery.*

Cases to which Acts apply.

40. Goods, furniture, and other articles which are capable of complete transfer by delivery are personal chattels within the meaning of the principal Act, as well as in the ordinary sense. The Acts apply only when such chattels, though capable of complete transfer by delivery, have not been actually delivered (*o*), and do not affect absolute transfers completed by delivery (*p*).

Plant.

41. Some articles which are capable of complete transfer by delivery may constitute plant within the meaning of the amending Act (*q*). And if plant is assigned by a bill of sale in substitution for like plant which is specifically described in the schedule thereto,

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(*g*) *Cochrane* v. *Entwistle* (1890), 25 Q. B. D. 116.
(*h*) *Swansea Coal Co.* v. *Denton*, [1906] 2 K. B. 873.
(*i*) *Re Bainbridge, Ex parte Fletcher* (1878), 8 Ch. D. 218.
(*k*) *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193; *Re Isaacson, Ex parte Mason*, [1895] 1 Q. B. 333.
(*l*) *Re Tritton, Ex parte Singleton* (1889), 61 L. T. 301.
(*m*) *Jarvis* v. *Jarvis* (1893), 63 L. J. (CH.) 10.
(*n*) *Re Burdett, Ex parte Byrne* (1888), 20 Q. B. D. 310.
(*o*) *Brantom* v. *Griffits* (1877), 2 C. P. D. 212.
(*p*) See p. 7, *ante*.
(*q*) **Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 6 (2). Plant includes tools, appliances, apparatus, and, it seems, even animals used in carrying on trade upon particular premises, *e.g.*, a horse used for turning a mill (*London and Eastern Counties Loan and Discount Co.* v. *Creasey*, [1897] 1 Q. B. 768, *per* CHITTY, L.J., at p. 771).**

such bill of sale is excepted from the provisions of the amending Act with regard to specific description in the schedule and true ownership, and will be valid against third parties as well as against the grantor, although the substituted plant is not specifically described in the schedule, and although the grantor was not the true owner of such substituted plant at the time of the execution of the bill of sale (*r*), provided that the bill of sale is in accordance with the form prescribed by the schedule (*s*).

SECT. 2. Chattels capable of Complete Transfer by Delivery.

SECT. 3.—*Growing Crops.*

42. Growing crops (*a*) become, when severed (*b*), personal chattels in the ordinary sense, and an assignment of them requires registration (*c*). They are personal chattels when separately assigned or charged, that is to say, apart from the land, but not when assigned together with any interest in the land on which they grow (*d*), and they may none the less be separately assigned, though other goods are assigned with them (*e*).

When assignment of growing crops is a bill of sale.

An assignment of growing crops by separate words, or a power to sever and sell them apart from the land, does not of itself operate as a separate assignment, if by the same instrument any freehold or leasehold interest in the land is also conveyed or assigned to the same person (*f*).

What amounts to a separate assignment.

If growing crops which are separately assigned or charged were actually growing at the time when the bill of sale was executed, they are excepted from the provisions of the amending Act, which, as against third parties, avoid a bill of sale given by way of security, in respect of chattels not specifically described in the schedule, or of which the grantor was not the true owner at the time when the bill of sale was executed (*g*).

Assignment of crops actually growing.

An assignment of an authority to let and manage a farm, coupled with an irrevocable appointment as auctioneer and salesman to dispose of the lettings, grazings, and meadowings, and out of the proceeds to retain advances, commission, and interest, is not a bill of sale, as it involves no assurance of growing crops as chattels (*h*).

Assignment o lettings etc.

(*r*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 6 (2).
(*s*) *Ibid.*, s. 9
(*a*) Growing crops were not within the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 7. The expression "produce" in that Act meant produce received from the land (*Brantom* v. *Griffits* (1877), 2 C. P. D. 212).
(*b*) No assignee under any bill of sale, nor any purchaser, of farm crops may dispose of them in any other manner than the tenant ought to have done (Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 11). The grantee of crops growing on premises which the grantor surrenders to his landlord is only entitled to the crops subject to the grantor's liabilities as tenant (*Clements* v. *Matthews* (1883), 11 Q. B. D. 808). See titles AGRICULTURE, Vol. I., p. 275; LANDLORD AND TENANT.
(*c*) *Re Phillips, Ex parte National Mercantile Bank* (1880), 16 Ch. D. 104. For form of bill of sale by way of mortgage of growing crops, see Encyclopædia of Forms, Vol. VIII., p. 790.
(*d*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4; and see p. 21, *ante*.
(*e*) *Roberts* v. *Roberts* (1884), 13 Q. B. D. 794.
(*f*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 7.
(*g*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), ss. 4, 5, 6; and see pp. 27—30, *post*.
(*h*) *Coonan* v. *O'Connor*, [1903] 1 I. R. 449.

SECT. 4. Fixtures.

SECT. 4.—*Fixtures.*

How far assignments of fixtures are bills of sale.

43. The Bills of Sale Acts do not affect mortgages or charges on realty or leaseholds, by which, without express mention, there will pass, as part of the land, fixtures affixed before the mortgage or during its continuance (*i*); and the same is true under certain conditions with regard to fixed trade machinery (*k*).

When fixtures are personal chattels.

44. Fixtures are personal chattels within the Acts, though not for other purposes (*l*), when separately assigned or charged, that is apart from the land (*m*), but not, except in the case of trade machinery, when conveyed or assigned together with a freehold or leasehold interest in any land or building to which they are affixed (*n*).

Separate assignment of fixtures.

They may be separately assigned though other goods are assigned with them (*o*); but are not deemed separately assigned or charged by reason only that power is given to sever them from the land or building to which they are affixed, without otherwise taking possession of, or dealing with, such land or building, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed is also conveyed or assigned to the same persons or person (*p*).

The same rule of construction is applicable to deeds or instruments, including fixtures or growing crops executed before, as well as after, the commencement of the principal Act (*p*).

Fixtures substituted for fixtures assigned.

45. If fixtures are separately assigned or charged by a bill of sale by way of security in substitution for like fixtures which are specifically described in the schedule thereto, such bill of sale is excepted from the provisions of the amending Act with regard to specific description in the schedule and true ownership (*q*). The bill of sale will, therefore, be valid against third parties, as well as against the grantor, although the substituted fixtures were not specifically described in the schedule, and although the grantor was not the true owner of such substituted fixtures at the time of the execution of the bill of sale (*r*), provided that the bill of sale is in accordance with the form prescribed by the schedule (*s*).

Fixtures on mortgaged premises.

46. Before the principal Act, a grantee by bill of sale of fixtures annexed to mortgaged premises had no title against the mortgagee (*t*), and the same appears still to be the law (*u*).

(*i*) *Meux* v. *Jacobs* (1875), L. R. 7 H. L. 481. See title MORTGAGE.
(*k*) See p. 26, *post*. Although some fixed effects are named, other fixtures may, without express mention, pass with the land (*Southport and West Lancashire Banking Co.* v. *Thompson* (1887), 37 Ch. D. 64).
(*l*) *Meux* v. *Jacobs*, *supra*.
(*m*) *Climpson* v. *Coles* (1889), 23 Q. B. D. 465.
(*n*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.
(*o*) *Roberts* v. *Roberts* (1884), 13 Q. B. D. 794.
(*p*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 7.
(*q*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), ss. 4, 5.
(*r*) *Ibid.*, s. 6
(*s*) *Ibid.*, s. 9.
(*t*) *Longbottom* v. *Berry* (1869), L. R. 5 Q. B. 123.
(*u*) *Reynolds* v. *Ashby & Son*, [1904] A. C. 466. See title MORTGAGE.

SECT. 5.—*Trade Machinery.*

SECT. 5. Trade Machinery.

47. Trade machinery, which, as defined by the principal Act (*a*), means the machinery used in or attached to any factory or workshop (*b*), with certain exceptions (*c*), is, for the purposes of the Act, to be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels is to be deemed to be a bill of sale within the meaning of the Act (*d*). The definition has relation to fixed trade machinery, loose machinery being personal chattels apart from the Act.

How far trade machinery is personal chattels.

Certain fixed machinery and effects are excluded from the statutory definition (*e*), and such excluded machinery and effects are not to be deemed to be personal chattels within the meaning of the Acts for any purpose, even though not assigned with land, or though affixed to land belonging to a third party (*f*). A bill of sale may give an effective security over machinery or effects so excluded, although void as regards things within the definition of personal chattels (*g*).

Excepted machinery.

If trade machinery becomes subject to a bill of sale in substitution for like trade machinery, which is specifically described in the schedule thereto, such bill of sale is excepted from the provisions of the amending Act with regard to specific description in the schedule and true ownership, to the same extent as in the case of plant and fixtures (*h*).

Substituted machinery.

48. Trade machinery being, for the purposes of bills of sale, personal chattels, and therefore not falling within the description of fixtures, is not exempted by the principal Act (*i*) from the operation of the rule which prevailed before the Act, according to which an

Separate assignment of trade machinery.

(*a*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 5.

(*b*) "Factory or workshop" means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them; that is to say, (a) in or incidental to the making any article or part of an article; or (b) in or incidental to the altering, repairing, ornamenting, finishing, of any article; or (c) in or incidental to the adapting for sale any article (*ibid.*).

(*c*) These are (1) the fixed motive-powers, such as the water-wheels and steam-engines, and the steam boilers, donkey engines, and other fixed appurtenances of the said motive-powers; and (2) the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive-powers to the other machinery, fixed and loose; and (3) the pipes for steam, gas, and water in the factory or workshop. The machinery and effects so excluded are not to be deemed to be personal chattels within the meaning of the Act (*ibid.*).

(*d*) *Ibid.* But the expression "deemed to be a bill of sale" in the principal Act has been held to make the instruments to which the expression is applied bills of sale for the purpose of registration, and not for all purposes of the Act (*Green* v. *Marsh*, [1892] 2 Q. B. 330); and a similar interpretation would probably be placed upon the expression "deemed to be personal chattels."

(*e*) See note (*c*), *supra.*

(*f*) *Topham* v. *Greenside Glazed Fire-Brick Co.* (1887), 37 Ch. D. 281.

(*g*) *Re Burdett, Ex parte Byrne* (1888), 20 Q. B. D. 310.

(*h*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 6; and see pp. 22, 24, *ante.*

(*i*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 7.

SECT. 5. Trade Machinery.

assignment of fixtures by separate words (*k*), or with a power of sale apart from the land (*l*), operated as a separate assignment, and the Bills of Sale Acts apply to a disposition of trade machinery, whether disposed of alone, or together with land, where the grantee takes an interest in trade machinery distinct from the land or buildings to which it is affixed, or has power to sell the machinery separately; and to be effectual such a disposition must be by bill of sale (*m*).

The statutory powers of a mortgagee (*n*) to sell mortgaged property, or any part thereof, either together or in lots, does not, of itself, give a power to sell separately trade machinery subject to a mortgage, or make the mortgage a bill of sale (*o*).

Machinery passing with land.

Fixed trade machinery may, without express mention, pass as part of mortgaged premises, whether freehold or leasehold; and if there is no disposition of trade machinery as such, nor any power to sell separately, registration is unnecessary (*o*). But an intention to give a power to sell trade machinery, apart from the premises, may be collected from the whole instrument, even though no express power of separate sale is given, in which case, as regards the trade machinery, the disposition is a bill of sale (*p*).

Trade machinery assigned with other property.

49. A deposit of the deeds of property may charge trade machinery fixed thereto, though coupled with an agreement to give an absolute transfer (*q*); and though trade machinery is scheduled to a mortgage, it may still pass as part of the land (*r*); but an agreement for security over premises, with everything erected or placed thereon, which would not require registration under the Acts, has been held not to extend to trade machinery (*s*).

SECT. 6.—*The Schedule, Description of Chattels.*

When schedule requisite.

50. A schedule is not essential to the validity of absolute bills of sale, but the amending Act requires that every bill of sale given by way of security for the payment of money shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, with certain exceptions (*t*), shall have effect only in respect of the

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(*k*) *Reglie* v. *Fenwick* (1871), 24 L. T. 58; *Hawtry* v. *Butlin* (1873), L. R. 8 Q. B. 290.

(*l*) *Re Wilde, Ex parte Daglish* (1873), 8 Ch. App. 1072; *Re Joyce, Ex parte Barclay* (1874), 9 Ch. App. 576; *Re Eslick, Ex parte Alexander* (1876), 4 Ch. D. 503; *Johns* v. *Ware*, [1899] 1 Ch. 359.

(*m*) *Re Yates* (1888), 38 Ch. D. 112.

(*n*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19.

(*o*) *Re Yates, supra.* Necessary parts of machinery, though detachable, will also pass without registration (*Sheffield and South Yorkshire Permanent Benefit Building Society* v. *Harrison* (1884), 15 Q. B. D. 358).

(*p*) *Small* v. *National Provincial Bank of England*, [1894] 1 Ch. 686, where registration was required of an assignment of trade machinery by separate words.

(*q*) *Re Lusty, Ex parte Lusty* v. *Official Receiver* (1889), 60 L. T. 160. The deposit of an unregistered assignment of leaseholds and fixtures did not formerly charge the latter (*Re Trethowan, Ex parte Tweedy* (1877), 5 Ch. D. 559).

(*r*) *Re Brooke*, [1894] 2 Ch. 600.

(*s*) *Re London and Lancashire Paper Mills Co., Ltd.* (1888), 58 L. T. 796.

(*t*) *I.e.*, the exceptions from the requirements of true ownership and specific

personal chattels specifically described in such schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described (*a*). This schedule must be attached at or before the time the bill of sale is executed (*b*), as it appears to form part of the deed (*c*), though the statutory form itself does not set out a schedule (*d*).

Registration of schedule.

The principal Act requires that a copy of every schedule or inventory annexed to, or referred to in, a bill of sale shall be registered (*e*), and registration of a copy schedule is sufficient, notwithstanding the destruction of the original (*f*).

Chattels not capable of specific description.

51. A further provision of the amending Act, besides requiring a schedule, makes it necessary that a bill of sale given by way of security for money should be in a prescribed form, and a bill of sale cannot comply with this condition if it includes chattels which are not capable of specific description (*g*).

Extent of avoidance if chattels not described.

A bill of sale, given by way of security for the payment of money, which is without a schedule, or which comprises chattels incapable of specific description, is void; but this result does not follow merely from the want of specific description, in the schedule, of personal chattels comprised in the bill of sale which are capable of specific description. Thus, a bill of sale, according with the form, but with a schedule not specifically describing some chattels assigned, is not wholly void; but, except as against the grantor, it is of no effect in respect of chattels not specifically described (*g*). The rule avoiding bills of sale, given by way of security, as against parties other than the grantor, in respect of chattels comprised therein of which the grantor is not true owner, or which are not specifically described in the schedule, is subject to certain exceptions (*h*) in the case of growing crops, or substituted fixtures, plant, or trade machinery (*i*).

What description is sufficient.

52. The provision that personal chattels shall be specifically described means that they must be described in the schedule with the particularity usual in an inventory of chattels, in the ordinary business sense of the term, in such a place as they are (*k*).

The description should be sufficient to distinguish the class of chattels assigned (*l*), but where the bill of sale comprises all chattels

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description in the schedule, in the case of plant, growing crops, fixtures, and trade machinery (Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 45), s. 6). See pp. 23 *et seq.*, *ante*.

(*a*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 4.

(*b*) *Griffin* v. *Union Deposit Bank* (1887), 3 T. L. R. 608.

(*c*) *Melville* v. *Stringer* (1883), 12 Q. B. D. 132; reversed on other grounds (1884) 13 Q. B. D. 392. For an instance of general words being cut down by the schedule, see *Wood* v. *Rowcliffe* (1851), 6 Exch. 407; of a schedule being limited by the deed, *Re McManus, Ex parte Jardine* (1875), 10 Ch. App. 322.

(*d*) See p. 34, *post*.

(*e*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (2); and see p. 46, *post*.

(*f*) *Green* v. *Attenborough* (1864), 3 H. & C. 468.

(*g*) *Thomas* v. *Kelly* (1888), 13 App. Cas. 506.

(*h*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 6.

(*i*) See pp. 23 *et seq.*, *ante*.

(*k*) *Witt* v. *Banner* (1887), 20 Q. B. D. 114.

(*l*) *Roberts* v. *Roberts* (1864), 13 Q. B. D. 794, where the description "household furniture and effects" was held insufficient. A description of a bath-chair

SECT. 6. The Schedule. Description of Chattels.

on the premises, a less detailed description is sufficient, and it may not be necessary to describe each article (*m*), especially in the case of chattels in a particular room at a private house (*n*).

A mere description by number will not, in general, be sufficient in the case of stock, or where there may be other articles of the like kind on the premises (*o*). Where in the ordinary course chattels are, as in the case of stock, replaced or substituted, more particularity is required than with articles, such as furniture in a private house, which are not changed with frequency (*p*).

Proof of insufficient description required.

53. To support an objection to a description of chattels, on the ground that it is not sufficiently specific, it must be shown either that, from the nature of the description, the articles cannot be identified, or that, in the particular case, the chattels themselves are incapable of identification (*q*).

The bill of sale and schedule need not describe the premises where the goods are (*r*).

SECT. 7.—*Chattels of which the Grantor is not True Owner.*

SUB-SECT. 1.—*After-acquired Chattels.*

Assignments of future property.

54. The amending Act provides that, save as therein mentioned (*a*), a bill of sale by way of security shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale (*b*). This provision prevents a security by bill of sale being given over chattels which are to be afterwards acquired (*c*); but its operation is not limited to bills of sale of after-acquired property.

The provision, like that with regard to the specific description of

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as a four-wheeled carriage and set of cloth cushions has been held sufficient (*Edwards* v. *Marston* (1890), 64 L. T. 97), and similarly of a premier "plating" machine by clerical error for "platen" (*Simmons* v. *Hughes* (1890), 6 T. L. R. 443).

(*m*) *Davidson* v. *Carlton Bank*, [1893] 1 Q. B. 82, where a description by reference to a catalogue of books in a library was upheld on the ground that the books could be identified without the catalogue; *Jones* v. *Roberts* (1890), 34 Sol. Jo. 254, where the description "all my farming stock, comprising four horses, five cows," was held sufficient.

(*n*) *Cooper* v. *Huggins* (1889), 34 Sol. Jo. 96 (twelve oil paintings in gilt frames).

(*o*) *Witt* v. *Banner* (1887), 20 Q. B. D. 114, where a description by number of a stock of oil paintings and water-colours in gilt frames, and unframed, was held insufficient; *Carpenter* v. *Deen* (1889), 23 Q. B. D. 566, where a description of farm stock as "twenty-one milch cows" was held insufficient. But it is otherwise if there is nothing to show that the grantor had other stock capable of answering the description (*Hickley* v. *Greenwood* (1890), 25 Q. B. D. 277, where a description "brown mare and foal, three rade carts," was held sufficient).

(*p*) *Davies* v. *Jenkins*, [1900] 1 Q. B. 133, where a description as "stock, two horses, four cows," was held insufficient.

(*q*) *Hickley* v. *Greenwood*, *supra*.

(*r*) *Re Lane, Ex parte Hill* (1886), 17 Q. B. D. 74.

(*a*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 6.

(*b*) *Ibid.*, s. 5.

(*c*) For charges on after-acquired property, see *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523, and title MORTGAGE.

SECT. 7. Chattels of which the Grantor is not True Owner.

chattels in the schedule, must be read with, and is subject to, the further provision of the amending Act, requiring every bill of sale by way of security to be in a prescribed form (*d*); it does not warrant any departure from that form, and therefore a bill of sale purporting to assign future property by way of security will be altogether void (*e*). But if to a bill of sale in the statutory form there is appended a schedule specifically describing chattels of which the grantor is not true owner, there is a limited avoidance; the bill of sale as regards such chattels is void against third parties, but valid as against the grantor (*f*).

Absolute dispositions.

Dispositions of chattels otherwise than by way of security are not affected by the amending Act, and are governed by the ordinary law of contract (*g*).

Growing crops etc.

55. The rules imposed by the amending Act with regard to true ownership at the time of the execution of the bill of sale, and to the specific description of chattels in the schedule, are subject to exceptions (1) in the case of growing crops separately assigned or charged, where such crops were actually growing at the time when the bill of sale was executed (*h*), and (2) in the case of fixtures separately assigned or charged (*i*), plant (*k*), or trade machinery (*l*), when they are in substitution for like fixtures, plant, or trade machinery which are specifically described in the schedule (*m*). And bills of sale, if in the statutory form, of such growing crops, and bills of sale with a schedule contemplating the substitution of fixtures, plant (*n*), or trade machinery for those assigned, will be valid as against third parties as well as against the grantor, although the grantor was not the true owner of such growing crops or substituted articles, and although they are not specifically described in the schedule (*o*).

Substitutions.

Additions.

But the Act will not protect additions to the property assigned, and does not warrant any departure from the scheduled form of bill of sale (*p*).

Replacements.

A bill of sale, however, may provide for the replacement of articles damaged or worn out (*q*); and may contain an assignment

(*d*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9.
(*e*) *Thomas* v. *Kelly* (1888), 13 App. Cas. 506.
(*f*) *Ibid.*, *per* Lord HALSBURY, L.C., at p. 511, affirming *Kelly & Co.* v. *Kellond* (1888), 20 Q. B. D. 569, *per* FRY, L.J., at p. 574.
(*g*) *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, where a settlement of all future property, including chattels, other than business assets, was upheld; and see title CONTRACT.
(*h*) See p. 23, *ante*.
(*i*) See p. 24, *ante*.
(*k*) See p. 23, *ante*.
(*l*) See p. 25, *ante*.
(*m*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 6.
(*n*) The word "plant" refers to plant in a particular place. So, although animals may be plant, horses used in a cab proprietor's business are not (*London and Eastern Counties Loan and Discount Co.* v. *Creasey*, [1897] 1 Q. B. 768).
(*o*) *Thomas* v. *Kelly*, *supra*.
(*p*) *Ibid.*, *Kelly & Co.* v. *Kellond*, *supra*, *per* FRY, L.J., at p. 573.
(*q*) *Seed* v. *Bradley*, [1894] 1 Q. B. 319.

SECT. 7. Chattels of which the Grantor is not True Owner.

of articles so substituted for chattels specifically described in the schedule (*r*).

SUB-SECT. 2.—*Who is True Owner.*

Who is true owner.

56. A bill of sale is avoided, except as against the grantor, where he is not the true owner, in the ordinary sense of the term, of the chattels assigned, even though, apart from the Act, the bill of sale might operate by estoppel or otherwise. Thus, if the grantor has previously parted with the chattels by gift or absolute unregistered bill of sale, he is no longer the true owner (*s*). But where the previous bill of sale is by way of security only, the grantor retains an interest or equity of redemption in the chattels, and being, in respect of that interest, the true owner, can give a subsequent bill of sale (*t*).

Legal or equitable interest.

So the possessor of a legal interest in chattels may be the true owner, though another person is equitably entitled (*a*); and a person beneficially interested in chattels is, for the purposes of the section, the true owner to the extent of his interest (*b*).

Where registration of a bill of sale has, under the amending Act, become void for want of renewal (*c*), the grantor again becomes the true owner, and as such can give another bill of sale (*d*).

Joint grantors.

Where two persons are each entitled separately to a part of chattels which are jointly assigned by them, it would appear that they are not true owners of such chattels so as to make their joint assignment of them a valid bill of sale (*e*).

Part V.—Statutory Requirements.

SECT. 1.—*Consideration.*

SUB-SECT. 1.—*Minimum Amount.*

Amount of consideration.

57. A bill of sale made or given in consideration of any sum under £30 is void (*f*).

In order that the bill of sale may be valid, it would seem that there must be a real advance, debt, or equivalent to the amount of £30. Thus, where there was an advance of £30, with an agreement to repay £15 on demand, and the balance by instalments,

(*r*) *Coates* v. *Moore*, [1903] 2 K. B. 140. Substituted articles appear not to be covered without an assignment (*Carpenter* v. *Deen* (1889), 23 Q. B. D. 566); but articles substituted for others by agreement have been held to pass (*Cooper* v. *Tatham* (1866), 15 L. T. 218).

(*s*) *Tuck* v. *Southern Counties Deposit Bank* (1889), 42 Ch. D. 471.

(*t*) *Thomas* v. *Searles*, [1891] 2 Q. B. 408; *Usher* v. *Martin* (1889), 24 Q. B. D. 272.

(*a*) *Re Sarl, Ex parte Williams*, [1892] 2 Q. B. 591.

(*b*) *Re Field, Ex parte Pratt* (1890), 63 L. T. 289 (bill of sale by husband having possible right to chattels by survivorship); *Re Tamplin & Son, Ex parte Barnett* (1890), 59 L. J. (Q. B.) 194 (bill of sale, by one partner, of joint property, co-partner consenting).

(*c*) As to renewal see p. 52, *post*.

(*d*) *Fenton* v. *Blythe* (1890), 25 Q. B. D. 417.

(*e*) *Saunders* v. *White*, [1902] 1 K. B. 472.

(*f*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 12.

the transaction not being a sham, and there being no understanding that the £15 should at once be returned, it was held that the requirements of the Act were satisfied (*g*). But it is questionable whether this case has any general application, for in later cases (*h*) it has been held that the agreement to repay part on demand cannot be expressed in the bill of sale, or made a collateral stipulation.

The amount of a promissory note, including a bonus or interest, payable by instalments the time for payment of which has not arrived, cannot be added to a present advance so as to make up a consideration of £30, where the sum lent on the promissory note and the new advance do not together equal £30 (*i*).

SUB-SECT. 2.—*Statement of Consideration*

Effect of mis-stating the consideration.

58. The principal Act (*k*) provides that every bill of sale to which it applies shall set forth the consideration for which such bill of sale was given; and the amending Act, which does not affect bills of sale given otherwise than as security, requires that every bill of sale shall truly set forth the consideration for which it was given (*l*).

The addition of the word "truly" is verbal only, as in each case the true consideration must be set forth; but an untrue statement of consideration in an absolute bill of sale only partially avoids it, leaving it valid as between the parties (*m*); while, if the consideration is mis-stated in a bill of sale subject to the amending Act, it becomes altogether void in respect of the personal chattels comprised therein (*n*).

Although the form of bill of sale scheduled to the amending Act requires a consideration to be inserted, a mis-statement of consideration does not make the bill of sale otherwise than in accordance with the statutory form, so as to avoid the agreements it contains (*o*).

Verbal inaccuracies.

59. The facts respecting the consideration should be set forth with substantial accuracy, according to their legal or mercantile business effect (*p*). A verbal inaccuracy, when not, intentionally or otherwise, misleading, does not amount to mis-statement of consideration (*a*); nor does mere surplusage (*b*).

Present payment.

Where a bill of sale is, wholly or in part, given to secure an existing debt, the legal or business effect may be a new lending on the terms of the bill of sale; and the consideration, being the debt,

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(*g*) *Davis* v. *Usher* (1884), 12 Q. B. D. 490.
(*h*) See pp. 33, 38, *post*.
(*i*) *Darlow* v. *Bland*, [1897] 1 Q. B. 125.
(*k*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8.
(*l*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. s. 43), s. 8.
(*m*) *Davis* v. *Goodman* (1880), 5 C. P. D. 128; and see p. 55, *post*.
(*n*) Bills of Sale Act, 1882 (45 & 46 Vict. 43), s. 8; and see p. 53, *post*.
(*o*) *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547.
(*p*) *Credit Co.* v. *Pott* (1880), 6 Q. B. D. 295.
(*a*) *Hughes* v. *Little* (1886), 18 Q. B. D. 32; *Roberts* v. *Roberts* (1884), 13 Q. B. D. 794; *Collis* v. *Tuson* (1882), 46 L. T. 387; *Re Chapman, Ex parte Johnson* (1884), 26 Ch. D. 338.
(*b*) *Re Fothergill, Ex parte Winter* (1881), 44 L. T. 323.

SECT. 1. Consideration.

or debt and further advance, may be stated as now paid (*c*). But if the consideration is stated as now paid, there must be present payment in a legal or business sense (*d*). A consideration, part in cash, and part by the grantee's bills of exchange, cannot be stated as money now paid (*e*). Nor can it be stated as now paid where the money intended to be advanced is on deposit at the grantee's bankers', and is not received by the grantor till a later period (*f*). If part of the consideration agreed to be paid is not handed over until some days afterwards, it cannot be stated as paid at or before the execution of the deed (*g*).

But the consideration is truly stated as paid to the grantor, though it is contributed by different persons, and lent by cheques to the order of the grantor and a third party, and paid into a joint account, to be applied for the purposes of a composition, as set forth in the bill of sale (*h*).

Time of payment.

A statement of payment does not necessarily mean a present payment (*i*), but if the time of payment is stated, it should be so set forth as not to be misleading (*k*). Where, however, an advance is made on the faith of a bill of sale being given, an error in stating the date of payment is not material (*l*). But a consideration which consists in part of a present advance, and in part of an old debt, is said not to be truly set forth as money now due and owing (*m*).

Statement must be complete.

60. The statement of consideration should show the whole transaction on the face of it, and must not be subject to any collateral agreement (*n*). But it is unnecessary to set forth a stipulation relating to the disposal of the consideration (*o*); and if that is paid away by the grantee, at the grantor's request, in satisfaction of existing debts owing by the grantor to third parties, the statement of consideration as now paid to him is correct (*p*).

Immediate repayment to grantee.

The same statement will be sufficient, though the consideration

(*c*) *Credit Co.* v. *Pott* (1880), 6 Q. B. D. 295, where the sum recited as now paid was the balance due in respect of previous advances, no money passing at the time when the bill was executed; *Re Hockaday, Ex parte Nelson* (1886), 55 L. T. 819, where the consideration consisted of previous advances and interest; *Re Roper, Ex parte Bolland* (1882), 21 Ch. D. 543; *Staniforth* v. *Capon* (1886), 2 T. L. R. 493, where the consideration was unpaid purchase-money. Compare *Re Young, Ex parte Berwick* (1880), 43 L. T. 576, which seems not to be law.

(*d*) See further as to what amounts to payment generally, title CONTRACT.

(*e*) *Re Moore, Ex parte Official Receiver* (1897), 4 Mans. 51.

(*f*) *Criddle* v. *Scott* (1895), 11 T. L. R. 222.

(*g*) *Re Spindler, Ex parte Rolph* (1881), 19 Ch. D. 98.

(*h*) *Peace* v. *Brookes*, [1895] 2 Q. B. 451. Several persons advancing money at different times and in different proportions are entitled to take a bill of sale to one of them as collector, the consideration being set forth as now paid by him (*Re Smith, Ex parte Tarbuck* (1894), 72 L. T. 59).

(*i*) *Carrard* v. *Meek* (1880), 43 L. T. 760.

(*k*) *Re Threappleton, Ex parte Carter* (1879), 12 Ch. D. 908.

(*l*) *Re Chapman, Ex parte Johnson*, (1884) 26 Ch. D. 338; *Re Munday, Ex parte Allam* (1884), 14 Q. B. D. 43 (money paid some days previously, stated as now paid).

(*m*) *Davies* v. *Jenkins*, [1900] 1 Q. B. 133.

(*n*) *Sharp* v. *McHenry* (1887), 38 Ch. D. 427.

(*o*) *Re Haynes, Ex parte National Mercantile Bank* (1880), 15 Ch. D. 42.

(*p*) *Richardson* v. *Harris* (1889), 22 Q. B. D. 268; *Hamlyn* v. *Betteley* (1880), 5 C. P. D. 323.

or part of it is repaid to, or at the grantor's request retained by, the grantee to satisfy a debt then due to him, provided that such debt exists irrespective of the contract for the loan (*q*); but a sum cannot be correctly described as now paid to the grantor if it includes money deducted or paid away without his consent (*r*).

Money retained.

61. If there is no debt or liability independent of the contract of loan, and irrespective of the agreement to make the payment, the consideration is not truly stated as money now paid (*s*), or money owing (*a*), where the debt or liability is deducted or retained.

Expenses of the transaction.

The liability of the grantor for expenses relating to the bill of sale does not arise independently of the transaction, and there is no debt in respect of them due or payable by him until after the execution of the bill of sale. Therefore, if such expenses, or any interest or commission on the transaction, are retained by the grantee or deducted on his behalf, they cannot be stated as part of the consideration paid to the grantor (*b*).

When included in the consideration.

If a solicitor, employed by both grantee and grantor, receives the whole consideration on behalf of the latter, retention by the solicitor of the costs or expenses, with the grantor's consent, is not inconsistent with the statement that the consideration was paid to the grantor (*c*).

And the consideration is truly stated as having been paid to the grantor, though, after execution of the bill of sale and receipt of the consideration, the grantor voluntarily pays the expenses (*d*);

(*q*) *Thomas* v. *Searles*, [1891] 2 Q. B. 408; *Re Davies, Ex parte Equitable Investment Co.* (1897), 77 L. T. 567, where part of the advance was repaid to satisfy a former bill of sale; *Re Wiltshire, Ex parte Eynon*, [1900] 1 Q. B. 96, where the money was paid to retire the grantor and grantee's joint and several promissory note current in the hands of third parties. But the retention of part of the consideration against the grantee's liability on current bills, which he agreed to pay, and did pay, for the grantor's accommodation, does not support a statement of money now paid (*Mayer and Fulda* v. *Mindlevich* (1888), 59 L. T. 400).

(*r*) *Bishop* v. *Consolidated Credit Corporation* (1889), 5 T. L. R. 378.

(*s*) *Richardson* v. *Harris* (1889), 22 Q. B. D. 268, where part of the consideration was retained in satisfaction of the grantor's current acceptances, future hire of furniture, and agreed expenses.

(*a*) *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, *per* FRY, L.J., at p. 73, where a consideration, stated as £7,575 then owing, but representing in fact the grantor's agreed liability on current bills for a larger amount, was held untruly set forth, as any agreement settling the liability should have been stated; *Darlow* v. *Bland*, [1897] 1 Q. B. 125, where a consideration, stated as money then owing on a promissory note, and a sum then paid, was held not to be truly stated, as the note, which was payable by instalments not then due, represented interest as well as advance, and no agreement was set out to treat the liability as a present debt.

(*b*) *Re Cowburn, Ex parte Firth* (1882), 19 Ch. D. 419, where thirty shillings were deducted for expenses; *Hamilton* v. *Chaine* (1881), 7 Q. B. D. 319, where a deduction for expenses and commission was made; *Re Parker, Ex parte Charing Cross Advance and Deposit Bank* (1880), 16 Ch. D. 35, where the deed contained a receipt in full, but a deduction was made for expenses and interest; *Re Spindler, Ex parte Rolph* (1881), 19 Ch. D. 98, where £3 10*s.* were deducted for expenses; *Re Gordon, Ex parte Bernstein* (1883), 74 L. T. Jo. 245, where the amount of stamps was deducted. These decisions qualify earlier cases, in which the rule as here set forth was not fully recognised. See *Re Haynes, Ex parte National Mercantile Bank* (1880), 15 Ch. D. 42, and *Re Rogers, Ex parte Challinor* (1880), 16 Ch. D. 260.

(*c*) *Re Cann, Ex parte Hunt* (1884), 13 Q. B. D. 36.

(*d*) *Cochrane* v. *Dixon* (1887), 3 T. L. R. 717.

SECT. 1. Consideration.

but it seems that if, before the bill of sale, it is stipulated that he shall do so out of the sum received, the whole cannot be stated as paid to him (*e*).

SECT. 2.—*Form of Bill of Sale.*

SUB-SECT. 1.—*When Statutory Form requisite.*

Bills of sale which must be in statutory form.

62. An absolute bill of sale is not required to be in any particular form, but a bill of sale made or given by way of security for the payment of money by the grantor thereof is void (*f*), unless made in accordance with the form in the schedule to the amending Act annexed (*g*); and this is the case, even though it purports to be an absolute assurance (*h*).

This rule extends to all the instruments which come within the definition of bills of sale in the principal Act if given by way of security, but it does not extend to those instruments giving powers of distress which by the principal Act are to be deemed to be bills of sale (*i*); and such instruments, although given by way of security, are not required to be in the statutory form (*k*).

If an instrument which comes within the description of a bill of sale in the principal Act cannot be reduced to the statutory form, it cannot be given by way of security at all, nor will possession taken and retained under an instrument avoided by this provision of the amending Act protect the goods (*l*).

Effect of bill of sale not in statutory form.

63. A bill of sale which is void as not being made in accordance with the statutory form cannot be treated as a licence to take possession (*m*), and agreements for payment of principal and interest

(*e*) *Cohen* v. *Higgins* (1891), 8 T. L. R. 8.

(*f*) *Thomas* v. *Kelly* (1888), 13 App. Cas. 506.

(*g*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9. The schedule annexed is in the following form: "FORM OF BILL OF SALE. This indenture made the day of between *A. B.* of of the one part, and *C. D.* of of the other part, witnesseth that in consideration of the sum of £ now paid to *A. B.* by *C. D.*, the receipt of which the said *A. B.* hereby acknowledges [*or whatever else the consideration may be*], he the said *A. B.* doth hereby assign unto *C. D.*, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said *A. B.* doth further agree and declare that he will duly pay to the said *C. D.* the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said *A. B.* doth also agree with the said *C. D.* that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*]. Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said *C. D.* for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882. In witness, etc. Signed and sealed by the said *A. B.* in the presence of me *E. F.* [*add witness's name, address, and description*]."

(*h*) *Madell* v. *Thomas & Co.*, [1891] 1 Q. B. 230.

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

(*k*) *Green* v. *Marsh*, [1892] 2 Q. B. 330.

(*l*) *Re Townsend, Ex parte Parsons* (1886), 16 Q. B. D. 532.

(*m*) *Griffin* v. *Union Deposit Bank* (1887), 3 T. L. R. 608.

contained in such a bill of sale are also void, where no assignment of property other than personal chattels is included (*n*).

A bill of sale, like other contracts (*o*), may be divisible, and may be good in part, though otherwise void. Thus, a bill of sale avoided by this provision of the Act may be effectual in so far as it is an assurance of machinery or effects which are excluded by the principal Act (*p*) from the definition of personal chattels (*q*), or in so far as it is an assurance of leaseholds (*r*), or of any property other than personal chattels (*s*).

When bill of sale divisible.

SUB-SECT. 2.—*Accordance with Form.*

64. To be in accordance with the statutory form, a bill of sale must be substantially like it; and a divergence which purports, by addition or omission, to give an effect greater or less than would result from the use of the form is substantial and material; for to be valid a bill of sale must have the same legal effect, and nothing but the legal effect, of the exact statutory form (*t*).

How far variations from statutory form are admissible.

For this reason a grantor cannot purport to assign as beneficial owner, for these words would introduce the covenants implied by virtue of the Conveyancing and Law of Property Act, 1881 (*u*), and a different legal effect would be produced from that of the statutory form (*a*).

Every word of the statutory form may not be imperative, but a bill of sale must not depart from any characteristic of that form, even where the same legal effect is produced (*b*). Thus, the address and description of the attesting witness (*c*), and the description of the grantee (*d*), are material parts of the form; and a bill of sale omitting them will be void.

65. If, by reason of a variation in form, the bill of sale is misleading (*e*), or if its wording produces what has been termed a puzzle, as, for instance, by the use of inconsistent clauses (*f*), it is not in accordance with the statutory form. But a bill of

Misleading variations.

(*n*) *Davies* v. *Rees* (1886), 17 Q. B. D. 408.
(*o*) As to this, see title CONTRACT.
(*p*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 5.
(*q*) *Re Burdett, Ex parte Byrne* (1888), 20 Q. B. D. 310; *Re Bansha Woollen Mills Co.* (1889), 21 L. R. Ir. 181.
(*r*) *Re O'Dwyer* (1886), 19 L. R. Ir. 19.
(*s*) *Re Isaacson, Ex parte Mason*, [1895] 1 Q. B. 333, where an assignment of rights under a hire agreement was held divisible from a transfer of the chattels hired. But this rule does not make an assurance of personal chattels and other property valid as a separate assignment of the chattels (*Cochrane* v. *Entwistle* (1890), 25 Q. B. D. 116).
(*t*) *Re Barber, Ex parte Stanford* (1886), 17 Q. B. D. 259. For variations from and additions to the statutory form which have been held permissible, see Encyclopædia of Forms, Vol. VIII., pp. 783 *et seq.*
(*u*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1) (c).
(*a*) *Re Barber, Ex parte Stanford, supra.*
(*b*) *Thomas* v. *Kelly* (1888), 13 App. Cas. 506.
(*c*) *Parsons* v. *Brand, Coulson* v. *Dickson* (1890), 25 Q. B. D. 110; and see p. 43, *post.*
(*d*) *Altree* v. *Altree*, [1898], 2 Q. B. 267.
(*e*) *Re Barber, Ex parte Stanford, supra.*
(*f*) *Furber* v. *Cobb* (1887), 18 Q. B. D. 494; *Curtis* v. *National Bank of Wales* (1889), 5 T. L. R. 338.

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sale must be construed like any other legal document (*g*), and the fact that different courts have not been agreed upon its construction does not necessarily make it misleading (*h*). It will not be avoided by a verbal omission where the meaning is clear, as by the omission of the word "pounds" after the sum named in the agreement to repay (*i*), and when it is clear that only a security is given, the omission of the words "by way of security" is merely a formal defect, and the deed will not be avoided (*j*).

Immaterial omissions.

Bill of sale must be complete.

A bill of sale must be complete in itself, and if it has to be read with some collateral agreement it is not in accordance with the statutory form (*k*).

SUB-SECT. 3.—*Analysis of Form.*

Parties.

66. The blanks following the names of the respective parties must be filled up with addresses and descriptions (*l*). There is no provision in the Acts, other than by the statutory form, for stating the names of the parties (*m*); and if the name, which may be a trade name and description, is stated sufficiently to identify the party, as in any other mercantile document, the form is complied with, in spite of some ambiguity of description (*n*).

A bill of sale is not avoided merely because the address of the grantor stated therein is one at which he does not reside or carry on business (*o*).

Joint parties.

A bill of sale cannot be made by two grantors, not being partners or joint owners, each owning some only of the chattels assigned (*p*);

(*g*) *Weardale Coal and Iron Co.* v. *Hodson*, [1894] 1 Q. B. 598.

(*h*) *Haslewood* v. *Consolidated Credit Co.* (1890), 25 Q. B. D. 555.

(*i*) *Mourmand* v. *Le Clair*, [1903] 2 K. B. 216.

(*j*) *Roberts* v. *Roberts* (1884), 13 Q. B. D. 794.

(*k*) *Sharp* v. *McHenry* (1887), 38 Ch. D. 427, where a separate document provided for compound interest; *Simpson* v. *Charing Cross Bank* (1886), 34 W. R. 568, where a promissory note for principal and aggregate interest was given with a bill of sale payable by instalments; *Lee* v. *Barnes* (1886), 17 Q. B. D. 77, where there was an agreement to perform the covenants in a recited deed; *Watson* v. *Strickland* (1887), 19 Q. B. D. 391, where the agreement was to pay interest on the mortgages, if any, on the premises where the chattels were or should be.

(*l*) *Altree* v. *Altree*, [1898] 2 Q. B. 267, where the grantees were stated as the Staffordshire Financial Co., Ltd., without address or other description, and the bill of sale was held void.

(*m*) *Re Wood, Ex parte M'Hattie* (1878), 10 Ch. D. 398; *Central Bank of London* v. *Hawkins* (1890), 62 L. T. 901, where the assumed name of the grantor was used, the grantee taking in good faith; *Stokes* v. *Spencer*, [1900] 2 Q. B. 483, where the real name of the grantor, who was known by an assumed name, was used; *Downs* v. *Salmon* (1888), 20 Q. B. D. 775, where the grantor's name was falsified for the purpose of concealment. As to misdescription of name on registration, see p. 49, *post*.

(*n*) *Simmons* v. *Woodward*, [1892] A. C. 100, where the grantee was described by his trade name. See also *Monson* v. *Milner* (1892), 8 T. L. R. 447.

(*o*) *Dolcini* v. *Dolcini*, [1895] 1 Q. B. 898, where the grantor's club address was given in the bill of sale, though his residential address was given in the affidavit filed with the bill of sale on registration.

(*p*) *Saunders* v. *White*, [1902] 1 K. B. 472. It has been doubted whether partners (*ibid.*) or a trustee (*Melville* v. *Stringer* (1884), 13 Q. B. D. 392, *per* BOWEN, L.J., at p. 401) can give a bill of sale. But a person having only the legal interest can give a bill of sale (*Re Sarl, Ex parte Williams*, [1892] 2 Q. B. 591).

and a bill of sale given to several grantees to secure different debts is not in accordance with the statutory form (*q*).

SECT. 2. Form of Bill of Sale.

Consideration.

67. Some consideration must be inserted, but an untrue statement of consideration is not of itself a defect in form (*r*).

If the consideration includes a present advance, it appears that the grantor must acknowledge the receipt of the money, as in the scheduled form (*s*).

After-acquired property.

68. A bill of sale is not in accordance with the form, if it purports to assign any chattels which are not personal chattels capable of specific description; and an attempt to include tenant right, tillages, and valuation, or any property other than such personal chattels, will avoid the bill of sale (*t*).

A bill of sale is not in accordance with the form, if it purports to assign any chattel not existing at the date of the execution of the bill of sale. Thus, a bill of sale is void if, together with chattels specifically described, it includes also any other chattels which may become the property of the grantor, and which are, or which may at any time during the continuance of the security come to be, in or about the same or other premises of the grantor, whether in substitution for, renewal of, or in addition to, the chattels thereby assigned (*u*).

Growing crops and substituted chattels.

69. The amending Act avoids, except as against the grantor, bills of sale given by way of security in respect of personal chattels not specifically described in the schedule thereto, and in respect of chattels of which the grantor was not the true owner at the date of the execution of the bill of sale (*a*); which rule is, however, subject to an exception in the case of growing crops separately assigned which were growing at the date of the execution of the bill of sale, and in the case of certain articles substituted for others specifically described in the schedule (*b*). This exception does not, however, warrant any deviation from the prescribed form; and a bill of sale contemplating substitution in the case of articles of the kind referred to, but not in the prescribed form, is altogether void (*c*). But it is permissible to assign chattels

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(*q*) *Melville* v. *Stringer* (1884), 13 Q. B. D. 392. But a bill of sale may be given to one of several lenders as collector for the others (*Re Smith, Ex parte Tarbuck* (1894), 72 L. T. 59), or to secure advances by partners in equal shares with an agreement to repay to both (*Davidson* v. *Carlton Bank* (1892), 8 T. L. R. 741).

(*r*) *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547.

(*s*) *Davies* v. *Jenkins*, [1900] 1 Q. B. 133.

(*t*) *Cochrane* v. *Entwistle* (1890), 25 Q. B. D. 116. A bill of sale assigning scheduled chattels with a power of sale on default, including in the schedule an assignment of the lease of the grantor's premises and all muniments of title referred to in such assignment, is valid as not conferring any charge on the land, but merely a security on the title-deeds as chattels (*Swanley Coal Co.* v. *Denton*, [1906] 2 K. B. 873).

(*u*) *Thomas* v. *Kelly* (1888), 13 App. Cas. 506.

(*a*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), ss. 4, 5.

(*b*) *Ibid.*, s. 6.

(*c*) See pp. 28, 29,

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substituted for those specifically assigned, under an agreement to replace (*d*).

Fixed sum secured.

70. The form requires that a fixed sum shall be secured, and a bill of sale cannot be given by way of indemnity, the amount ultimately payable being uncertain (*e*), nor can further advances be included (*f*).

Interest.

71. The interest, which is a characteristic of the form, must be rateable, but may be at a rate by the year or month, as may be agreed on, even though the percentage of rateable interest is not stated in terms (*g*). The amount of interest payable, and its time of payment, must be certain (*h*). Capitalised interest (*i*) or a lump sum for agreed interest, with (*j*) or without (*k*) a bonus, payable in any event, cannot be reserved (*l*).

Time of repayment.

72. A bill of sale must contain an agreement to repay the principal sum (*m*) at a certain stipulated time or times, though a time of payment fixed by reference to any known event is not necessarily uncertain. Payment, however, cannot be made to depend on the mere choice or volition of the grantee; thus, payment cannot be provided for on demand (*n*), or after demand (*o*).

The time for payment must not depend on a contingency, as, for example, on the contingency of a surety being called upon to pay on his principal's default (*p*), and this is the case even if the sum secured by the bill of sale is on the face of it payable at a certain time (*q*), or after the grantee has been obliged to pay the debt (*r*). But payment on or before a day named is admissible, as an agreement to pay at a fixed date, with a defeasance in the grantor's favour (*s*).

And a stipulation for payment at a specified time, providing that if the grantor should not commit breaches of the agreements in the bill of sale the grantee should accept payment by given monthly instalments, is in accordance with the form (*t*).

Manner of repayment.

73. The general principle seems to be that if the time or times fixed for payment are certain, the manner of payment may be such

(*d*) *Coates* v. *Moore*, [1903] 2 K. B. 140. Compare *Hadden* v. *Oppenheim* (1889), 60 L. T. 962.
(*e*) *Hughes* v. *Little* (1886), 18 Q. B. D. 32.
(*f*) *Cook* v. *Taylor* (1887), 3 T. L. R. 800.
(*g*) *Lumley* v. *Simmons* (1887), 34 Ch. D. 698.
(*h*) *Attia* v. *Finch* (1904), 91 L. T. 70.
(*i*) *Davis* v. *Burton* (1883), 11 Q. B. D. 537.
(*j*) *Myers* v. *Elliott* (1886), 16 Q. B. D. 526.
(*k*) *Re Johnstone, Ex parte Abrams* (1884), 50 L. T. 184; *Blankenstein* v. *Robertson* (1890), 24 Q. B. D. 543.
(*l*) *Myers* v. *Elliott*, *supra*.
(*m*) *Re Moore, Ex parte Official Receiver* (1897), 4 Mans. 51. If a day of the month, without specifying the year, is named for payment, the day is the next ensuing day complying with the description (*Grannell* v. *Monck* (1889), 24 L. R. Ir. 241).
(*n*) *Hetherington* v. *Groome* (1884), 13 Q. B. D. 789.
(*o*) *Sibley* v. *Higgs* (1885), 15 Q. B. D. 619, where payment was to be made seven days after demand in writing.
(*p*) *Hughes* v. *Little*, *supra*.
(*q*) *Re Hill (Edward)* (1895), 2 Mans. 208.
(*r*) *Sibley* v. *Higgs*, *supra*.
(*s*) *De Braam* v. *Ford*, [1900] 1 Ch. 142.
(*t*) *Re Coton, Ex parte Payne* (1887), 56 L. T. 571.

as the parties agree, provided that the agreement is not misleading or contrary to the provisions of the Acts.

Although the form sets out equal payments, it is permissible to stipulate for payment in one sum with interest until paid (*u*), or by instalments, which need not be equal, and the balance with interest on a day named (*w*).

It is not necessary, though permissible, that principal and interest should be repayable together, and it is a question of construction whether the agreement for payment is referable to principal or interest, and which is first payable, or whether principal and interest are to be paid together (*a*).

Payment by instalments.

A bill of sale is in accordance with the form, although it provides for payment by instalments of principal and interest, without stating when the last is payable, so that some calculation may be involved to ascertain the amount of the last instalment, and how many instalments are necessary to complete payment (*b*).

If payment is by instalments, the bill of sale may provide that on default in any payment when due the whole of the unpaid principal, with the interest then due, shall at once become payable (*c*). But it cannot stipulate that, on breach of agreements, some of which would not warrant seizure under the provisions of the amending Act, the principal sum, together with the interest then due, shall become immediately payable (*d*).

Maintenance or defeasance of security.

74. The statutory form only permits agreements to be inserted of the kind named (*e*), that is to say, for insurance (*f*), payment of rent (*g*), or other matters which the parties may agree to, for the

(*u*) *Watkins* v. *Evans* (1887), 18 Q. B. D. 386.

(*w*) *Re Cleaver, Ex parte Rawlings* (1887), 18 Q. B. D. 489.

(*a*) *Edwards* v. *Marston*, [1891] 1 Q. B. 225, where provision was made for payment of interest before principal, with payment of the balance and interest at a given day; *Goldstrom* v. *Tullerman* (1886), 18 Q. B. D. 1, where the principal was to be paid by instalments with interest, and interest on arrears of principal; *Haslewood* v. *Consolidated Credit Co.* (1890), 25 Q. B. D. 555, where principal and interest were to be paid by instalments, with the balance on a given day.

(*b*) *Linfoot* v. *Pockett*, [1895] 2 Ch. 835; *Re Bargen, Ex parte Husluck*, [1894] 1 Q. B. 444. Compare *Attia* v. *Finch* (1904), 91 L. T. 70, where a bill of sale for £50, whereby the grantor agreed to pay the principal sum, with interest thereon at 5 per cent. per annum, by instalments of £10 on December 25, and the like sum on March 25, June 24, September 29, and December 25 in each year succeeding, until the whole amount was duly paid, was held not to be in accordance with the form, as the amount of interest and the period when it was to be paid were uncertain, the grantor being entitled to know what he had to pay for principal and interest in each instalment, and what he had to pay to redeem.

(*c*) *Lumley* v. *Simmons* (1887), 34 Ch. D. 698; *Re Wood, Ex parte Woolfe*, [1894] 1 Q. B. 605.

(*d*) *Barr* v. *Kingsford* (1887), 56 L. T. 861.

(*e*) *Melville* v. *Stringer* (1884), 13 Q. B. D. 392.

(*f*) *Watkins* v. *Evans, supra*; *Hammond* v. *Hocking* (1884), 12 Q. B. D. 291, where the agreement was to insure, produce, and, if required, deliver receipts for premiums; *Duff* v. *Valentine*, [1883] W. N. 225, where a power to seize on failure to produce the policy or receipt for the premium was held necessary for maintaining the security.

(*g*) See cases cited in last note; *Turner & Co.* v. *Culpan* (1888), 58 L. T. 340, where the agreement was punctually to pay rent, rates, taxes, assessments, or outgoings, and take receipts therefor, and on demand in writing to produce

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maintenance or defeasance of the security; and no other agreements can be included (*h*).

Maintenance of the security means the preservation of the whole security given by the bill of sale, as regards both the chattels assigned and the grantee's title to them, in as good condition as when the security was created (*i*).

Defeasance (*k*), within the meaning of the form, is in the nature of a condition which limits or defeats the operation of the bill of sale (*l*).

If terms are agreed to for the maintenance or defeasance of the security, the fact that they are superfluous, or not by law enforceable, will not, unless they are contrary to some provision of the Acts, make the bill of sale otherwise than in accordance with the statutory form (*m*).

Power of seizure.

75. Seizure is permitted in certain events only (*n*), one of which is default in the performance of any covenant or agreement necessary for maintaining the security. The parties cannot directly or indirectly (*o*) stipulate for a power to seize in other than the permitted events, and a power to seize cannot be given for default in the performance of an agreement, unless such agreement is not only for the maintenance of, but also necessary for maintaining, the security (*p*).

Where power to seize is given in events not permitted by the Acts, the bill of sale is void; and the defect is not cured by the concluding proviso of the statutory form (*q*).

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such receipts to the grantee or his authorised agent; *Cartwright* v. *Regan*, [1895] 1 Q. B. 900, where the agreement, which was in similar terms, omitting assessments, related to the premises where the chattels were or should be.

(*h*) *Blaiberg* v. *Beckett* (1886), 18 Q. B. D. 96. An agreement by the grantor not to obtain credit to the extent of £10 without the grantee's consent, to give the grantee the greater portion of his business, to keep proper books and permit inspection, is not for maintenance of the security (*Peace* v. *Brookes*, [1895] 2 Q. B. 451).

(*i*) *Furber* v. *Cobb* (1887), 18 Q. B. D. 494.

(*k*) As to defeasance or condition within the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (3), see p. 43, *post*.

(*l*) *Blaiberg* v. *Beckett*, *supra*. The terms agreed to for defeasance of the security, not mere conditions, must be stated in the bill of sale (*Heseltine* v. *Simmons*, [1892] 2 Q. B. 547).

(*m*) *Re Morritt*, *Ex parte Official Receiver* (1886), 18 Q. B. D. 222.

(*n*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7; and see p. 68, *post*.

(*o*) *Barr* v. *Kingsford* (1887), 56 L. T. 861, where a provision for payment on default in performance of agreements not necessary for maintaining the security was held to avoid the bill of sale.

(*p*) *Davis* v. *Burton* (1883), 11 Q. B. D. 537. A stipulation, not necessary for maintaining the security, cannot be made so by agreement of the parties (*Furber* v. *Cobb* (1887), 18 Q. B. D. 494).

(*q*) *Furber* v. *Cobb*, *supra*. A bill of sale is avoided by a power to seize if the grantor should enter into liquidation, or compound with his creditors (*Barr* v. *Kingsford*, *supra*), or take the benefit of any Bankruptcy Act (*Gilroy* v. *Bowey* (1888), 59 L. T. 223), or do any act whereby he shall render himself liable to become bankrupt (*Re Williams*, *Ex parte Pearce* (1883), 25 Ch. D. 656). But a power to seize if the grantor should do or suffer anything whereby he shall become bankrupt is in substance the same as s. 7 (2) of the Bills of Sale Act (1878) Amendment Act, 1882, and valid (*Re Munday*, *Ex parte Allen* (1884), 14 Q. B. D. 43).

But if no power of seizure is given, expressly or by implication, otherwise than in those events, it is permissible to insert agreements for maintenance, though they may be wider in terms than is necessary for maintaining the security (*r*); and in such cases the proviso controls the agreements, and supports the bill of sale (*s*).

Power for grantee to pay rent etc.

76. A power for the grantee, on the grantor's default, to make payments for insurance (*t*), rent, rates (*u*), taxes, or outlay on repairs (*a*), is for the maintenance of the security; and such payments may be made repayable on demand with interest, and may be charged on the chattels assigned, so that the latter cannot be redeemed until repayment (*b*).

But no power can be given to seize in respect of any such payments, and a bill of sale by which payments by the grantee are added to, and recoverable in the same manner as, the principal moneys and interest, is not in accordance with the statutory form (*c*).

Power of sale.

77. An express power of sale may (*d*), but need not, be inserted in a bill of sale, as a power to seize is implied in certain events (*e*),

(*r*) *Topley* v. *Corsbie* (1888), 20 Q. B. D. 350; *Weardale Coal and Iron Co.* v. *Hodson*, [1894] 1 Q. B. 598; *Turner & Co.* v. *Culpan* (1888), 36 W. R. 278; *Cartwright* v. *Regan*, [1895] 1 Q. B. 900, where the agreement provided for the production of rent receipts, without the conditions imposed by s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882; *Furber* v. *Cobb* (1887), 18 Q. B. D. 494; *Re Paxton, Ex parte Pope* (1889), 60 L. T. 428, where there was an unqualified agreement not to remove the chattels, and for the grantee to enter and inspect; *Seed* v. *Bradley*, [1894] 1 Q. B. 319, where the agreement was not to permit the chattels to be destroyed, injured, or deteriorated, except by use and wear, and to replace them; *Consolidated Credit Corporation, Ltd.* v. *Gosney* (1885), 16 Q. B. D. 24, where the agreement was to replace so as to keep up present value; *Coates* v. *Moore*, [1903] 2 K. B. 140, where the agreement was to the same effect, with an assignment of the substituted chattels; *Re Parton, Ex parte Pope, supra*, where the grantor agreed not to suffer any distress to be levied on the chattels, or do anything whereby he might become bankrupt, or have execution levied on his goods and there was a power to seize on bankruptcy; *Re Cleaver, Ex parte Rawlings* (1887), 18 Q. B. D. 489, where there was an agreement for further assurance by grantor, and all persons claiming through or under him. Compare, for a wider covenant for further assurance, *Liverpool Commercial Investment Society* v. *Richardson* (1886), 2 T. L. R. 602.

(*s*) *Re Bullock, Ex parte Ward*, [1899] 2 Q. B. 517, where a power to sell after five clear days, if the chattels were seized for breach of any agreements, was held qualified by the proviso; *Briggs* v. *Pike* (1892), 66 L. T. 637, where an agreement that the grantee might pay premiums on the grantor's default, and that the money so expended, with interest, should be repaid on demand, accompanied by a general power to seize on default in payment of the sum or sums secured, was held qualified by the proviso.

(*t*) *Re Barber, Ex parte Stanford* (1886), 17 Q. B. D. 259; *Briggs* v. *Pike, supra*.

(*u*) *Goldstrom* v. *Tallerman* (1886), 18 Q. B. D. 1.

(*a*) *Topley* v. *Corsbie, supra*.

(*b*) *Re Barber, Ex parte Stanford, supra*; *Briggs* v. *Pike, supra*.

(*c*) *Real and Personal Advance Co.* v. *Cleare* (1888), 20 Q. B. D. 804; *Bianchi* v. *Offord* (1886), 17 Q. B. D. 484; *Macey* v. *Gilbert* (1888), 57 L. J. (Q. B.) 461.

(*d*) *Re Morritt, Ex parte Official Receiver* (1886), 18 Q. B. D. 222.

(*e*) These are specified in the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7; see p. 68, *post*.

Sect. 2. Form of Bill of Sale.

which, after the expiration of five clear days (*f*), warrants removal and sale (*g*).

The statutory powers of sale conferred upon mortgagees by deed (*h*) do not apply to bills of sale in the statutory form (*i*); but it is permissible to exclude the restrictions imposed on the statutory power of sale (*k*). A power may be given to sell on or off the premises by public auction or private contract (*l*), but not to affix placards to the premises (*m*). A power may not be given to the grantee to purchase the chattels at a valuation (*n*), or, if he is an auctioneer, to retain commission as if selling for the grantor (*o*).

Provisions, that the purchaser upon a sale shall not be bound to inquire whether default has been made (*p*), or that the receipt of the grantee shall be a sufficient discharge, the buyer not being required to see to the application of the purchase-money (*q*), are not for maintenance of the security, or in accordance with the statutory form.

Proceeds of sale.

A bill of sale may provide that the grantee shall be at liberty to retain out of the proceeds of sale his principal and interest, with all costs incurred in maintaining his security (*r*); but a wider clause for retention of all expenses attending the sale or incurred in relation to the security (*s*), or to which the grantee may be put (*t*), is indefinite and not in accordance with the form (*u*).

Retention of bill of sale.

The grantee cannot stipulate for retention of the bill of sale after payment in full (*a*).

Omission of the proviso.

78. The concluding proviso as to seizure is a characteristic of the statutory form, and its omission has been said to avoid the bill of sale (*b*).

(*f*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 13; and see p. 70, *post*. No express power can be given to seize and sell immediately on default, as that would conflict with the provisions of the section (*Hetherington* v. *Groome* (1884), 13 Q. B. D. 789).

(*g*) *Watkins* v. *Evans* (1887), 18 Q. B. D. 386; *Re Morritt, Ex parte Official Receiver* (1886), 18 Q. B. D. 222.

(*h*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19. See title MORTGAGE.

(*i*) *Calvert* v. *Thomas* (1887), 19 Q. B. D. 204. Compare *Watkins* v. *Evans*, *supra*.

(*k*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 20; *Re Morritt, Ex parte Official Receiver*, *supra*.

(*l*) *Bourne* v. *Wall* (1891), 64 L. T. 530.

(*m*) *Bardell* v. *Daykin* (1887), 3 T. L. R. 526.

(*n*) *Lyon* v. *Morris* (1887), 19 Q. B. D. 139.

(*o*) *Furber* v. *Cobb* (1887), 18 Q. B. D. 494.

(*p*) *Blaiberg* v. *Beckett* (1886), 18 Q. B. D. 96.

(*q*) *Gibbs* v. *Parsons* (1887), 22 L. J. 96.

(*r*) *Lumley* v. *Simmons* (1887), 34 Ch. D. 698; *Re Morritt, Ex parte Official Receiver*, *supra*, where the bill of sale provided for the retention of principal, interest, costs, and expenses, with rent, rates, or taxes paid by the grantee, and payments for discharging any distress, execution, or incumbrance on the chattels, and seizing, retaining, and keeping possession thereof, and in or about their carriage, removal, warehousing, or sale. Such a trust of proceeds of sale is substantially the same as would be implied if there were no declaration (*Re Cleaver, Ex parte Rawlings* (1887), 18 Q. B. D. 489).

(*s*) *Calvert* v. *Thomas*, *supra*.

(*t*) *Macey* v. *Gilbert* (1888), 57 L. J. (Q. B.) 461.

(*u*) *Calvert* v. *Thomas*, *supra*.

(*a*) *Watson* v. *Strickland* (1887), 19 Q. B. D. 391.

(*b*) *Thomas* v. *Kelly* (1888), 13 App. Cas. 506, *per* Lord MACNAGHTEN, at p. 519.

The name, address (*c*), and description of the attesting witness or witnesses are also characteristic of the form, and the name only is not sufficient without address and description (*d*).

Attestation.

Description, though not synonymous with occupation, includes it; and the profession, trade, or calling of the witness must be stated (*e*), or, if he has none, his addition or style (*f*).

A defect in description cannot be cured by the affidavit filed on registration (*g*), or by extraneous evidence. Where a witness attests more than one attestation clause, adding his description to only one, it is sufficient if it appears on the face of the bill of sale, as by comparison of handwriting, that the witness in each case is the same; but if extraneous evidence is necessary to prove this fact, the bill of sale will be void as not in accordance with the statutory form (*h*).

The schedule.

79. Every bill of sale given by way of security must have annexed thereto, or written thereon, a schedule containing an inventory of the personal chattels comprised in it (*i*), though the statutory form itself does not set out a schedule (*k*). The principal Act also requires that a copy of every schedule or inventory annexed to or referred to in a bill of sale must be registered (*l*).

SECT. 3.—*Defeasance, Condition, or Declaration of Trust.*

Defeasances etc. deemed part of bill of sale.

80. Any terms agreed to for defeasance of the security must be inserted in a bill of sale in the statutory form (*m*).

It is also provided by the principal Act (*n*) that if a bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration of trust shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy required by the Act to be filed therewith, and as part thereof, otherwise the registration shall be void.

The object of this provision is to restrict, within certain limits, the nature of the bargain which can be made by bill of sale, and to ensure that the true bargain is registered (*o*).

The Act avoids registration of a bill of sale not complying with the prescribed formalities, whether the defeasance, condition, or declaration of trust is in favour of the grantor or of the grantee, and

(*c*) This may be the business address of the witness, not necessarily his private residence (*Simmons* v. *Woodward*, [1892] A. C. 100).
(*d*) *Parsons* v. *Brand* (1890), 25 Q. B. D. 110; *Blankenstein* v. *Robertson* (1890), 24 Q. B. D. 543.
(*e*) *Coulson* v. *Dickson* (1890), 25 Q. B. D. 110.
(*f*) *Sims* v. *Trollope & Sons*, [1897] 1 Q. B. 24, where the witness had no occupation.
(*g*) *Parsons* v. *Brand*, *Coulson* v. *Dickson*, *supra*.
(*h*) *Bird* v. *Davey*, [1891] 1 Q. B. 29.
(*i*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 4.
(*k*) *Ibid.*, Schedule. For the requirements of the Schedule, see pp. 34 *et seq.*, *ante*.
(*l*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (2); and see p. 46, *post*.
(*m*) See p. 34, *ante*.
(*n*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (3).
(*o*) *Pettit* v. *Lodge and Harper*, [1908] 1 K. B. 744, *per* FLETCHER MOULTON, L.J., at p. 749.

SECT. 3. Défeasance, Condition, or Declaration of Trust.

the avoidance is not, as was formerly supposed (*p*), confined to a defeasance, condition, or declaration of trust limiting the rights of the grantee, or affecting them prejudicially in favour of the grantor (*q*).

What is a defeasance.

81. A defeasance is an instrument or agreement which defeats the operation of a bill of sale (*r*), and is, more strictly speaking, a condition (*s*).

A collateral agreement forming part of the contract for, but not expressed in, a bill of sale, and securing the same, or part of the same, sum of money, is within this provision of the Act, as, for example, a contemporaneous mortgage of property by one of two grantors to secure, with compound interest, the same payment which is secured with simple interest by a bill of sale given by both (*t*).

And a promissory note, given at the same time as a bill of sale, for the same loan and as part of the same transaction, is a defeasance within the same provision (*a*), although it is valid as a note (*b*).

So a parol agreement varying the terms of payment contained in a bill of sale, if made as part of the same transaction, is a condition (*c*). And any bargain different to that expressed in the bill of sale, affecting the rights of either party, as for example an alteration of the events on which a seizure may be made, is a defeasance which must be incorporated in the bill of sale and registered (*d*). Thus, where a bill of sale provides for payment of principal, together with interest, by weekly instalments, an arrangement to substitute equal weekly payments, of an increased amount, to cover principal and interest, so as to avoid calculating varying amounts of interest week by week, is a defeasance, though the aggregate amount payable for principal and interest is not altered (*d*).

Collateral stipulation when not affected.

82. It is not every collateral stipulation between the parties that is within this provision of the Act. Thus, an understanding that out of the advance the grantor should repay a debt owing by him to the grantee, in part secured by an existing bill of sale, is not a

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(*p*) *Re Lees, Ex parte Collins* (1875), 10 Ch. App. 367.
(*q*) *Edwards* v. *Marcus*, [1894] 1 Q. B. 587.
(*r*) *Blaiberg* v. *Beckett* (1886), 18 Q. B. D. 96.
(*s*) *Re Storey, Ex parte Popplewell* (1882), 21 Ch. D. 73.
(*t*) *Edwards* v. *Marcus, supra*; *Ellis* v. *Wright* (1897), 76 L. T. 522, where a mortgage, payable on demand, was given as part of the same transaction as a bill of sale payable by instalments, to secure part of the mortgage debt; *Sharp* v. *McHenry* (1887), 38 Ch. D. 427, where there was a contemporaneous covenant to pay compound interest on the debt secured by the bill of sale; *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547, where a collateral agreement to resort first to securities, other than the bill of sale, was held to be a condition, though not a defeasance. Compare *Re Leber* (1908), 52 Sol. Jo. 483.
(*a*) *Counsell* v. *London and Westminster Loan and Discount Co.* (1887), 19 Q. B. D. 512. The result is the same though other parties join in the note (*Onn* v. *Fisher* (1889), 5 T. L. R. 504).
(*b*) *Monetary Advance Co.* v. *Cater* (1888), 20 Q. B. D. 785.
(*c*) *Re Southam, Ex parte Southam* (1874), L. R. 17 Eq. 578.
(*d*) *Pettit* v. *Lodge and Harper*, [1903] 1 K. B. 744, overruling *Reed* v. *Franks* (1900), 16 T. L. R. 347.

condition or declaration of trust(*e*). A mere deposit by the grantor of a policy of insurance as collateral security for the debt secured by the bill of sale is not a defeasance or a condition (*f*), nor is the guarantee of a third party to pay on demand any unpaid balance of loan and interest, in the event of the bill of sale becoming inoperative, or an insufficient security (*g*).

SECT. 8. **Defeasance, Condition, or Declaration of Trust.**

Terms made subsequent to the bill of sale are not within the provisions of the section (*h*).

83. Where registration is made void by this provision a bill of sale given by way of security is void in respect of the personal chattels comprised therein (*i*); but an absolute bill of sale is only avoided as against the persons, and to the extent, mentioned in the principal Act (*k*).

Extent of avoidance.

SECT. 4.—*Attestation.*

SUB-SECT. 1.—*Necessity for Attestation.*

84. Absolute bills of sale, as well as those given by way of security for the payment of money by the grantor, must be duly (*l*) attested (*m*), but with different formalities.

All bills of sale must be attested.

SUB-SECT. 2.—*Absolute Bills of Sale.*

85. An absolute bill of sale must be attested by a solicitor of the Supreme Court, and the attestation must state that, before the execution of the bill of sale, the effect thereof has been explained to the grantor by the attesting solicitor (*n*), otherwise it will be void to the extent and against the persons named in the principal Act (*o*), though valid as between the parties (*p*).

Attestation by solicitor.

It is not required that an explanation of the bill of sale shall in fact have been given, though the attestation must so state (*q*); and the affidavit filed on registration need not verify the fact of explanation (*r*).

(*e*) *Thomas* v. *Searles*, [1891] 2 Q. B. 408. The section does not apply to an agreement not to register a bill of sale (*Re Storey, Ex parte Popplewell* (1882), 21 Ch. D. 73), or to a purchase in trust for another (*Robinson* v. *Collingwood* (1864), 34 L. J. (C. P.) 18). It has been said not to apply to an agreement for a bonus, but this is doubtful (*Re Lees, Ex parte Collins* (1875), 10 Ch. App. 367).

(*f*) *Carpenter* v. *Deen* (1889), 23 Q. B. D. 566.

(*g*) *Oakes* v. *Green* (1907), 23 T. L. R. 560.

(*h*) *Linfoot* v. *Pockett*, [1895] 2 Ch. 835.

(*i*) See p. 54, *post*.

(*k*) See p. 55, *post*.

(*l*) That is, in the manner prescribed (*Parsons* v. *Brand*, *Coulson* v. *Dickson* (1890), 25 Q. B. D. 110).

(*m*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8; Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 8.

(*n*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (1), which is not repealed by the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 10, as regards bills of sale given otherwise than by way of security (*Swift* v. *Pannell* (1883), 24 Ch. D. 210; *Casson* v. *Churchley* (1884), 53 L. J. (Q. B.) 335).

(*o*) Bills of Sale Act, 1878, s. 8; and see p. 55, *post*.

(*p*) *Davis* v. *Goodman* (1880), 5 C. P. D. 128.

(*q*) *Re Haynes, Ex parte National Mercantile Bank* (1880), 15 Ch. D. 42.

(*r*) *Re Roper, Ex parte Bolland* (1882), 21 Ch. D. 543.

SECT. 4.

Attestation.

An absolute bill of sale may be attested by the solicitor for both parties (*s*), or by the grantee's solicitor (*t*), or his managing clerk, being a solicitor, though not practising on his own account (*u*). But a solicitor who is party to the bill of sale cannot attest it (*w*).

Who may attest.

Affidavit of attestation.

86. An affidavit proving due attestation must be filed on registration (*x*). It is not enough to verify the handwriting of the attesting solicitor and state that he explained the bill of sale to the grantor; the affidavit must prove that the solicitor whose name appears as the attesting witness was present when the bill of sale was executed by the grantor (*y*).

It will be sufficient if it can be inferred from the whole affidavit that the solicitor did in fact attest the bill of sale, although this is not expressly stated (*z*).

SUB-SECT. 3.—*Bills of Sale by way of Security.*

Attestation by credible witnesses.

87. The amending Act requires that the execution by the grantor of every bill of sale given by way of security shall be attested (*a*) by one or more credible witnesses, not being parties thereto (*b*).

Although a party cannot attest a bill of sale, his agent or manager may do so (*c*).

SECT. 5.—*Registration.*

SUB-SECT. 1.—*In General.*

Necessity for registration.

88. Both absolute bills of sale (*d*) and bills of sale given by way of security (*e*) are required to be registered.

Mode of registration.

The mode of registering both kinds of bills of sale is regulated by the principal Act, and is as follows: the bill of sale with every schedule or inventory thereto annexed or therein referred to, and a true copy of such bill and of such schedule or inventory and of every attestation of the execution of such bill of sale, together with the prescribed affidavit, must be presented to the registrar; and the copy bill of sale and affidavit must be filed with him (*f*).

(*s*) *Vernon* v. *Cooke* (1880), 49 L. J. (C. P.) 767.
(*t*) *Penwarden* v. *Roberts* (1882), 9 Q. B. D. 137.
(*u*) *Hill* v. *Kirkwood* (1880), 42 L. T. 105.
(*w*) *Seal* v. *Claridge* (1881), 7 Q. B. D. 516.
(*x*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (2).
(*y*) *Ford* v. *Kettle* (1882), 9 Q. B. D. 139; *Sharpe* v. *Birch* (1881), 8 Q. B. D. 111; *Re Moulson, Ex parte Knightley* (1882), 46 L. T. 776.
(*z*) *Yates* v. *Ashcroft* (1882), 47 L. T. 337; *Cooper* v. *Zeffert* (1883), 32 W. R. 402.
(*a*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 8; and see p. 53, *post*.
(*b*) *Ibid.*, s. 10.
(*c*) *Peace* v. *Brookes*, [1895] 2 Q. B. 451.
(*d*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8.
(*e*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 8.
(*f*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (2): "Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and

The place of registration is the Bills of Sale Department of the Central Office at the Royal Courts of Justice, London (*g*).

SUB-SECT. 2.—*Time for Registration.*

Period in which bill of sale must be registered.

89. The time for registering absolute bills of sale is within seven clear days after the making or giving thereof (*h*), and for a bill of sale given by way of security, within seven clear days after the execution thereof, or if executed in any place out of England, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England, if posted immediately after the execution thereof (*i*).

When the time for registering a bill of sale expires on a Sunday or other day on which the registrar's office is closed, the registration is valid if made on the next following day on which the office is open (*k*). Power is given to extend the time for registration in certain cases (*l*).

Validity before registration.

During the time allowed for registration, a bill of sale, if otherwise valid, is effectual though unregistered, even if within that time there purports to have been registration which turns out to be insufficient (*m*).

SUB-SECT. 3.—*True Copy, and Affidavit on Registration.*

What is a true copy.

90. The copy of the bill of sale, schedule or inventory, and attestation, to be presented to, and filed with, the registrar, must be substantially a true copy, but need not be an exact copy, and clerical or verbal errors, which cannot mislead, do not avoid registration (*n*).

A catalogue of chattels referred to in the schedule to a bill of sale, when the chattels can be identified without referring to the catalogue, is not a schedule or inventory within the meaning of the Act (*o*).

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attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed."

(*g*) R. S. C., Ord. 61. As to local registration, see p. 51, *post*.

(*h*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), ss. 8, 10 (2).

(*i*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 8.

(*k*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 22.

(*l*) *Ibid.*, s. 14; and see p. 74, *post*.

(*m*) *Marples* v. *Hartley* (1861), 30 L. J. (Q. B.) 92; *Banbury* v. *White* (1863), 32 L. J. (EX.) 258.

(*n*) *Re Hewer, Ex parte Kahen* (1882), 21 Ch. D. 871, where words were left out; *Sharp* v. *Brown* (1887), 38 Ch. D. 427, where blanks in the copy were filled up in the original; *Gardner* v. *Shaw* (1871), 24 L. T. 319, where there was a mistake in name; *Elliott* v. *Freeman* (1863), 7 L. T. 715, where the mistake was in the consideration; *Thomas* v. *Roberts*, [1898] 1 Q. B. 657, where the date of execution was stated in the original, but omitted in the copy; *Coates* v. *Moore*, [1903] 2 K. B. 140, where the omission of the signature of the grantor and attesting witness, with description, was supplied by the affidavit filed with the copy.

(*o*) *Davidson* v. *Carlton Bank*, [1893] 1 Q. B. 82.

SECT. 5. Registration.

Contents of affidavit.

91. The affidavit presented to and filed with the registrar (*p*) must prove—(1) the due execution and attestation of the bill of sale, (2) the residence and occupation of the grantor, and of every attesting witness, and (3) the true date of the execution of the bill of sale (*q*). It is sufficient to state that the bill of sale was executed on the day it bears date. An obvious mistake in date, as 1806 for 1876, is not a fatal defect (*r*).

Before whom sworn.

Affidavits may be sworn before a master of the High Court or a commissioner of oaths (*s*); and every first and second-class clerk in the Bills of Sale Department of the Central Office has authority to take oaths and affidavits in matters relating to that department (*a*).

The rules of the Supreme Court relating to affidavits (*b*) apply to an affidavit on registration of a bill of sale, and such an affidavit may not be sworn before the solicitor to the grantor or grantee, who is a party within the meaning of the rule (*c*), or before any agent or correspondent of such solicitor, or before a party himself; and an affidavit which would be insufficient if sworn before the solicitor himself is insufficient if sworn before his clerk or partner (*d*). If an affidavit on registration be sworn before the solicitor acting for the grantee in preparing or filing the bill of sale registration is avoided (*e*).

Irregularities in jurat.

A clerical error in the jurat of an affidavit may be a mere irregularity (*e*). Thus, where the jurat omits to describe the officer swearing the affidavit on registration as a commissioner, the affidavit is admissible in the absence of proof that he is not a commissioner (*f*). But where the commissioner does not sign his name to the jurat, the affidavit is incomplete, and registration is avoided (*g*).

SUB-SECT. 4.—*Description of Parties and Attesting Witnesses.*

What is a sufficient description.

92. The affidavit filed on registration must contain a description (*h*) of the residence and occupation of the grantor and of every attesting witness to the bill of sale (*i*), in order that creditors and

(*p*) For form see R. S. C., Appendix B, 24, and Encyclopædia of Forms, Vol. VIII., p. 793

(*q*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (2).

(*r*) *Lamb* v. *Bruce* (1876), 45 L. J. (Q. B.) 538.

(*s*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 17. It is perjury to make or use any false affidavit for the purposes of the Act (*ibid.*); see title CRIMINAL LAW AND PROCEDURE. For commissioners of oaths, see title SOLICITORS.

(*a*) R. S. C., Bills of Sale Acts, 1878 and 1882, r. 12; and see Yearly County Court Practice, 1908, Vol. II., p. 71.

(*b*) R. S. C., Ord. 38.

(*c*) *Baker* v. *Ambrose*, [1896] 2 Q. B. 372.

(*d*) R. S. C., Ord. 38, rr. 16, 17.

(*e*) See *ibid.*, r. 14.

(*f*) *Re Chapman, Ex parte Johnson* (1884), 26 Ch. D. 338.

(*g*) *Brown* v. *London and County Advance and Discount Co.* (1889), 5 T. L. R. 199.

(*h*) Description to the best of the deponent's belief is sufficient (*Roe* v. *Bradshaw* (1866), L. R. 1 Exch. 106). Compare R. S. C., Ord. 38, r. 3. So where the description is given in the introductory part, but left blank in the body of the affidavit, the registration is valid (*Blaiberg* v. *Parke* (1882), 10 Q. B. D. 90).

(*i*) Every witness must be described (*Pickard* v. *Marriage* (1876), 1 Ex. D. 364), and every grantor (*Hooper* v. *Parmenter* (1862), 10 W. R. 648).

others concerned may make inquiries before dealing with the grantor (*k*).

A description is sufficient which identifies the grantor and attesting witnesses, and enables a person by ordinary inquiry to ascertain where to find the objects of his search (*l*).

The description must be of residence and occupation at the time of registering the bill of sale, not at the time of its execution (*m*).

Although the Acts make no provision for stating the names of the parties, a wrong christian name or surname, when coupled with a misdescription of occupation, or probably of residence, may be so inaccurate and misleading as to avoid registration (*n*).

How far affidavit and bill of sale may be read together.

93. The statutory form of bill of sale, as already noted (*o*), requires the address and description of the grantor and every attesting witness to be stated on the face of the bill of sale; but this information must be given also in the affidavit filed on registration (*p*). Where, without any intention to mislead and without anyone having been in fact misled, the address of the grantor or of an attesting witness is not correctly given in the bill of sale itself, but his residence and occupation are accurately stated in the affidavit, the registration is valid (*q*).

On the other hand, if the affidavit contains no description (*r*), or an untrue or mis-stated description (*s*), registration will be avoided; and where the bill of sale and affidavit differ, the bill of sale cannot be used to cure a defective description in the affidavit (*t*), even though the description is given correctly in the bill of sale (*u*). But the bill of sale may be referred to, in order to supplement or correct an imperfect or ambiguous description in the affidavit (*b*); and mere surplusage may be rejected, if the meaning is clear (*c*).

The affidavit will be sufficient, if, referring to the description of address and occupation given in the bill of sale, it states that it is correct (*d*).

Burden of proof.

The burden of proof is on the person alleging that the description

(*k*) *Jones* v. *Harris* (1871), L. R. 7 Q. B. 157.

(*l*) *Blount* v. *Harris* (1878), 4 Q. B. D. 603.

(*m*) *Button* v. *O'Neill* (1879), 4 C. P. D. 354. The description of the grantor as carrying on a business which he has ceased to carry on (*Cuper* v. *Davis* (1884), 32 W. R. 329; *Proctor* v. *Lucius* (1903), 19 T. L. R. 458), or as "until lately" a commercial traveller (*Castle* v. *Downton* (1879), 5 C. P. D. 56), is insufficient. But where the grantor absconded before registration, the description of his address as in the bill of sale was held sufficient (*Re Hewer, Ex parte Kahen* (1882), 21 Ch. D. 871).

(*n*) *Lee* v. *Turner* (1888), 20 Q. B. D. 773; *Stokes* v. *Spencer*, [1900] 2 Q. B. 483.

(*o*) See pp. 36, 43, *ante*.

(*p*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (2).

(*q*) *Dolcini* v. *Dolcini*, [1895] 1 Q. B. 898.

(*r*) *Hatton* v. *English* (1857), 26 L. J. (Q. B.) 161.

(*s*) *Brodrick* v. *Scalé* (1871), L. R. 6 C. P. 98.

(*t*) *Murray* v. *Mackenzie* (1875), L. R. 10 C. P. 625.

(*u*) *Marks* v. *Derrick* (1899), 80 L. T. 60.

(*b*) *Jones* v. *Harris, supra; Re Bent, Ex parte Mackenzie* (1873), 42 L. J. (BCY.) 25.

(*c*) *Blount* v. *Harris, supra*, where the addition of "in the city of London" to the description "Acton" was rejected.

(*d*) *Foulger* v. *Taylor* (1860), 5 H. & N. 202.

Sect. 5. Registration.

is misleading (*e*), or should be otherwise stated (*f*), or that, where no occupation is described, the person in fact has one (*g*); and when the facts are ascertained, the question of sufficiency of description is for the judge (*h*).

Residence.

94. The residence of the grantor and attesting witnesses must be described in the affidavit with such reasonable certainty and sufficiency as to identify them, and with a particularity depending on the circumstances of the case (*i*).

In some instances a more detailed description, as of a street, or even a number, may be necessary, and a misleading mistake in number may avoid registration (*k*).

It is not necessary to set out every residence or place of business; and if the person described has two or more addresses, it is sufficient to describe him as of the principal one (*l*).

The residence required is not necessarily the place where the party lives; and an address where he is most likely to be found, as, for instance, his place of business, or his employer's place of business, is sufficient (*m*).

Occupation.

95. Occupation, for the purposes of registration, is the trade, business, or calling, which a person pursues to get a living (*n*), the business in which a man is usually engaged to the knowledge of his neighbours (*o*). If a person has an occupation, it must be described (*p*); but if he has none, it is unnecessary so to state in

(*e*) *Throssell* v. *Marsh* (1885), 53 L. T. 321.

(*f*) *Grant* v. *Shaw* (1872), L. R. 7 Q. B. 700

(*g*) *Sutton* v. *Bath* (1858), 3 H. & N. 382.

(*h*) *Phillips* v. *Burt* (1862), 2 F. & F. 862.

(*i*) *Hickley* v. *Greenwood* (1890), 25 Q. B. D. 277; *Briggs* v. *Boss* (1868), L. R. 3 Q. B. 268, where the description of the witness as of Hanley, without further address, was held sufficient, letters so addressed reaching him.

(*k*) *Murray* v. *Mackenzie* (1875), L. R. 10 C. P. 625; *Marks* v. *Derrick* (1899), 80 L. T. 60.

(*l*) *Greenham* v. *Child* (1889), 24 Q. B. D. 29; *Cooper* v. *Ibberson* (1881), 44 L. T. 309; *Re Moulson, Ex parte Knightley* (1882), 46 L. T. 776.

(*m*) *Hewer* v. *Cox* (1860), 30 L. J. (Q. B.) 73. So a clerk may be sufficiently described as of his employer's address, where he can be found during business hours (*Simmons* v. *Woodward*, [1892] A. C. 100; *Blackwell* v. *England* (1857), 27 L. J. (Q. B.) 124).

(*n*) *Tuton* v. *Sanoner* (1858), 27 L. J. (EX.) 293.

(*o*) *Luckin* v. *Hamlyn* (1869), 21 L. T 366, *per* MARTIN, B., at p. 366; *Neverson* v. *Seymour* (1908), 97 L. T. 788.

(*p*) The following descriptions have been held sufficient: describing a merchant shipbroker as broker (*Gugen* v. *Sampson* (1866), 4 F. & F. 974); Government or insurance clerk (*Grant* v. *Shaw* (1872), L. R. 7 Q. B. 700); describing a clerk to an accountant as an accountant (*Briggs* v. *Boss*, *supra*); clerk, not stating his employer's occupation (*Lamb* v. *Bruce* (1876), 45 L. J. (Q. B.) 538). But the description "married woman" is insufficient, if she has an occupation (*Kemble* v. *Addison*, [1900] 1 Q. B. 430), or the description "gentleman" where the person described has any office or employment (*Allen* v. *Thompson* (1856), 25 L. J. (EX.) 249), or is a solicitor's clerk (*Brodrick* v. *Scalé* (1871), L. R. 6 C. P. 98; *Beales* v. *Tennant* (1860), 29 L. J. (Q. B.) 188), or is a silk buyer (*Adams* v. *Graham* (1864), 33 L. J. (Q. B.) 71). It is not sufficient to describe a manager of a theatre (*Re Vining, Ex parte Hwoman* (1870), L. R. 10 Eq. 63), or a commercial traveller (*Matthews* v. *Buchanan* (1889), 5 T. L. R. 373), as "esquire," or a school-master, as tutor, and by a wrong name (*Lee* v. *Turner* (1888), 20 Q. B. D. 773), or a clerk to a railway, as an accountant (*Larchin* v. *North-Western Deposit Bank* (1875), L. R. 10 Exch. 64).

the affidavit (*q*). If a person has no occupation, it is unnecessary to set out details of business undertakings in which he may be interested or engaged (*r*).

The description should be of the principal, substantial occupation; and if that is stated, an omission, not calculated to mislead, of some other occupation followed by the person described is not a defect (*s*).

Surplusage, added to an otherwise correct description of occupation, may be rejected (*t*).

What description is sufficient.

Such description should be given that if inquiry be made in the place where the person resides he may be easily identified (*a*), and if the description identifies the true occupation, it will be sufficient even though the person may not be actively pursuing his occupation at the time (*b*); but former (*c*), or proposed, occupations need not be described (*d*).

SECT. 6.—*Local Registration.*

When local registration requisite.

96. Where the affidavit which is required to accompany a bill of sale when presented for registration describes the residence of the person making or giving the same, or of the person against whom the process is issued, as being in some place outside the London bankruptcy district (*e*), or where the bill of sale describes the chattels

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(*q*) *Re Symonds, Ex parte Young* (1880), 42 L. T. 744, where a blank was left in the affidavit for "occupation," the person described having none. So the description "gentleman" is sufficient for one who has no regular employ, if

The scheduled form requires the addition or style of a witness, without occupation, to be stated in the attestation clause; see p. 35, *ante*.

(*r*) *Feast* v. *Robinson and Fisher* (1894), 70 L. T. 168, where a country gentleman, the sleeping partner in a business, was described as of no occupation; *Luckin* v. *Hamlyn* (1869), 21 L. T. 366, where a widow, so described, was managing a farm as executrix; *Davies* v. *Jenkins*, [1900] 1 Q. B. 133, where a married woman, so described, was conducting a farm in her husband's absence; *Usher* v. *Martin* (1889), 24 Q. B. D. 272, where a married woman was the leaseholder of a public-house conducted by her husband. The question whether a description of the occupation of a married woman, who lives with and keeps house for her husband, is sufficient is one of degree (*Neverson* v. *Seymour* (1908), 97 L. T. 788).

(*s*) *Throssell* v. *Marsh* (1885), 53 L. T. 321; *Re Wills, Ex parte National Deposit Bank* (1878), 26 W. R. 624; *Re Haynes, Ex parte National Mercantile Bank* (1880), 15 Ch. D. 42.

(*t*) *Re Storey, Ex parte Popplewell* (1882), 21 Ch. D. 73.

(*a*) *Luckin* v. *Hamlyn*, *supra*.

(*b*) *Sharp* v. *McHenry* (1887), 38 Ch. D. 427, where the person referred to was a contractor and financial agent, out of business; *Martinson* v. *Consolidated Co.* (1889), 5 T. L. R. 353, where he was a commercial clerk, out of employ; *Re Davies, Ex parte Equitable Investment Co.* (1897), 77 L. T. 567, where an actress, known as such, was held sufficiently so described, though not on the stage.

(*c*) *Smith* v. *Cheese*, *supra*, where the description of the grantor, who was without regular occupation, as "gentleman" was sufficient, though formerly he had been a proctor's clerk.

(*d*) *Re Davey, Ex parte Chapman* (1881), 45 L. T. 268.

(*e*) The London bankruptcy district under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 60, is now defined by s. 96 and Sched. III. of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). See also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 47, note (*g*).

SECT. 6. **Local Registration.**

enumerated therein as being in some place outside the London bankruptcy district, the registrar under the principal Act must forthwith, and within three clear days after registration in the principal registry, and in accordance with directions prescribed by the rules, transmit an abstract (*f*), in a form prescribed by the rules (*g*), of the contents of such bill of sale to the county court registrar in whose district such places are situate, and if such places are in the districts of different registrars to each such registrar.

Filing in county court.

Every abstract so transmitted must be filed, kept, and indexed by the registrar of the county court in the manner prescribed by the rules (*h*), and any person may search, inspect, make extracts from, and obtain copies of the abstract so registered in the like manner and upon the like terms as to payment or otherwise as near as may be as in the case of bills of sale registered by the registrar under the principal Act (*i*).

Omission of local registration.

The provisions for local registration are directory, and the registrar's default in transmitting the abstract to a county court registry does not avoid registration (*j*).

SECT. 7.—*Renewal of Registration.*

When renewal necessary.

97. The registration of a bill of sale, whether executed before or after the commencement of the principal Act, must be renewed once at least every five years, and if a period of five years elapses from the registration, or renewed registration, of a bill of sale without a renewal or further renewal, as the case may be, the registration becomes void. But a renewal of registration does not become necessary by reason only of a transfer or assignment of a bill of sale (*k*).

Mode of renewal.

98. The renewal of a registration is effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security (*l*). This affidavit must state the names,

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(*f*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 11, where the expressions used are "the prescribed directions," "the prescribed form," "the prescribed manner." By s. 4 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), "prescribed" means prescribed by rules made under the provisions of the Act, and by s. 21 power to make such rules is conferred. The rules in question are the R. S. C., Bills of Sale Acts, 1878 and 1882, for which see Yearly Practice, 1908, p. 1462. Directions for the transmission of the abstract are contained *ibid.*, r. 4.

(*g*) R. S. C., Bills of Sale Acts, 1878 and 1882, r. 3, and Appendix.

(*h*) *Ibid.*, rr. 7, 8.

(*i*) Provision is made (*ibid.*, r. 10) for the search and inspection of abstracts in the office of the registrar of the county court, and for making extracts from, or obtaining office copies of, such abstracts, also (r. 5) for re-registration and (r. 6) for entering notice of satisfaction.

(*j*) *Trinder* v. *Raynor* (1887), 56 L. J. (Q. B.) 422.

(*k*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 11, which applies also to bills of sale executed before the commencement of the Act, and registered under the Acts repealed (*ibid.*, s. 23).

(*l*) *Ibid.* The affidavit may be in the form set forth *ibid.*, Sched. A. See also Encyclopædia of Forms, Vol. VIII., p. 794.

residences, and occupations of the parties as stated in the bill of sale, even though they are there stated incorrectly; but the correct descriptions may be added. If these requirements of the Act are not complied with, the renewal of registration will be invalid (*m*). Local registration of renewals is effected (*n*) in the manner reuqired by the amending Act on registering a bill of sale (*o*).

SECT. 7. Renewal of Registration.

99. The time for renewal of registration may be extended by order of a judge of the High Court, where the omission to renew is accidental or due to inadvertence (*p*); but it cannot be extended in the case of a bill of sale the registration of which had become void for want of renewal before the principal Act came into operation (*q*), nor can such a bill of sale be renewed under the principal Act (*r*).

Extension of time.

100. Bills of sale registered before the commencement of the amending Act, and re-registered, are not affected by that Act (*s*), nor does it apply to bills of sale registered under the repealed Acts, even though renewal of registration has not taken place (*t*).

If registration of a bill of sale to which the amending Act applies is not duly renewed, the bill of sale will be void in respect of the personal chattels comprised therein (*u*).

Effect of amending Act.

Part VI.—Avoidance of Bills of Sale.

SECT. 1.—*Bills of Sale by way of Security.*

101. A bill of sale by way of security for the payment of money is void—(1) if it is not duly attested (*w*); (2) if it is not duly registered (*x*); (3) if the consideration is not truly set forth (*y*); (4) if it is not in accordance with the statutory form (*z*); (5) if it is made in consideration of any sum under £30 (*a*); or (6) if it is a successive bill of sale, that is, if it is executed within, or on the expiration of, seven days after the execution of a prior unregistered bill of sale, and if it is given for the same or part of the same debt and comprises all or part of the same chattels (*b*).

When bills of sale are void.

(*m*) *Re Morris, Ex parte Webster* (1882), 22 Ch. D. 136.
(*n*) R. S. C., Bills of Sale Acts, 1878 and 1882, r. 5. See Yearly County Court Practice, 1908, Vol. II., p. 70.
(*o*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 11.
(*p*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 14; and see p. 74, *post*.
(*q*) *Re Emery, Ex parte Chief Official Receiver* (1888), 21 Q. B. D. 405.
(*r*) *Askew* v. *Lewis* (1883). 10 Q. B. D. 477.
(*s*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 3; and see p. 4, *ante*.
(*t*) *Cookson* v. *Swire* (1884), 9 App. Cas. 653.
(*u*) *Fenton* v. *Blythe* (1890), 25 Q. B. D. 417.
(*w*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 8; and see pp. 45, 46, *ante*.
(*x*) *Ibid.*; and see pp. 46 *et seq.*, *ante*.
(*y*) *Ibid.*; and see pp. 31 *et seq.*, *ante*.
(*z*) *Ibid.*, s. 9; and see pp. 34 *et seq.*, *ante*.
(*a*) *Ibid.*, s. 12; and see pp. 30, 31, *ante*.
(*b*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 9; and see p. 64, *post*.

SECT. 1. **Bills of Sale by way of Security.**

The registration of a bill of sale is void, if the bill is given subject to an unregistered defeasance, condition, or declaration of trust (*c*), or if the registration is not renewed once at least every five years (*d*).

Extent of avoidance.

102. The extent of avoidance is not the same in all cases. A bill of sale which is void, as not in accordance with the statutory form, is void altogether (*e*), so that agreements contained in it cannot be enforced (*f*); and the same result seems to follow the avoidance of a bill of sale given in consideration of any sum under £30 (*g*).

But want of due attestation, registration, true statement of consideration, or renewal of registration, only avoids a bill of sale in respect of the personal chattels comprised therein (*h*), leaving it available for the enforcement of agreements for payment of principal and interest (*i*), or for other purposes (*j*). There is the same limited avoidance of successive bills of sale (*k*).

A bill of sale is also void, except as against the grantor, in respect of chattels which are not specifically described in the schedule (*l*), or of which the grantor was not true owner (*m*).

No protection against distress for taxes etc.

Bills of sale by way of security are no protection against a distress for taxes, poor and other parochial rates (*n*).

Possession under void bill of sale.

103. As already noted, possession taken under a void bill of sale does not protect the chattels; nor is the bill of sale any defence to an action for seizing the goods (*o*). But the grantee of a bill of sale may by an independent bargain acquire rights to chattels comprised in it which may remain effective, although the bill of sale is held void; but no right, in addition to those conferred by the bill of sale, arises where the grantor only intends to carry out its provisions on his part (*p*).

(*c*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (3).
(*d*) *Ibid.*, s. 11.
(*e*) See p. 34, *ante*.
(*f*) *Davies* v. *Rees* (1886), 17 Q. B. D. 408.
(*g*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 12.
(*h*) *Davies* v. *Rees*, *supra*.
(*i*) *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547. A defeasance not stated in a bill of sale avoids it altogether under s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43); but the omission of a condition only avoids registration under s. 10 (3) of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31).
(*j*) *Re Burdett*, *Ex parte Byrne* (1888), 20 Q. B. D. 310, where the deed was held a valid mortgage of property other than personal chattels; *Mumford* v. *Collier* (1890), 25 Q. B. D. 279, where it created the relation of landlord and tenant; and see p. 35, *ante*.
(*k*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 9.
(*l*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 4.
(*m*) *Ibid.*, s. 5.
(*n*) *Ibid.*, s. 14; and see p. 63, *post*.
(*o*) See p. 34, *ante*. Where a bill of sale is void, the sureties for its performance are discharged (*Brown* v. *Blaine* (1884), 1 T. L. R. 158). A surety for a debt secured by bill of sale is discharged to the extent of the security lost by the grantee's default to register or enforce its provisions (*Wulff and Billing* v. *Jay* (1872), L. R. 7 Q. B. 756).
(*p*) *Furber* v. *Cobb* (1887), 18 Q. B. D. 494. If the grantor consents to the appropriation of the proceeds of sale of chattels comprised in a bill of sale, he

SECT. 1. Bills of Sale by way of Security.

104. If a grantor has treated the bill of sale as valid for his own purposes, to the possible prejudice of the grantee, he cannot afterwards be heard to say that it is void (*q*).

SECT. 2.—*Absolute Bills of Sale.*

SUB-SECT. 1.—*Extent of Avoidance.*

How far absolute bills of sale are void.

105. A bill of sale given otherwise than by way of security for the payment of money, or registered before the commencement of the amending Act, is not invalid under any provision of that Act.

Such a bill of sale, though not complying with the provisions of the principal Act, is good between the parties (*r*), and is void only to the extent, and as against the persons, mentioned in the principal Act, namely, trustees or assignees in the grantor's bankruptcy or liquidation (*s*) or under any assignment for the benefit of his creditors, sheriffs' officers, and other persons seizing chattels under execution against the grantor, and every person on whose behalf such process of execution shall have been issued (*t*).

Extent of avoidance.

An absolute bill of sale is not avoided against the grantor or any person other than those above mentioned (*u*); and it is only avoided against the persons mentioned so far as regards the property in, or the right to the possession of, any chattels comprised

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cannot, nor can those representing him, claim them on the ground that the bill of sale was void (*Parsons* v. *Dewsbury and Clarke* (1887), 3 T. L. R. 354).

(*q*) *Roe* v. *Mutual Loan Fund, Ltd.* (1887), 19 Q. B. D. 347 (returning grantees as partly secured in liquidation proceedings, and paying them a composition on balance); *Comitti* v. *Maher* (1905), 94 L. T. 158 (requesting, or concurring in, grantee's assertion of title under the bill of sale to defeat executions).

(*r*) *Davis* v. *Goodman* (1880), 5 C. P. D. 128. A bill of sale within the principal Act by joint grantors, on one becoming bankrupt, is only avoided to the extent of his interest in the chattels (*Re Reed, Ex parte Brown* (1878), 9 Ch. D. 389).

(*s*) As to a scheme or composition, see Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (16), (17), and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 79 *et seq.*, 325 *et seq.*

(*t*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8: "Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days, are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be)."

(*u*) *E.g.*, the liquidator of a company (*Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601); unsecured creditors of an insolvent estate (*Re D'Epineuil (Count)* (1882), 20 Ch. D. 217).

SECT. 2. Absolute Bills of Sale.

in such bill of sale, which at or after the time of the filing of a petition for bankruptcy or liquidation, or of the execution of any assignment for the benefit of creditors, or of the execution of process of any court authorising the seizure of the chattels (as the case may be), and after the expiration of the seven days from the execution of the bill of sale allowed for its registration, are in the possession or apparent possession of the grantor (*w*).

When registration unnecessary.

106. During the seven days allowed for registration an absolute bill of sale, otherwise valid, is not avoided by the occurrence of the events mentioned, although the grantor remains in uncontrolled possession of the chattels comprised therein. If before the occurrence of any of the events mentioned the grantee takes and holds actual possession, registration is unnecessary (*a*).

SUB-SECT. 2.—*Apparent Possession.*

When chattels are in grantor's apparent possession.

107. The doctrine of apparent possession now only affects bills of sale to which the amending Act does not apply. Personal chattels are in the apparent possession of the grantor of a bill of sale so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used or enjoyed by him in any place whatever, notwithstanding that formal possession of them may have been taken by or given to any other person (*b*).

The possession of the grantor may either be actual, or apparent as defined above, where chattels are on premises occupied by him, which means *de facto* occupation in the ordinary sense of the term (*c*), or where they are used or enjoyed by him in any place (*d*).

Chattels not in possession of the grantor, but held for him by a bailee, may remain in his apparent possession (*e*), if not held under a pledge or lien (*f*).

Goods may still be in the grantor's apparent possession, although a demand of possession or threat to take forcible possession has been made by the grantee (*g*).

Termination of apparent possession.

108. To terminate the grantor's apparent possession there must be more than formal possession (*h*). Something must be done which in the eyes of everybody who sees the goods, or who is concerned in the matter, plainly takes them out of the possession, or apparent possession, of the grantor. Where possession is taken merely to

(*w*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8.
(*a*) *Marples* v. *Hartley* (1861), 30 L. J. (Q. B.) 92.
(*b*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.
(*c*) *Robinson* v. *Briggs* (1870), L. R. 6 Exch. 1, where the tenant of the rooms in which the goods were placed resided elsewhere, and having given up the keys to the grantee, was held not to be in occupation.
(*d*) Chattels are not "used and enjoyed" by the grantor where they have been let to a third person, together with the house (*Re Westray, Ex parte Morrison* (1880), 42 L. T. 158, where part of the rent was payable to the grantee).
(*e*) *Ancona* v. *Rogers* (1876), 1 Ex. D. 285, C. A.; *Re Wood, Ex parte Newsham* (1879), 40 L. T. 104, where goods in the hands of the police, included by the grantor in a bill of sale, were held to be in his apparent possession.
(*f*) *Lincoln Wagon and Engine Co.* v. *Mumford* (1879), 41 L. T. 655.
(*g*) *Ancona* v. *Rogers, supra.* It is otherwise as regards reputed ownership (see p. 60, post).
(*h*) *Gough* v. *Everard* (1863), 32 L. J. (EX.) 210.

prevent removal of the goods, everything being used by the grantor, or going on as it did before, the goods remain in his apparent possession (*i*). But if the grantee has taken actual possession, even though it be wrongful (*k*), and the goods no longer appear to be in possession of the grantor, although they may remain on premises occupied by him, the Act does not apply (*l*).

Chattels of which the sheriff has taken and holds actual possession under an execution do not remain in the grantor's apparent possession (*m*).

Chattels belonging to wife.

109. Chattels belonging to a wife, in the house which she and her husband occupy, are, in general, deemed to be in her possession, and not in the possession or apparent possession of her husband (*n*).

SECT. 3.—*Avoidance against Third Parties.*

SUB-SECT. 1.—*Trustee in Bankruptcy.*

Grantee's rights on bankruptcy of grantor.

110. If the grantor of a valid bill of sale becomes bankrupt (*o*), the grantee has the same rights of proof (*p*), and otherwise, as other secured creditors. If he proves his debt, and gives up his security, the trustee stands in his place, and a subsequent bill of sale is not advanced (*q*); and the same result follows where the trustee buys up a bill of sale (*r*).

(*i*) *Re Blenkhorn, Ex parte Jay* (1874), 9 Ch. App. 697. For other instances of formal possession being insufficient, see *Re Vining, Ex parte Hooman* (1870), L. R. 10 Eq. 63; *Seal* v. *Claridge* (1881), 7 Q. B. D. 516, where, though possession was taken, the grantor retained the key of the premises, and used them as he pleased; *Pickard* v. *Marriage* (1876), 1 Ex. D. 364, where the grantor resided on the premises as servant to the grantee, and used the goods as part salary for managing the business; *Re Henderson, Ex parte Lewis* (1871), 6 Ch. App. 626, where possession was taken and a sale announced, not stated to be under the bill of sale; *Ancona* v. *Rogers* (1876), 1 Ex. D. 285, where there were threats to seize, but the grantor remained in possession.

(*k*) *Re Henley, Ex parte Fletcher* (1877), 5 Ch. D. 809.

(*l*) *Smith* v. *Wall* (1868), 18 L. T. 182. For other cases in which real possession terminated apparent possession, see *Davies* v. *Jones* (1862), 10 W. R. 779, where possession was taken and the business conducted by the grantee; *Gibbons* v. *Hickson & Sons* (1885), 53 L. T. 910, where on sale of a business the name was altered and the creditors were informed, though the vendor continued to conduct the business; *Robinson* v. *Briggs* (1870), L. R. 6 Exch. 1, where the goods were in the grantor's rooms, but the key was handed to the grantee; *Re Westray, Ex parte Morrison* (1880), 42 L. T. 158, where the goods were let by the grantor, the grantee receiving part of the rent; *Emanuel* v. *Bridger* (1874), L. R. 9 Q. B. 286; *Smith* v. *Wall, supra*, where possession was taken, and the goods were advertised for sale under a bill of sale, though the grantor remained in the house; *Re Blenkhorn, Ex parte Jay, supra*, where the grantee had commenced to remove and pack the goods into vans; *Antoniadi* v. *Smith*, [1901] 2 K. B. 589, where the buyer of goods used them as his own, though living in the same house as the seller.

(*m*) *Re Brenner, Ex parte Saffery* (1881), 16 Ch. D. 668; *Re Eales, Ex parte Steel* (1905), 54 W. R. 202. See *Taylor* v. *Eckersley* (1877), 5 Ch. D. 740 (possession of receiver).

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

(*o*) For the principles of bankruptcy generally, see title BANKRUPTCY AND INSOLVENCY, Vol. II.

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II. As to secured creditors generally, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 224 *et seq.*

(*q*) *Cracknall* v. *Janson* (1877), 6 Ch. D. 735.

(*r*) *Bell* v. *Sunderland Building Society* (1883), 24 Ch. D. 618. A grantee

SECT. 3. **Avoidance against Third Parties.**

Trustee's rights.

111. If the trustee sets aside a bill of sale as void against him, he does not gain priority over a valid bill of sale of later date (*s*); nor, when the bill of sale is absolute, can he claim, as against the grantee, chattels which at the time of an execution avoided by the bankruptcy are in the apparent possession of the grantor, but which are not in such possession at the time of filing the petition for bankruptcy (*a*).

A trustee in bankruptcy, in addition to any claim under the Bills of Sale Acts, may impeach a bill of sale under the law of bankruptcy, or as a fraudulent conveyance within the statute 13 Eliz. c. 5 (*b*); but he takes only the same rights as the bankrupt, unless he is by statute placed in a better position (*c*).

The court will not interfere by injunction with the rights of a grantee in possession on the mere suggestion that a trustee in bankruptcy may be able to impeach the bill of sale, unless some facts are deposed to, which if established would make it void (*d*).

When bill of sale an act of bankruptcy.

112. A bill of sale of substantially all the grantor's property given as security for a pre-existing debt, without further equivalent, is an act of bankruptcy, void against the grantor's trustee in bankruptcy appointed in proceedings under a petition presented within three months after it was given (*e*).

But this is not so if the bill of sale is given in good faith for a present advance, or to secure a pre-existing debt, with a further advance, reasonably believed to be sufficient to enable the grantor to continue his business (*f*), unless the advance is made merely for the purpose of obtaining security for a past debt (*g*).

Further advances.

An agreement to make further advances may support a bill of sale for a past debt (*h*); and a bill of sale subsequently given in pursuance of an agreement made at the time of a loan is in the same position as if given for a present equivalent (*i*), unless giving the bill of sale is postponed until the eve of insolvency. It rests on

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compromising a trustee's claim to avoid a bill of sale, on the terms that the bankruptcy should be annulled, is remitted to his original rights on the order for annulment being discharged (*Re Spanton, Ex parte Jarvis* (1879), 10 Ch. D. 179).

(*s*) *Re Cross, Ex parte Payne* (1879), 11 Ch. D. 539; *Sanguinetti* v. *Stuckey's Banking Co.*, [1895] 1 Ch. 176; *Re Barraud, Ex parte Leman* (1876), 4 Ch. D. 23.

(*a*) *Re Toomer, Ex parte Blaiberg* (1883), 23 Ch. D. 254.

(*b*) See p. 61, *post*; and title FRAUDULENT AND VOIDABLE CONVEYANCES.

(*c*) *Re Mapleback, Ex parte Caldecott* (1876), 4 Ch. D. 150. If the trustee claims the proceeds of a sale by the grantee, he cannot afterwards proceed in trover (*Smith* v. *Baker* (1873), L. R. 8 C. P. 350).

(*d*) *Re Hart, Ex parte Bayly* (1880), 15 Ch. D. 223.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 4 (1) (b), 43; *Re Wood* (1872), 7 Ch. App. 302. Such a bill of sale, if executed before the period to which the trustee's title relates, is not an act of bankruptcy. As to act of bankruptcy by assignment of the whole of debtor's property, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 14, 15.

(*f*) *Re Ellis, Ex parte Ellis* (1876), 2 Ch. D. 797.

(*g*) *Re Chapman, Ex parte Johnson* (1884), 26 Ch. D. 338.

(*h*) *Re Berry, Ex parte Wilkinson* (1883), 22 Ch. D. 788. Compare *Re Parker, Ex parte Dann* (1881), 17 Ch. D. 26, where there was no agreement for advances, though contemplated.

(*i*) *Mercer* v. *Peterson* (1868), L. R. 3 Exch. 104.

the person claiming under such an agreement to prove its good faith, and the reason for any delay (*k*).

Forbearance to enforce an execution is not of itself sufficient consideration to support against a trustee in bankruptcy a bill of sale which would otherwise be an available act of bankruptcy (*l*), nor is such a bill of sale protected where the only consideration is forbearance to seize under a valid bill of sale already held by the grantee (*m*).

Forbearance.

113. If a bill of sale is taken in good faith, and comprises only part of the grantor's property, it may nevertheless be subject to avoidance under the Bankruptcy Act, 1883 (*n*), if made by the grantor when unable to pay his debts, within three months before a petition on which he is adjudged bankrupt, with a view to give the grantee, being a creditor, a preference over other creditors (*n*).

When bill of sale fraudulent preference.

To avoid a bill of sale as a fraudulent preference, proof must be given that the grantor's dominant view in giving the bill of sale was to prefer the grantee (*o*).

It is not a fraudulent preference to give a new bill of sale in place of one already executed containing clauses which made it void, with the intention to correct the mistake (*p*), nor for the grantor to cause chattels covered by a valid bill of sale to be taken out of his apparent possession or reputed ownership (*q*).

114. Where the grantee of a bill of sale, void against a trustee in bankruptcy, has in good faith (*r*) made payments which have relieved the estate, they have been allowed him out of the proceeds of sale of the chattels included in the bill of sale (*s*).

Payments under void bill of sale.

SUB-SECT. 2.—*Reputed Ownership.*

115. On the bankruptcy of the grantor of a bill of sale subject to the amending Act, chattels comprised in it may be claimed by his trustee as being in the bankrupt's reputed ownership (*a*).

Effect of bill of sale on reputed ownership.

Before the commencement of the principal Act registration of a bill of sale did not take chattels out of the grantor's reputed ownership (*b*); but that Act altered the law in this respect, and provides

(*k*) *Re Barker, Ex parte Kilner* (1879), 13 Ch. D. 245. Postponing seizure until insolvency is not within this rule, if the bill of sale was taken in good faith (*Morris* v. *Morris*, [1895] A. C. 625).

(*l*) *Re Baum, Ex parte Cooper* (1878), 10 Ch. D. 313.

(*m*) *Re Cross, Ex parte Payne* (1879), 11 Ch. D. 539.

(*n*) 46 & 47 Vict. c. 52, s. 48.

(*o*) *Sharp* v. *Jackson*, [1899] A. C. 419. For fraudulent preference generally, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 279 *et seq.*

(*p*) *Re Tweedale, Ex parte Tweedale*, [1892] 2 Q. B. 216.

(*q*) *Re Jordan, Ex parte Symmons* (1880), 14 Ch. D. 693.

(*r*) *Re Townsend, Ex parte Hall* (1880), 14 Ch. D. 132.

(*s*) *Re James, Ex parte Harris* (1874), L. R. 19 Eq. 253 (discharge of prior valid bills of sale); *Re Cole, Ex parte Mutton* (1872), L. R. 14 Eq. 178 (paying out executions); *Re Ayshford, Ex parte Lovering* (1887), 35 W. R. 652 (paying out distress).

(*a*) As to reputed ownership generally, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (2) (iii.), which by *ibid.*, s. 149 (2), now governs the construction of s. 20 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 173 *et seq.*

(*b*) *Re Fairbrother, Ex parte Harding* (1873), L. R. 15 Eq. 223.

SECT. 3. Avoidance against Third Parties.

that chattels comprised in a bill of sale which has been and continues to be duly registered under the Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale (*c*). Although partially repealed by the amending Act (*d*), this provision protects chattels comprised in a bill of sale duly registered before the amending Act came into force (*e*), or since given, if otherwise than by way of security for the payment of money (*f*), provided that the registration remains in force. And the protection given by the Act applies notwithstanding the bankruptcy of the grantor during the period allowed for registration (*g*).

When reputed ownership applies.

116. A bankrupt's property divisible amongst his creditors includes all goods being, at the commencement of the bankruptcy (*h*), in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, except choses in action, other than debts due or growing due to the bankrupt in the course of his trade or business (*i*).

Fixtures are not goods for the purposes of reputed ownership, although in some cases within the Bills of Sale Acts (*j*).

Only goods in the possession, order, or disposition of a bankrupt in his trade or business are affected, and not, in general, household furniture or articles of domestic use.

Custom.

Even trade goods may be protected by a notorious custom, proved to exist, for persons in the bankrupt's trade or business to have in their custody the goods of others, so as to exclude any reputation of ownership arising from possession (*k*). For the consent and permission of the true owner (*l*) must extend not only to possession, order, or disposition, but also to reputation of ownership (*m*).

Consent.

This consent may be withdrawn by taking formal possession (*n*), or by a demand of possession (*o*), even if after an act of bankruptcy, but without notice, and before a receiving order has been made (*p*).

But the consent and permission of the grantee of a bill of sale subject to the amending Act, being the true owner, to the grantor's possession, order, or disposition as reputed owner, may

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(*c*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 20.
(*d*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 15.
(*e*) *Re Chapple, Ex parte Izard* (1883), 23 Ch. D. 409.
(*f*) *Swift* v. *Pannell* (1883), 24 Ch. D. 210.
(*g*) *Re Hewer, Ex parte Kahen* (1882), 21 Ch. D. 871.
(*h*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 43.
(*i*) *Ibid.*, s. 44 (2) (iii.).
(*j*) See p. 21, *ante*.
(*k*) *Re Parker, Ex parte Turquand* (1885), 14 Q. B. D. 636 (furniture in hotel). For the trades in which such custom has been proved, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 180, note (*l*).
(*l*) The true owner must be distinct from the reputed owner, but a person having an equitable interest may be true owner within the section (*Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426).
(*m*) *Re Watson & Co., Ex parte Atkin Brothers*, [1904] 2 K. B. 753.
(*n*) *Re Francis, Ex parte National Guardian Assurance Co.* (1878), 10 Ch. D. 408.
(*o*) *Re O'Brien, Ex parte Montagu* (1876), 1 Ch. D. 554.
(*p*) *Re Wright, Ex parte Arnold* (1876), 3 Ch. D. 70.

continue, although none of the events on which, under the Act (*q*), possession can lawfully be taken by the grantee have happened before the grantor's bankruptcy (*r*).

Goods in the custody of the law are not in the grantor's possession, order, or disposition (*a*).

Application of Bills of Sale Acts, 1890 and 1891.

117. The Bills of Sale Acts, 1890 and 1891, do not affect the operation of the law of reputed ownership in respect of goods comprised in any instrument within those Acts (*b*).

SUB-SECT. 3.—*Execution Creditors.*

Bill of sale by way of security.

118. An execution levied against the goods of the grantor is a cause of seizure in the case of a bill of sale given by way of security (*c*).

The validity of such a bill of sale, taken in good faith, is the same against execution creditors as between the parties, save in the cases where a bill of sale is void except as against the grantor (*d*).

Absolute bills of sale.

An absolute bill of sale may be void against execution creditors as regards goods which, at or after the levy of execution, are in the grantor's possession or apparent possession (*e*); but the avoidance is only to the extent of the levy, and after the execution has been satisfied, the bill of sale may be good against subsequent executions, provided that the chattels are then no longer in the possession or apparent possession of the grantor (*f*).

Notice.

An execution creditor may take the objection of want of registration, notwithstanding that he was aware of the bill of sale when his debt was contracted (*g*).

SUB-SECT. 4.—*Fraudulent Conveyance.*

What bills of sale are affected.

119. Execution creditors, or a trustee in bankruptcy as representing creditors, may at any time within the period allowed by the Statutes of Limitation (*h*) impeach a bill of sale as a fraudulent transfer of property, made with intent to defeat or delay creditors, within the statute 13 Eliz. c. 5 (*i*).

The case is not brought within the statute merely because the only consideration for the bill of sale is a past debt, or because it includes all the grantor's property (*k*), or because it was given to

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(*q*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7.
(*r*) *Re Ginger, Ex parte London and Universal Bank*, [1897] 2 Q. B. 461.
(*a*) *Taylor* v. *Eckersley* (1877), 5 Ch. D. 740.
(*b*) See p. 19, *ante*.
(*c*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7 (5). As to execution generally, see title EXECUTION.
(*d*) *Ibid.*, ss. 4, 5; and see pp. 27, 28, *ante*.
(*e*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8; and see p. 55, *ante*.
(*f*) *Re Toomer, Ex parte Blaiberg* (1883), 23 Ch. D. 254. Formerly an execution altogether displaced an unregistered bill of sale (*Richards* v. *James* (1867), L. R. 2 Q. B. 285).
(*g*) *Edwards* v. *Edwards* (1876), 2 Ch. D. 291.
(*h*) *Re Maddever* (1884), 27 Ch. D. 523.
(*i*) See titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 15, 16; FRAUDULENT AND VOIDABLE CONVEYANCES.
(*k*) *Re Bamford, Ex parte Games* (1879), 12 Ch. D. 314.

SECT. 8. Avoidance against Third Parties.

prefer a creditor, or some creditors to others (*l*), or because in the result it defeats an execution expected but not actually issued (*m*).

Transfers voluntary and for value.

If a transfer is voluntary, the grantor's intent to defeat or delay creditors will be sufficient to avoid it against creditors defeated or delayed, but if for valuable consideration, there must be proof of the like intent by both grantor and grantee (*n*). If express intent of both parties to defeat or delay creditors by giving a bill of sale be proved, such bill of sale will be void, even though for value (*o*). But it is not, it seems, sufficient proof of intent merely to show that the necessary result of the transfer is to defeat or delay creditors (*p*).

Debtors Act, 1869.

120. A bill of sale given by a defendant in an action for unliquidated damages, with intent to defeat any judgment the plaintiff may obtain, is not a transfer of, or charge on, property, so as to make the defendant guilty of a misdemeanour within the Debtors Act, 1869 (*q*).

Privilege.

121. Where it is sought to prove a bill of sale fraudulent, the solicitor for the parties, or one of them, is not debarred by professional privilege from giving evidence as to the circumstances in which the bill of sale was executed (*r*).

SUB-SECT. 5.—*Interpleader.*

Order for sale.

122. When chattels seized in execution are claimed under a bill of sale by way of security for debt, the sheriff may interplead (*s*), and an order may thereupon be made for sale of the whole or part of them, and directions may be given for the application of the proceeds of sale (*t*). An order for sale may also be made notwithstanding a claim by the grantee of an absolute bill of sale (*u*).

But no such order should be made unless there is reasonable ground to believe that there will be a surplus for the execution creditor, or, if the security is of doubtful value, without the grantee's consent (*w*).

If the execution is avoided by the judgment debtor's bankruptcy, and the chattels, not having been sold, are claimed by the official receiver or trustee, there is no power to order such a sale (*a*).

If an order is made for sale and satisfaction of the grantee's claim,

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(*l*) *Alton* v. *Harrison* (1869), 4 Ch. App. 622.
(*m*) *Wood* v. *Dixie* (1845), 7 Q. B. 892.
(*n*) *Freeman* v. *Pope* (1870), 5 Ch. App. 538; *Re Hirth*, [1899] 1 Q. B. 613, per LINDLEY, M.R., at p. 620; *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769.
(*o*) *Graham* v. *Furber* (1854), 23 L. J. (C. P.) 51.
(*p*) *Re Wise, Ex parte Mercer* (1886), 17 Q. B. D. 290.
(*q*) 32 & 33 Vict. c. 62, s. 13 (2); *R.* v. *Hopkins*, [1896] 1 Q. B. 652.
(*r*) *R.* v. *Cox and Railton* (1884), 14 Q. B. D. 153, where the solicitor had been consulted with a view to defeat an execution by giving a bill of sale; *Crawcour* v. *Salter* (1881), 18 Ch. D. 30. See title EVIDENCE.
(*s*) As to interpleader, see title INTERPLEADER.
(*t*) R. S. C., Ord. 57, r. 12.
(*u*) *Paquin* v. *Robinson* (1901), 85 L. T. 5.
(*w*) *Stern* v. *Tegner*, [1898] 1 Q. B. 37.
(*a*) *Ibid.*

as stated in his particulars, he cannot afterwards claim any further sum from the sheriff (*b*).

SECT. 3. Avoidance against Third Parties.

123. Where money is paid into court to abide an issue, and the goods are then seized under another execution, the grantee, if he again claims, may be ordered again to find security on the second interpleader (*c*). Payment into court.

If the grantor becomes bankrupt pending an interpleader issue, his trustee in bankruptcy, where there has been no sale, cannot claim, as representing the goods, money paid into court by the grantee (*d*).

Although a grantee, by paying money into court to abide the event of an issue, does not thereby acquire any property in the goods, an execution creditor, who succeeds on the issue and takes the money out of court, cannot again seize the goods under the same judgment (*e*).

124. Where the grantee is made plaintiff on an interpleader issue, the defendant may defeat his claim by setting up the title of a third party, under a prior bill of sale, to prove that the plaintiff had not, at the date of seizure, the property in the goods or a right to their possession (*f*). *Jus tertii.*

SUB-SECT. 6.—*Rates and Taxes.*

125. A bill of sale given by way of security is no protection against distress for taxes, poor and other parochial rates (*g*); but, with this exception, chattels comprised in a bill of sale are not subject to distraint for rates (*h*). Right of distress.

The right of distress on goods comprised in a bill of sale does not exist in the case of a general district rate, which may or may not operate in respect of several parishes or only part of a parish, and which is therefore not a parochial rate (*i*). General district rate.

Chattels comprised in a bill of sale are protected against an execution levied on a judgment for rates recovered by a local authority in the county court, as their liability to seizure exists only where a distress has been or could be levied (*k*).

(*b*) *Hockey* v. *Evans* (1887), 18 Q. B. D. 390.

(*c*) *Ketchie* v. *Golden Sovereigns, Ltd.*, [1898] 2 Q. B. 164.

(*d*) *Shuckburgh* v. *Duthoit* (1892), 8 T. L. R. 710. As to adding the trustee in bankruptcy as claimant, see title INTERPLEADER.

(*e*) *Haddow* v. *Morton*, [1894] 1 Q. B. 565. But where, after the claimant under a bill of sale had paid money into court to abide an issue, third parties claimed part of the goods, on their title being admitted by the claimant and execution creditor, and the bill of sale being found void, the execution creditors were held entitled to all the money in court, without deducting the value of the goods claimed by the third parties (*Wells* v. *Hughes*, [1907] 2 K. B. 845).

(*f*) *Richards* v. *Jenkins* (1887), 18 Q. B. D. 451.

(*g*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 14.

(*h*) Securities other than bills of sale, such as debentures, also afford protection against distress for rates (*Richards* v. *Kidderminster Corporation*, [1897] 2 Ch. 212).

(*i*) *Ibid.*

(*k*) *Wimbledon Local Board* v. *Underwood*, [1892] 1 Q. B. 836.

SECT. 4.

Successive Bills of Sale.

SECT. 4.—*Successive Bills of Sale.*

Avoidance of successive bills of sale.

126. Before the principal Act came into operation, it had become a practice to grant a series of bills of sale within the time allowed for registration, each of which cancelled the one previously given, the last only being registered when occasion arose (*l*). But such bills of sale are now void, unless proved to have been *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale (*m*).

Where a bill of sale is executed more than seven days after a prior bill of sale of the same chattels, which has not been registered, the second bill of sale is valid (*n*).

Substitution of successive bill of sale.

A bill of sale given to correct a supposed mistake in one already executed is not necessarily a fraudulent preference of the grantee (*o*). Such a bill of sale does not cancel the former one in the absence of any intention to do so; and if the second bill of sale is avoided, the first may still be effectual (*p*).

A bill of sale given after, but without notice of, the bankruptcy of the grantor, in substitution for a prior bill of sale, does not cancel it, or affect the grantee's rights under it (*q*).

Part VII.—Rights and Liabilities of Parties.

SECT. 1.—*Rights of the Grantor.*

SUB-SECT. 1.—*In General.*

Who may grant a bill of sale.

127. Any person, not being an infant, able to contract (*r*), can give a valid bill of sale of chattels of which he is the true owner (*s*).

A married woman may, without her husband's concurrence, give a bill of sale of chattels forming part of her separate estate (*t*).

(*l*) *Ramsden* v. *Lupton* (1873), L. R. 9 Q. B. 17.

(*m*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 9: "Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the court having cognisance of the case that the subsequent bill of sale was *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act."

(*n*) *Carrard* v. *Meek* (1880), 43 L. T. 760.

(*o*) See p. 59, *ante*.

(*p*) *Cooper* v. *Zeffert* (1883), 32 W. R. 402.

(*q*) *Re Bargen, Ex parte Husluck*, [1894] 1 Q. B. 444.

(*r*) As to capacity to contract in general, see title CONTRACT.

(*s*) See p. 28, *ante*.

(*t*) *Walrond* v. *Goldmann* (1885), 16 Q. B. D. 121. Compare *Chapman* v. *Knight* (1880), 5 C. P. D. 308; and see title HUSBAND AND WIFE.

SECT. 1. Rights of the Grantor.

An undischarged bankrupt can give a title to a transferee for value and in good faith of chattels acquired since his bankruptcy, to which the trustee has made no claim (*u*), and can probably give a valid bill of sale of such chattels.

Bankrupt.

An undischarged bankrupt, left in possession of business assets by his trustee, may have implied authority to raise money for his business by including them in a bill of sale (*w*), but a trustee does not, by leaving a bankrupt in possession of furniture, give him authority to dispose of it by bill of sale (*a*).

A bill of sale given by a debtor after a composition approved in bankruptcy has been upheld, although the composition was carried by the debtor's fraud (*b*).

SUB-SECT. 2.—*Relief against Seizure; Redemption; Damages.*

Effect of seizure.

128. A bill of sale in the statutory form vests the chattels assigned in the grantee, leaving the right to their possession in the grantor until any of the events mentioned as causes of seizure in the amending Act occur (*c*).

When, for any of such causes, the grantee seizes the chattels, the grantor's legal interest in them ceases, and he cannot sue the grantee in trespass for removing them, even after tender of principal, interest, and costs (*d*). His remedy is to apply for relief to the High Court or a judge in chambers, within five days from the seizure (*e*), or, after that period has elapsed, to take proceedings for redemption on the usual terms (*f*). If the debt has been satisfied or discharged, he is entitled to have satisfaction entered at the registry (*g*).

Terms on which relief granted.

On the grantor's application within five days from seizure, the court or judge, if satisfied that by payment of money or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling the chattels, or may make such other order as may seem just (*h*). Thus, a sale may be restrained on condition that instalments overdue are paid (*i*); and if a grantee seizes only for an instalment overdue, he may be ordered to withdraw on payment of that instalment, interest, and costs (*k*). But if the grantor is otherwise in default, as for non-payment of rent, relief may be refused (*l*).

(*u*) *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262. For dealings by undischarged bankrupt with after-acquired property, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 164 *et seq.*

(*w*) *Re Simons, Ex parte Allard* (1881), 16 Ch. D. 505.

(*a*) *Meggy* v. *Imperial Discount Co.* (1878), 3 Q. B. D. 711.

(*b*) *Seymour* v. *Coulson* (1880), 5 Q. B. D. 359.

(*c*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7; *Johnson* v. *Diprose*, [1893] 1 Q. B. 512.

(*d*) *Ibid.*

(*e*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7 (proviso).

(*f*) See p. 66, *post*.

(*g*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 15; and see p. 73, *post*.

(*h*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7 (proviso).

(*i*) *Ex parte Cotton* (1883), 11 Q. B. D. 301.

(*k*) *Re Ellis, Ex parte Ellis*, [1898] 2 Q. B. 79.

(*l*) *Cowley* v. *Tyler*, [1884] W. N. 77, where the grantor had not repaid rent paid at his request by the grantee to avoid a distress.

SECT. 1. Rights of the Grantor.

A grantee will not, as a general rule, be restrained from exercising his legal rights, unless the grantor pays into court the amount claimed to be due, but the court may grant an injunction without imposing such terms where it is clear that the grantee is claiming too much (*m*).

Redemption before due date.

129. A grantor cannot ordinarily redeem a bill of sale before the time agreed for payment, which, where principal and interest are payable together, may be matter of calculation (*n*).

Where, however, the grantee takes possession in order to realise his security, he is bound to accept the grantor's tender of principal, although not yet due, with interest to date, and expenses, and may be ordered to withdraw and give up the bill of sale on such payment (*o*).

And if the grantee sells with the grantor's consent, he cannot after sale claim interest for the period during which the grantor would have been liable for interest if the bill of sale had continued in force (*p*).

But a grantee is entitled, on default in payment of an instalment, to take possession to protect his security, and may hold possession until the amount overdue is paid. Unless, therefore, he has taken possession for the purpose of realisation, he cannot be compelled to accept payment of his principal not yet due, with interest to date, or to give up the bill of sale (*q*).

Where chattels comprised in a bill of sale are seized in execution, and, in interpleader proceedings, an order for sale is made (*r*), the order may, it seems, by its terms provide for the compulsory redemption of the grantee before the time for payment (*s*).

The Money-lenders Act, 1900 (*t*), appears to give additional powers of relief, and in certain cases to permit an order for redemption, although the time for repayment of the loan may not have arrived (*u*).

Wrongful seizure.

130. If the grantor, on the day appointed for payment, pays or tenders principal and interest, the grantee will be responsible in damages if he seizes the goods (*w*). He is also responsible, if he seizes before default (*x*), as, for instance, without any of the causes for seizure stated in the amending Act (*a*).

(*m*) *Hickson* v. *Darlow* (1883), 23 Ch. D. 690.

(*n*) *Re Davies, Ex parte Equitable Investment Co.* (1897), 77 L. T. 567. For the general principles of redemption, see title MORTGAGE.

(*o*) *Ex parte Wickens*, [1898] 1 Q. B. 543. Where the seizure is wrongful, the grantee may be ordered to pay costs of the application for relief (*ibid.*).

(*p*) *West* v. *Diprose*, [1900] 1 Ch. 337.

(*q*) *Re Ellis, Ex parte Ellis*, [1898] 2 Q. B. 79.

(*r*) R. S. C., Ord. 57, r. 12; and see p. 62, *ante*.

(*s*) *Forster* v. *Clowser*, [1897] 2 Q. B. 362.

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

(*u*) See title MONEY AND MONEY-LENDING.

(*w*) *Johnson* v. *Diprose*, [1893] 1 Q. B. 512. A promise without consideration to extend the time for payment does not of itself prevent the grantee taking possession (*Williams* v. *Stern* (1879), 5 Q. B. D. 409). Compare *Albert* v. *Grosvenor Investment Co.* (1867), L. R. 3 Q. B. 123.

(*x*) *Massey* v. *Sladen* (1868), L. R. 4 Exch. 13. The bill of sale remains a security notwithstanding wrongful seizure (*Monson* v. *Milner* (1892), 8 T. L. R. 447).

(*a*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7; and see p. 68, *post*.

SECT. 1.
Rights of the Grantor.

A void bill of sale is no answer to an action for seizing the chattels purporting to be assigned (*b*).

Substantial damages may be given for a wrongful seizure (*c*); but where the bill of sale is valid, the measure of damages for wrongfully taking the chattels assigned, apart from any question of special damage, is the value of the grantor's interest in them, and not their full value (*d*).

Measure of damages.

131. Where possession of chattels is lawfully taken by the grantee of a bill of sale, and by his negligence they are injured in the course of removal, though the grantor cannot at law recover damages for such injury, he is entitled to be credited with the loss on redeeming, or, if he is sued for the balance of debt, may claim that it be deducted (*e*).

Injury to goods after seizure.

SUB-SECT. 3.—*Fraud on, or by, Grantor.*

132. The grantor may within a reasonable time repudiate a bill of sale which he has been induced to give by fraud (*f*). Thus, a bill of sale may be set aside for fraud where it was obtained in place of a prior bill of sale which the grantee represented as valid, knowing that it was void on legal grounds (*g*).

Setting aside bill of sale.

133. A fraudulent removal of chattels assigned by a bill of sale is a cause for seizure under the amending Act (*h*); and if a grantor wrongfully sells chattels assigned by bill of sale, the grantee may, in general, at once sue to recover them, even before the time for payment (*i*), notwithstanding that the purchaser bought in good faith without notice of the bill of sale (*k*); and, where the sale is not in the ordinary course of the grantor's business (*k*), any person dealing with them is responsible to the grantee (*l*).

Disposal of goods.

(*b*) See p. 54, *ante*.

(*c*) *Moore* v. *Shelley* (1883), 8 App. Cas. 285. A grantor, notwithstanding his bankruptcy, may recover damages for personal annoyance and loss caused by wrongful seizure of goods under a bill of sale (*Rose* v. *Buckett*, [1901] 2 K. B. 449).

(*d*) *Brierley* v. *Kendall* (1852), 17 Q. B. 937.

(*e*) *Johnson* v. *Diprose*, [1893] 1 Q. B. 512.

(*f*) *Moorhouse* v. *Woolfe* (1882), 46 L. T. 374 (misrepresentation of rate of interest); *Gordon* v. *Street*, [1899] 2 Q. B. 641 (money-lender concealing his identity). See Money-lenders Act, 1900 (63 & 64 Vict. c. 51), ss. 2, 4. An agreement with a money-lender who has not registered under this Act cannot be enforced (*Bonnard* v. *Dott*, [1906] 1 Ch. 740); but the borrower cannot, in equity, recover his securities without payment (*Lodge* v. *National Union Investment Co.*, [1907] 1 Ch. 300). See also titles MISREPRESENTATION AND FRAUD; MONEY AND MONEY-LENDING.

(*g*) *Bouchette* v. *Consolidated Credit and Mortgage Corporation* (1889), 5 T. L. R. 653.

(*h*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7 (3); and see p. 69, *post*.

(*i*) *Fenn* v. *Bittleston* (1851), 7 Exch. 152.

(*k*) *Taylor* v. *McKeand* (1880), 5 C. P. D. 358; *Payne* v. *Fern* (1881), 6 Q. B. D. 620.

(*l*) As, for instance, a pledgee (*Joseph* v. *Webb* (1884), 1 Cab. & El. 262), or an auctioneer selling on the instructions of the grantor (*Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495; *Cochrane* v. *Rymill* (1879), 40 L. T. 744), unless he does not deal with the goods themselves, but only introduces a purchaser (*National Mercantile Bank* v. *Rymill* (1881), 44 L. T. 767). See titles AGENCY, Vol. I., p. 226; AUCTIONS AND AUCTIONEERS, Vol. I., p. 521; TROVER AND CONVERSION.

SECT. 1.
Rights of the Grantor.

But if the grantee permits the grantor, left in possession of chattels, to hold himself out as having the property in them, as where they consist of stock in trade or chattels used in carrying on a business, a purchaser from the grantor, in the ordinary course of the grantor's business, without notice of the bill of sale, obtains a good title against the grantee (*m*).

Punishment of fraudulent grantor.

134. A grantor who sells goods included in a bill of sale, the existence of which he conceals (*n*), or who obtains a loan on a bill of sale of chattels which are already included in a bill of sale by representing that they are unincumbered (*o*), may be guilty of obtaining money by false pretences.

SECT. 2.—*Rights of the Grantee.*

SUB-SECT. 1.—*Right of Seizure.*

Limitations on right of seizure.

135. In the case of an absolute bill of sale, not only the property in the goods, but also the right of possession, passes to the grantee on the execution of the deed; but in the case of a bill of sale given by way of security the right of possession remains provisionally in the grantor; and the grantee cannot seize and take possession of the goods except for the causes specified in the amending Act (*p*). Possession may be taken for any one or more of those causes, even though no express power of seizure is conferred by the bill of sale; for the provisions of the Act, together with the schedule l form, give an implied power of seizure (*q*).

Right as against receiver.

The grantee cannot, without leave of the court, seize goods in the possession of a receiver duly appointed (*r*); nor can he, after a receiver has been appointed, remove the goods, although he was in possession before the receiver (*s*).

Right where premises assigned.

A bill of sale gives no right to keep or sell the goods assigned on premises of which the grantor has parted with possession (*t*).

SUB-SECT. 2.—*Causes of Seizure.*

Default in payment.

136. Personal chattels assigned under a bill of sale, given by way of security, are not liable to be seized or taken possession of by the grantee for any other than the causes specified in the amending Act (*u*). One cause of seizure is if the grantor makes default in the payment of the sum or sums secured by the bill of sale at the time therein provided for payment (*u*). But a grantee is entitled to seize the goods on default in payment of any instalment due under a bill of sale, although the bill of sale does not provide that the whole debt shall become due on non-payment of one instalment (*v*).

(*m*) *National Mercantile Bank* v. *Hampson* (1880), 5 Q. B. D. 177; *Walker* v. *Clay* (1880), 42 L. T. 369.

(*n*) *R.* v. *Sampson* (1885), 52 L. T. 772. See also title CRIMINAL LAW AND PROCEDURE.

(*o*) *R.* v. *Meakin* (1869), 11 Cox, C. C. 270.

(*p*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7; *Johnson* v. *Diprose*, [1893] 1 Q. B. 512.

(*q*) *Watkins* v. *Evans* (1887), 18 Q. B. D. 386.

(*r*) *Re Mead, Ex parte Cochrane* (1875), L. R. 20 Eq. 282.

(*s*) *Re Falle, Ex parte Andrews* (1876), 4 Ch. D. 509.

(*t*) *Smith* v. *Brown* (1879), 48 L. J. (CH.) 694.

(*u*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7 (1).

(*v*) *Re Wood, Ex parte Woolfe*, [1894] 1 Q. B. 605. If he seizes for his whole

It is a cause of seizure if the grantor becomes bankrupt (*w*). A grantor becomes bankrupt when he commits an available act of bankruptcy followed by adjudication (*x*). But seizure cannot be made on the grantor effecting a composition (*y*), or committing an act of bankruptcy (*z*). Whether approval by the court of a scheme of arrangement would warrant seizure has not been decided (*a*).

Bankruptcy of grantor.

It is a cause of seizure if the grantor fraudulently either removes the goods comprised in the bill of sale, or suffers them, or any of them, to be removed from the premises (*b*). A removal of goods assigned by a bill of sale, not being a fraudulent removal, will not warrant seizure, but an agreement by the grantor not to remove goods is valid (*c*).

Fraudulent removal.

It is a cause of seizure if the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes (*d*); but an agreement to produce receipts for rent, rates, and taxes, without the qualifications imposed by the Act, is valid (*e*). Another cause of seizure exists if execution is levied against the goods of the grantor under any judgment at law (*f*); but the Act does not prohibit an agreement not to do anything whereby execution may be levied on the goods (*g*). It is also a cause of seizure if the grantor makes default in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security (*h*), or if he suffers the goods assigned, or any of them, to be distrained for rent, rates, or taxes (*i*).

Non-production of rent receipts etc.

Levy of execution.

Breach of covenant, or distress.

137. No power of seizure can be given for breach of agreements varying from the causes of seizure within the Act, and to make seizure lawful the conditions of the Act must be observed. Thus, a written demand that the last receipt for rent be sent to the grantee by post is not a demand for production of the receipt (*k*).

No seizure for other than statutory causes.

If rent has recently accrued due, it is a reasonable excuse for not producing the receipt that the landlord has not required payment (*l*).

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debt, he may be paid off, although the time of payment has not arrived, but not if he takes possession only to secure the instalment overdue. See p. 66, *ante*.

(*w*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7 (2).

(*x*) *Re Turner, Ex parte Attwater* (1877), 5 Ch. D. 27. See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 13 *et seq.*, 85 *et seq.*

(*y*) *Gilroy* v. *Bowey* (1888), 59 L. T. 223; *Barr* v. *Kingsford* (1887), 56 L. T. 861.

(*z*) *Re Williams, Ex parte Pearce* (1883), 25 Ch. D. 656.

(*a*) See Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (16), (17), and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 83 *et seq.*

(*b*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7 (3).

(*c*) *Topley* v. *Corsbie* (1888), 20 Q. B. D. 350.

(*d*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7 (4).

(*e*) *Cartwright* v. *Regan*, [1895] 1 Q. B. 900; *Turner & Co.* v. *Culpan* (1888), 58 L. T. 340.

(*f*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7 (5).

(*g*) *Re Paxton, Ex parte Pope* (1889), 60 L. T. 428.

(*h*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7 (1).

(*i*) *Ibid.*, s. 7 (2).

(*k*) *Ex parte Wickens*, [1898] 1 Q. B. 543, approved and distinguished in *Re Ellis, Ex parte Ellis*, [1898] 2 Q. B. 79.

(*l*) *Ex parte Cotton* (1883), 11 Q. B. D. 301.

SECT. 2.

Rights of the Grantee.

SUB-SECT. 3.—*When Chattels distrained.*

Extent of right of distress.

138. A bill of sale is no protection against a distress for rent, nor, in some cases, for taxes and rates (*m*); and chattels assigned by bill of sale, while still on the demised premises, may be taken under a distress for rent, even after seizure by the grantee, and though the rent is payable in advance (*n*). But the grantee is entitled to remove his goods before distress levied; and such removal, with the grantor's consent, is not fraudulent against the landlord, although the five clear days limited by the amending Act (*o*) have not elapsed (*p*).

A distress on goods assigned by bill of sale, the grantor being bankrupt, is not limited to the six months' rent for which in bankruptcy a distress is available against the bankrupt's property (*q*).

Surplus on distress.

139. A landlord is not obliged to account for any surplus goods, or proceeds of distress, to the holder of a bill of sale of which he has notice (*r*).

Marshalling.

But if a landlord distrains on goods included in a bill of sale, and on other goods the property of the grantor, he may be required, under the equitable doctrine of marshalling, to resort in the first place, for satisfaction of rent, to goods not assigned by the bill of sale (*s*).

Indemnity.

If the goods in a bill of sale are taken under a distress for rent which the grantor ought to have paid, the grantee is entitled to be indemnified by the grantor, and, it seems, to recover anything paid by him to discharge the rent (*a*). Money so paid by the grantee for rent must be repaid on redemption, and can be retained by the grantee out of the proceeds of sale of his security (*b*).

SUB-SECT. 4.—*Removal and Sale.*

When removal may take place.

140. Chattels seized under a bill of sale given by way of security, whether registered before or after the commencement of the amending Act, must, before removal or sale, remain on the premises where seized until after the expiration of five clear days from the day they were so seized (*c*), within which time of five days from

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(*m*) As to distress for rates and taxes, see Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 14, and p. 63, *ante*.

(*n*) *London and Westminster Loan and Discount Co.* v. *London and North Western Rail. Co.*, [1893] 2 Q. B. 49.

(*o*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 13.

(*p*) *Tomlinson* v. *Consolidated Credit and Mortgage Corporation* (1889), 24 Q. B. D. 135.

(*q*) *Crosse* v. *Welch* (1892), 8 T. L. R. 709; *Railton* v. *Wood* (1890), 15 App. Cas. 363. See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 291.

(*r*) *Evans* v. *Wright* (1858), 27 L. J. (EX.) 50.

(*s*) *Re Stephenson, Ex parte Stephenson* (1817), 17 L. J. (BCY.) 5.

(*a*) *Edmunds* v. *Wallingford* (1885), 14 Q. B. D. 811, questioning *England* v. *Marsden* (1866), L. R. 1 C. P. 529.

(*b*) *Re Morritt, Ex parte Official Receiver* (1886), 18 Q. B. D. 222.

(*c*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 13. Compare *O'Neill* v. *City and County Finance Co.* (1886), 17 Q. B. D. 234, where chattels, consisting of a horse and cab, were seized under a bill of sale in the public street and removed to the grantee's yard, where they were kept five clear days, and it was held that the seizure was lawful, and that no action would lie by the grantor for the removal in the absence of special damage.

the seizure the grantor may apply for relief (*d*). Removal may take place, with the grantor's consent, before expiration of the period of five days (*e*).

Power of sale.

After the expiration of the time limited, the grantee may remove the goods, and proceed to sell them, although the bill of sale contains no express power of sale (*f*). And power may be conferred by the bill of sale to sell the goods either by private treaty or public auction, and either on or off the premises (*g*).

Application of proceeds.

141. The same trusts of the proceeds of sale are implied as in the case of other sales of mortgaged property, but they may be expressed (*h*); and the grantee may, out of the proceeds of sale, retain his unpaid principal with interest to the date of sale, the expenses of sale (*i*), costs properly incurred in defending and maintaining his rights under the security (*k*), and also any rent, rates, taxes, or other valid incumbrance on the chattels, discharged by him (*l*).

An instrument embodying the terms of sale by a grantee, selling under the powers of a valid bill of sale, does not require registration (*m*).

SUB-SECT. 5.—*Priorities.*

Priority dependent on registration.

142. If two or more bills of sale are given comprising, in whole or in part, any of the same chattels, they have priority in the order of the date of their registration respectively as regards such chattels (*n*).

This rule applies between absolute bills of sale, as well as between bills of sale given by way of security for the payment of money (*o*).

It applies in favour of the grantee of an absolute bill of sale, duly

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(*d*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7, proviso; and see p. 65, *ante*.

(*e*) *Lane* v. *Tyler* (1887), 56 L. J. (Q. B.) 461; *Tomlinson* v. *Consolidated Credit and Mortgage Corporation* (1889), 24 Q. B. D. 135.

(*f*) *Re Morritt, Ex parte Official Receiver* (1886), 18 Q. B. D. 222.

(*g*) *Bourne* v. *Wall* (1891), 64 L. T. 530; *Lumley* v. *Simmons* (1887), 34 Ch. D. 698.

(*h*) *Re Clearer, Ex parte Rawlings* (1887), 18 Q. B. D. 489. See title MORTGAGE.

(*i*) *Re Morritt, Ex parte Official Receiver, supra*, where the trust was to retain out of proceeds of sale the unpaid principal sum and interest then due, together with all costs, charges, payments, and expenses incurred, made, or sustained by the grantee in or about entering the premises, and in discharging any distress, execution, or other incumbrances on the chattels or any of them, and seizing, taking, and retaining possession thereof, and in and about their carriage, removal, warehousing, or sale (including the cost of inventories, catalogues, or advertising), and to pay over the surplus proceeds, if any, to the grantor.

(*k*) *Lumley* v. *Simmons, supra*. Taxation has been ordered of costs, agreed to be paid by the grantor, and retained by the grantee out of the proceeds of a sale after the grantor's bankruptcy (*Re Ford, Ex parte Official Receiver* (1901), 84 L. T. 329).

(*l*) *Re Morritt, Ex parte Official Receiver, supra*.

(*m*) *Hall* v. *Smith* (1887), 3 T. L. R. 805.

(*n*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10. Bills of sale formerly took priority according to date of execution (*Re Middleton, Ex parte Allen, Ex parte Page* (1870), L. R. 11 Eq. 209).

(*o*) *Tuck* v. *Southern Counties Deposit Bank* (1889), 42 Ch. D. 471.

SECT. 2. Rights of the Grantee.

registered, against the holder of a prior unregistered bill of sale, although the latter has been first to take possession (*p*).

Exception.

But where the grantor has already parted with all interest in the chattels by an absolute bill of sale, he ceases to be the true owner, and a subsequent bill of sale, given by way of security, being void under the amending Act, except against the grantor (*q*), does not, by registration, take priority of the earlier absolute bill of sale, even though the latter be unregistered (*r*).

This, however, only applies where the first bill of sale is absolute; for a grantor is the "true owner" within the amending Act, although he has previously given a bill of sale by way of security for the payment of money (*s*).

Consolidation.

143. A grantee cannot, under the doctrine of consolidation of mortgages (*a*), tack to his bill of sale a security over other property of the grantor, so as to claim against an execution creditor the surplus proceeds of sale of the chattels after satisfying the bill of sale (*b*).

Priority of legal estate.

144. If the grantee has only an equitable title to chattels of which he has not taken possession, he may be postponed to a person, as for instance a pledgee, in whom the legal estate and interest in them becomes vested for value and without notice of the bill of sale (*c*).

SECT. 3.—*Transfer.*

Registration unnecessary.

145. A transfer or assignment of a registered bill of sale need not be registered (*d*), nor is renewal of registration necessary by reason only of a transfer or assignment of a bill of sale (*e*).

A memorandum of charge by the transferee of a bill of sale, given by way of sub-mortgage and accompanied by a deposit of the bill of sale and transfer, need not be registered, even although the transferee afterwards acquires the grantor's equity of redemption (*f*).

If both grantor and grantee join in transferring a bill of sale on which a balance remains due, a further advance being made to the grantor by the transferee on different terms, the transfer need not be registered, at all events to the extent of the balance remaining due on the original bill of sale (*g*).

Position of transferee.

146. A transferee of a bill of sale, in general, stands in no better position than the transferor (*h*); and if he permits the period for

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(*p*) *Lyons* v. *Tucker* (1881), 7 Q. B. D. 523; *Conelly* v. *Steer* (1881), 7 Q. B. D. 520.

(*q*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 5.

(*r*) *Tuck* v. *Southern Counties Deposit Bank* (1889), 42 Ch. D. 471.

(*s*) See p. 30, *ante*; *Thomas* v. *Searles*, [1891] 2 Q. B. 408.

(*a*) As to this, see title MORTGAGE.

(*b*) *Chesworth* v. *Hunt* (1880), 5 C. P. D. 266.

(*c*) *Joseph* v. *Lyons* (1884), 15 Q. B. D. 280; *Hallas* v. *Robinson* (1885), 15 Q. B. D. 288. These cases primarily apply to after-acquired property, but are probably of general application.

(*d*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 *ad fin.*

(*e*) *Ibid.*, s. 11; and see p. 52, *ante*.

(*f*) *Re Parker, Ex parte Turquand* (1885), 14 Q. B. D. 636.

(*g*) *Horne* v. *Hughes* (1881), 6 Q. B. D. 676.

(*h*) *Re Walden, Ex parte Odell* (1878), 10 Ch. D. 76; *Chapman* v. *Knight*

renewal to elapse, the registration of the original bill of sale will become void notwithstanding the transfer (*i*). But on the transfer of a registered absolute bill of sale, effected by an instrument registered as a bill of sale, the transferee's title will be protected against an execution creditor of the grantor of the original bill of sale, even though its registration is not renewed, and the goods remain in the grantor's possession, if at the time of transfer no person was in a position to avoid the bill of sale under the principal Act (*k*). SECT. 3. Transfer.

So where the grantee of an absolute bill of sale takes possession and sells under his power of sale, a purchaser will get a good title, even if registration is not renewed; for, by the absolute transfer of the chattels at a time when no person is entitled to claim under the principal Act (*l*), the bill of sale is spent and satisfied, and the Act has no further application (*m*). Purchaser under power of sale.

If, however, possession has not been taken, and there has not been registration either of the bill of sale or transfer, chattels which throughout remain in the possession or apparent possession of the original grantor will, notwithstanding the transfer, be subject to the claims of persons entitled to avoid the bill of sale against him (*n*).

SECT. 4.—*Satisfaction.*

147. Where the debt secured by a bill of sale has been satisfied or discharged, the registrar may order a memorandum of satisfaction to be written upon any registered copy of the bill (*o*). Leave to enter up satisfaction may be obtained *ex parte* on a consent, signed by the person entitled to the benefit of the bill of sale, attested by a witness, and verified by affidavit, being produced to the registrar and filed in the Central Office (*p*). Where consent cannot be obtained, an order to enter up satisfaction may be obtained on summons in chambers (*q*). Entering up satisfaction.

If the witness attesting and verifying the consent is a solicitor, and so described, satisfaction will be directed, the papers being otherwise correct, as of course (*r*). But an order to enter up satisfaction cannot be refused merely because the deponent to the affidavit verifying consent is not a solicitor (*s*).

Where there has been local registration of a bill of sale, a notice After local registration.

(1880), 5 C. P. D. 308. It is apprehended that the transferee of a bill of sale void under the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), would acquire no interest.

(*i*) *Karet* v. *Kosher Meat Supply Association* (1877), 2 Q. B. D. 361.

(*k*) *Antoniadi* v. *Smith*, [1901] 2 K. B. 589.

(*l*) See Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8, and p. 55, *ante*.

(*m*) *Cookson* v. *Swire* (1884), 9 App. Cas. 653.

(*n*) *Hopkins* v. *Gudgeon*, [1906] 1 K. B. 630.

(*o*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 15.

(*p*) R. S. C., Ord. 61, r. 26. The consent signed and duly attested and the affidavit verifying it are placed before the Practice Master, who, if the papers are in order, will grant the required leave. Forms of consent and affidavit may be obtained in the Stamp Department of the Central Office, Room No. 5.

(*q*) *Ibid.*, r. 27. For forms of summons and order, see R. S. C., Appendix K Nos. 58, 60; Yearly Practice, 1908, pp. 1879, 1880.

(*r*) Practice Masters' Rules (25).

(*s*) *Re a Bill of Sale*, [1894] 2 Q. B. 923.

SECT. 4. Satisfaction.

of entering up satisfaction must be transmitted to any registrar to whom an abstract of such bill of sale has been transmitted, and must by him be numbered, filed, and indexed (*t*).

Effect of satisfaction.

148. An order that a bill of sale should be expunged from the register has been made in some cases either by consent or on summons (*u*). Such a practice does not seem directly authorised by the statutes; but a grantee may, on payment, be ordered to give up his bill of sale (*a*), and cannot stipulate that it shall remain in his possession after payment (*b*).

A bill of sale which has been paid off cannot be set up against an execution creditor, even though satisfaction has not been entered (*c*).

Part VIII.—Procedure and Evidence.

SECT. 1.—*Rectification, and Extension of Time.*

Extent of relief given.

149. Power is given by the principal Act to a judge of the High Court, on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed, or the omission or mis-statement of the name, residence, or occupation of any person, was accidental or due to inadvertence, in his discretion to order such omission or mis-statement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions, if any, as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct (*d*). The Court of Appeal has, it seems, no original jurisdiction to make an order under the Act (*e*).

There is no power to order extension of time for re-registering a bill of sale, the registration of which had, at the commencement of the principal Act, become void for want of renewal (*f*).

Relief is limited to rectification of the register (*g*), or extension of time; and an order cannot be made for an affidavit to be filed correcting a mistake in the affidavit on registration (*h*).

Rights of third persons.

150. An order for rectification of the register, or for extension of the time for registration, will only be granted subject to rights which have already accrued to third persons (*h*). It will not be

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(*t*) R. S. C., Bills of Sale Acts, 1878 and 1882, rr. 6—9. See Yearly Practice, 1908, p. 1462.
(*u*) Annual Practice, 1908, p. 885.
(*a*) *Ex parte Wickens*, [1898] 1 Q. B. 543.
(*b*) *Watson* v. *Strickland* (1887), 19 Q. B. D. 391.
(*c*) *Waterton* v. *Baker* (1868), 17 L. T. 494.
(*d*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 14.
(*e*) *Re Morris, Ex parte Webster* (1882), 22 Ch. D. 136.
(*f*) *Re Emery, Ex parte Chief Official Receiver* (1888), 21 Q. B. D. 405.
(*g*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 14.
(*h*) *Crew* v. *Cummings* (1888), 21 Q. B. D. 420.

granted to the prejudice of an execution creditor who has seized, or of a trustee in the grantor's bankruptcy (*i*), or of any person whose rights would be affected by registration, even though there has been no change of property in the chattels sought to be protected (*k*).

An order made in accordance with the form now in use is expressed to be without prejudice to the rights of persons acquired prior to the time when the bill of sale is actually registered or re-registered (*l*).

SECT. 2.—*Registrar and Register, Searches, Inspection, and Office Copies.*

Who is registrar.

151. The office of registrar for the purposes of the Bills of Sale Acts is executed by the Masters of the King's Bench Division (*m*), any one of whom may perform all or any of the duties of the registrar (*n*).

Contents of register.

152. The time of delivery of every document filed at the Central Office is entered in books which may be inspected (*o*). A book is directed to be kept called the register (*p*), for entry of particulars of registration (*q*) and renewal of registration (*r*) of bills of sale, with an index (*s*). Provision is also made for entering up satisfaction in the register (*t*).

Office copies.

153. Any person is entitled to have an office copy or extract of any registered bill of sale, and affidavit of execution filed therewith, or copy thereof, and of any affidavit filed therewith, if any, or registered affidavit of renewal, upon payment (*u*). Any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, is, in all legal proceedings, admissible as *primâ facie* evidence thereof and of the fact and date of registration as

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(*i*) *Re Parsons, Ex parte Furber*, [1893] 2 Q. B. 122, holding that *Re Dobbin's Settlement* (1887), 56 L. J. (Q. B.) 295, is overruled by *Crew* v. *Cummings* (1888), 21 Q. B. D. 420.

(*k*) *Re Spiral Globe, Ltd.*, [1902] 1 Ch. 396.

(*l*) But an order in wider terms is valid unless set aside (*Re Parke* (1884), 13 L. R. Ir. 85). Where three days' extension of time is granted, registration on the fourth day is sufficient, if a Sunday intervenes (*ibid.*).

(*m*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 13. As to the Masters of the King's Bench Division, see title COURTS.

(*n*) *Ibid.*; R. S. C., Ord. 61, r. 25.

(*o*) R. S. C., Ord. 61, r. 18.

(*p*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 12. No action lies, without proof of malice, for putting on the register a document which is not a bill of sale (*Horsley* v. *Style* (1893), 69 L. T. 222), nor, it seems, for publishing a copy of the register (*Searles* v. *Scarlett*, [1892] 2 Q. B. 56).

(*q*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 12. For the particulars to be entered on registration, see p. 46, *ante*.

(*r*) *Ibid.* For the particulars to be entered on renewal of registration, see p. 52, *ante*.

(*s*) Such index is arranged in divisions corresponding with the letters of the alphabet, so that all grantors whose surnames begin with the same letter (and no others) may be comprised in one division, but the arrangement within each such division need not be strictly alphabetical (*ibid.*).

(*t*) *Ibid.*, Sched. B.

(*u*) *Ibid.*, s. 16. The fee is 6*d.* per folio.

SECT. 2. Registrar and Register etc.

shown thereon (*w*), and also, it appears, of its execution by the grantor (*x*).

But a certificate of registration alone is not sufficient proof of due registration (*y*), or that a true copy bill of sale has been filed (*a*). Where evidence of due registration is objected to as insufficient, an adjournment may be granted for production of an office copy or further proof (*b*).

Office copies are now admissible in evidence to the same extent as originals would be admissible (*c*).

Searches.

154. Any person is entitled at all reasonable times to search the register on payment of a fee of one shilling, and also to inspect, examine, and make extracts from, any and every registered bill of sale, without being required to make a written application, or to specify any particulars in reference thereto, upon payment of one shilling for each bill of sale inspected (*d*).

Official search.

The registrar must, on a request in writing giving sufficient particulars, and on payment of a fee (*e*), cause the register to be searched, and issue a certificate of the result (*f*).

SECT. 3.—*Stamps and Fees.*

Necessity for stamping.

155. A bill of sale is not to be registered unless the original, duly stamped, is produced to the proper officer (*g*). It is the duty of the grantee or transferee, under penalties (*h*), to see that it is properly stamped, and, if it is unstamped or insufficiently stamped, it may be properly stamped after its execution on payment of the unpaid duty and penalty (*i*).

Scale of stamp duties.

156. An absolute bill of sale is to be stamped as a conveyance, with an *ad valorem* duty on the amount or value of the consideration for the sale (*k*).

(*w*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 16.

(*x*) *Re Slater, Ex parte Slater* (1897), 76 L. T. 704, decided on the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 11, which is in the same words as the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 16.

(*y*) *Mason* v. *Wood* (1875), 1 C. P. D. 63.

(*a*) *Emmott* v. *Marchant* (1878), 3 Q. B. D. 555.

(*b*) *Turner & Co.* v. *Culpan* (1888), 58 L. T. 340.

(*c*) R. S. C., Ord. 37, r. 4.

(*d*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 16. Extracts are limited to the dates of execution, registration, renewal of registration, and satisfaction, to the names, addresses, and occupations of the parties, to the amount of the consideration, and to any further prescribed particulars.

(*e*) The fee is 5*s*., and for every additional name 2*s*. (Order as to Supreme Court Fees, 1884, Schedule, Nos. 114, 115).

(*f*) R. S. C., Ord. 61, r. 23.

(*g*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 41.

(*h*) As to these, see title REVENUE.

(*i*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 15 (2) (c), (d).

(*k*) The duty must be paid in impressed stamps calculated according to the amount of the consideration in accordance with the following scale:—

	£	s.	d.
Not exceeding £5	0	0	6
Exceeding £5 and not exceeding £10	0	1	0
„ 10 „ „ 15	0	1	6
„ 15 „ „ 20	0	2	0
„ 20 „ „ 25	0	2	6

A bill of sale by way of security for the payment of money is stamped as a mortgage (*l*).

A reconveyance, release, or discharge of a security, or a transfer or assignment of a bill of sale by way of security, is subject to a duty of sixpence for every £100 or part of £100 of the amount transferred or assigned (*m*). The transfer of an absolute bill of sale bears duty as a conveyance or transfer on sale (*n*).

Where there is a further advance on a transfer or assignment of a bill of sale, the instrument, in addition to a transfer or assignment stamp, should, it seems, be stamped as a new security to the extent of the further advance (*o*).

157. Certain fees are also payable in respect of the registration of bills of sale (*p*). Fees on registration.

	£	s.	d.
Exceeding £25 and not exceeding £50	0	5	0
,, 50 ,, ,, 75	0	7	6
,, 75 ,, ,, 100	0	10	0
,, 100 ,, ,, 125	0	12	6
,, 125 ,, ,, 150	0	15	0
,, 150 ,, ,, 175	0	17	6
,, 175 ,, ,, 200	1	0	0
,, 200 ,, ,, 225	1	2	6
,, 225 ,, ,, 250	1	5	0
,, 250 ,, ,, 275	1	7	6
,, 275 ,, ,, 300	1	10	0

,, 300 for every £50 or fractional part of £50 (*ibid.*, Schedule I., Conveyance or Transfer on Sale).

(*l*) The scale of duty is as follows:—

	£	s.	d.
Not exceeding £10	0	0	3
Exceeding £10 and not exceeding £25	0	0	6
,, 25 ,, ,, 50	0	1	3
,, 50 ,, ,, 100	0	2	6
,, 100 ,, ,, 150	0	3	9
,, 150 ,, ,, 200	0	5	0
,, 200 ,, ,, 250	0	6	3
,, 250 ,, ,, 300	0	7	6
,, 300 for every £100 or fractional part of £100	0	2	6

If collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped—

For every £100 and also for any fractional part of £100 and the amount secured . . . . . 6*d.*

(*ibid.*, Schedule I., Mortgage etc.).

(*m*) *Ibid.*

(*n*) For the scale of duties see note (*k*), p. 76, *ante*.

(*o*) *Wale* v. *Commissioners of Inland Revenue* (1879), 4 Ex. D. 270.

(*p*) Order as to Supreme Court Fees, 1884, Schedule, Nos. 36—41, superseding Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 18. The fees now payable are as follows:—

	£	s.	d.
36. On filing a bill of sale and affidavit therewith where the consideration (including further advances) does not exceed £100	0	5	0
37. Above £100 and not exceeding £200	0	10	0
38 Above £200	1	0	0
39. On filing under the Bills of Sale Acts, 1878 and 1882, any other document to which the fees Nos. 36, 37, and 38 do not apply	0	10	0
40. On filing an affidavit of re-registration of a bill of sale or any such other document as in No. 39 mentioned	0	10	0
41. On filing a fiat of satisfaction	0	5	0

BIRDS.

See ANIMALS; GAME.

BIRTH,

Concealment of.—*See* CRIMINAL LAW AND PROCEDURE.
Notification and Registration of.—*See* PUBLIC HEALTH ETC.
Proof of.—*See* EVIDENCE.

BISHOPS.

See ECCLESIASTICAL LAW.

BLACKMAIL.

See CRIMINAL LAW AND PROCEDURE.

BLASPHEMY.

See CRIMINAL LAW AND PROCEDURE.

BOARD OF AGRICULTURE AND FISHERIES.

See AGRICULTURE.

BOARD OF TRADE.

See CONSTITUTIONAL LAW; TRADE AND TRADE UNIONS.

BOILER.

See FACTORIES AND WORKSHOPS.

BONDS.

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SECT. 1. Nature and Form of a Bond.

SECT. 1.—*Nature and Form of a Bond.*

Definition.

158. A bond is an instrument under seal, usually a deed poll, whereby one person binds himself to another for the payment of a specified sum of money either immediately or at a fixed future date. The person who so binds himself is called the obligor, and the person to whom he is bound the obligee; and the instrument itself is sometimes called an obligation (*a*). A bond may be given by two or more obligors either jointly, or severally, or jointly and severally; and may be given to two or more obligees jointly or severally, but not jointly and severally (*b*).

Single bond.

159. A bond merely for the payment of a certain sum of money, without any condition in or annexed to it, is called a simple or single bond (*c*). Such instruments are rarely, if ever, met with at the present day, and the term "single bond" is sometimes used to signify a bond given by one obligor as distinguished from one given by two or more.

Double or conditional bond.

160. The ordinary form of bond now in use is one accompanied by a condition in the nature of a defeasance (*d*), the performance of the condition generally being secured by a penalty. This form of bond is called a double or conditional bond (*e*), and consists of two parts: first, the obligation, and secondly, the condition. The condition, which may be contained in the same or another instrument, or may be indorsed on the back (*f*), specifies the real agreement between the parties—that is to say, the money to be paid or acts or duties to be performed or observed, the payment, performance, or observance of which is intended to be secured by the bond—and provides that on due performance of the condition the bond shall be void (*g*). The obligation, as in the case of a single bond, simply binds the obligor to the payment of a certain sum of money, such sum of money being usually, though not necessarily, a penalty (*h*), and does not in terms refer to the condition. On breach of the condition the bond is said to become forfeited or absolute, though, as will be subsequently seen, it does not follow that the obligee is entitled to recover the sum mentioned in the obligation (*i*).

Recitals.

A conditional bond sometimes contains explanatory recitals. When it does so, the recitals follow the obligation and precede the condition.

(*a*) Shep. Touch. 367.

(*b*) *Bradburne* v. *Botfield* (1845), 14 M. & W. 559.

(*c*) 2 Bl. Com. 340; *Morrant* v. *Gough* (1827), 7 B. & C. 206.

(*d*) The term "defeasance" is more properly employed when the condition is contained in a separate instrument (Shep. Touch. 367, 396).

(*e*) Shep. Touch. 367.

(*f*) *Ibid.*; Vin. Abr. tit. Faits (G).

(*g*) The omission of words providing that the obligation shall be void does not affect the validity of the condition (*Mauleverer* v. *Hawxby* (1670), 2 Saund. 78).

(*h*) See p. 93, *post*.

(*i*) See pp. 93 *et seq.*, *post*.

SECT. 1. Nature and Form of a Bond.

161. No particular form of words is necessary to create a bond. The obligor must be bound in a certain sum of money (*j*), but, if this requisite is satisfied, any mode of expression by which the intention of the parties is made clear will suffice (*k*).

Difference between bond and covenant.

162. The difference between a bond and a covenant is one rather of form than substance. Covenants are generally found in indentures, whereas a bond is usually a deed poll; and a covenant expresses the real agreement between the parties, the penalty or sum fixed by way of liquidated damages, if any, being the subject of a further covenant, whereas in a bond the only undertaking of the obligor is to pay a certain sum of money, such sum being either a penalty or liquidated damages, the real obligation being expressed in the superadded condition, on due performance of which the instrument is avoided.

SECT. 2.—*Different Kinds of Bonds.*

Single and double bonds.

163. There are many varieties of bonds, some of which are subject to special rules and considerations which are not applicable to bonds generally. The difference between a single or unconditional and a double or conditional bond has already been explained (*l*).

Common money bonds.

164. A common money bond (*m*) is one given to secure the payment of money, the condition being that if the obligor pays to the obligee a smaller sum, usually one-half of the sum named in the obligation, with interest, on a specified day, the bond shall be void. Common money bonds are subject to the provisions of the statute 4 & 5 Anne, c. 16, hereinafter referred to (*n*).

Bonds to secure performance of covenant or agreement.

165. Bonds conditioned to be void on the performance of any covenant or agreement in any deed or writing, other than a covenant or agreement to pay a specified sum of money (*o*), are subject to the provisions of the statute 8 & 9 Will. 3, c. 11, hereafter referred to (*p*).

Bond to secure annuity or instalments.

A bond conditioned for the payment of an annuity (*q*), or of a certain sum by stated instalments (*r*), is within the statute of

(*j*) *Loggins* v. *Titherton* (1613), Yelv. 225.
(*k*) Shep. Touch. 368.
(*l*) See p. 80, *ante*.
(*m*) For form of common money bond, see Encyclopædia of Forms, Vol. II., pp. 536 *et seq.*
(*n*) See p. 93, *post*.
(*o*) For forms of such bonds, see Encyclopædia of Forms, Vol. II., pp. 541, 543, 549 *et seq.*
(*p*) See p. 94, *post*.
(*q*) *Collins* v. *Collins* (1759), 2 Burr. 820; *Walcot* v. *Goulding* (1799), 8 Term Rep. 126; *Tuther* v. *Caralampi* (1888), 21 Q. B. D. 414. For annuities generally, see title RENT-CHARGES AND ANNUITIES.
(*r*) *Willoughby* v. *Swinton* (1805), 6 East, 550; *Murray* v. *Stair* (*Earl*) (1823), 2 B. & C. 82; *Prestun* v. *Dania* (1872), L. R. 8 Exch. 19. See also *Hurst* v. *Jennings* (1826), 5 B. & C. 650. As to bonds conditioned for payment of a specified sum at a certain day with interest to be paid periodically in the meantime, see *Smith* v. *Bond* (1833), 10 Bing. 125; *James* v. *Thomas* (1833), 5 B. & Ad. 40; *Skinners' Co.* v. *Jones* (1837), 4 Scott, 271; and p. 95, *post*. For form of such bond, see Encyclopædia of Forms, Vol. II., p. 538.

SECT. 2. Different Kinds of Bonds.

William III., and is not a bond conditioned for payment of a lesser sum within the meaning of the statute of Anne.

Neither statute has any application where the sum named in the obligation is not a penalty, but liquidated damages (*s*)

Arbitration bond.

166. On a reference to arbitration the submission is sometimes made by mutual bonds, the obligation being in the form of a common money bond, with a condition to abide the event of the award (*t*). Arbitration bonds are within the provisions of the statute of William III. (*u*).

Post obits.

167. A *post obit* bond (*w*) is a bond conditioned for the payment of a sum of money after the death of a specified person, and is usually given in respect of a loan for a sum greater than that advanced. Such bonds are of two kinds: (1) where the payment depends on a contingency, as, for instance, in the event of the obligor surviving a relative in regard to whom he has expectations; (2) where the payment is certain, but the time of payment uncertain, as in the case of a bond conditioned for payment of a certain sum on the death of the obligor. When the money becomes payable in pursuance of the condition of a *post obit* bond, the bond is subject to the provisions of the statute of Anne, and not to those of the statute of William III. (*x*).

Lloyd's bond.

168. A Lloyd's bond (*a*) is a security issued by a company either in the form of a common money bond, with a recital of the company's indebtedness to the obligee (*b*), or in the form of an acknowledgment of a debt to a particular person, with a covenant to pay it (*c*). Though originally devised for the purpose of raising money, such bonds are, when so used, invalid, unless the borrowing powers of the company authorise their issue (*d*), except to the extent that the money raised by their issue has been legitimately applied for the company's benefit (*e*). Where, however, the bonds are given in consideration of an existing liability incurred by the company *bonâ*

(*s*) *Strickland* v. *Williams*, [1899] 1 Q. B. 382, C. A.; *Goad* v. *Empire Printing and Publishing Co., Ltd.* (1888), 52 J. P. 438. See p. 95, *post*.

(*t*) See title ARBITRATION, Vol. I., p. 440. For form of arbitration bond, see Encyclopædia of Forms, Vol. II., p. 121.

(*u*) *Welch* v. *Ireland* (1805), 6 East, 613; *Hanbury* v. *Guest* (1811), 14 East, 401.

(*w*) For forms of *post obit* bonds, see Encyclopædia of Forms, Vol. II., pp. 544 *et seq.*

(*x*) *Smith* v. *Bond* (1833), 10 Bing. 125, at p. 132.

(*a*) So called after the inventor (*Chambers* v. *Manchester and Milford Rail. Co.* (1864), 5 B. & S. 588, *per* CROMPTON, J., at p. 608).

(*b*) For this form of Lloyd's bond, see *Re Cork and Youghal Rail. Co.* (1869), 4 Ch. App. 748, at p. 749. See also Encyclopædia of Forms, Vol. II., p. 558.

(*c*) For this form of Lloyd's bond, see *Chambers* v. *Manchester and Milford Rail. Co.*, *supra*, at p. 591.

(*d*) *Ibid.*, and see title COMPANIES. These bonds were expressly declared void in the case of railway companies by the Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 19. See further, title RAILWAYS AND CANALS. For the proper form of bond to be used in case of borrowing by railway and other companies governed by the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16) see *ibid.*, s. 41 and Sched. D; Encyclopædia of Forms, Vol. II., p. 557.

(*e*) *Re Cork and Youghal Rail. Co.*, *supra*.

fide, and not *ultra vires*, as in the case of a debt due to a contractor for work done, they are valid (*f*). SECT. 2. Different Kinds of Bonds.

SECT. 3.—*Capacity of Parties.*

169. The capacity of a person to become an obligor depends, generally speaking, on his capacity to contract (*g*). But, though an infant may bind himself to pay a reasonable price for necessaries supplied to him, a bond given by him to secure such payment is void (*h*). Obligor.

Infants (*i*), lunatics (*k*), married women (*l*), and others with limited or no capacity to contract may, however, be obligees, because, a bond being a unilateral contract, the person to whom it is given does not thereby incur any liability. A bond given to a corporation sole—*e.g.*, to a bishop—enures to him in his natural capacity, because such a corporation cannot take a chattel in succession except by custom (*m*). Obligee.

SECT. 4.—*Validity.*

170. To constitute a valid bond, there must be an obligor and obligee, and a fixed sum of money in which the obligor is bound; and the instrument must be duly executed by the obligor (*n*). Consideration is not necessary, the instrument being under seal (*o*). Essentials of valid bond.

A bond executed with a blank for the name of the obligee is void, and parol evidence is not admissible to supply the defect (*p*); but if it appears from the instrument as a whole to whom the obligor is intended to be bound, as where there is a recital of indebtedness to a person named, the bond is not invalid merely because the obligee's name is not mentioned in the obligatory part (*a*). Blank for name of obligee.

A bond is void unless the obligor is bound in a definite sum of money (*b*), but it is not invalid merely because the sum is improperly expressed, provided the intention is clear (*c*). Necessity for definite sum.

(*f*) *Re Cork and Youghal Rail. Co.* (1869), 4 Ch. App. 748, *per* Lord HATHERLEY, L.C., at p. 757, approving *Chambers* v. *Manchester and Milford Rail. Co.* (1864), 5 B. & S. 588, *per* BLACKBURN, J., at p. 611, and *White* v. *Carmarthen Rail. Co.* (1863), 1 Hem. & M. 786.

(*g*) As to which see title CONTRACT.

(*h*) *Martin* v. *Gale* (1876), 4 Ch. D. 428; *Fisher* v. *Mowbray* (1807), 8 East, 330; *Baylis* v. *Dineley* (1815), 3 M. & S. 477; *Ayliff* v. *Archdale* (1603), Cro. Eliz. 920. *Russel* v. *Lee* (1663), 1 Lev. 86, must be considered overruled. See generally, title INFANTS.

(*i*) Bac. Abr. tit. Obligation, D 2.

(*k*) *Ibid.* See generally, title LUNATICS AND PERSONS OF UNSOUND MIND.

(*l*) *Whelpdale's Case* (1604), 5 Co. Rep. 118 b. See generally, title HUSBAND AND WIFE.

(*m*) Bac. Abr. tit. Obligation, D 2; *Byrd* v. *Wilford* (1592), Cro. Eliz. 464; *Fulwood's Case* (1590), 4 Co. Rep. 64 b. See generally, title CORPORATIONS.

(*n*) Com. Dig. tit. Obligation, A; Shep. Touch. 56; *Dodson* v. *Kayes* (1610), Yelv. 193.

(*o*) *Squire* v. *Whitton* (1848), 1 H. L. Cas. 333.

(*p*) See titles DEEDS AND OTHER INSTRUMENTS; EVIDENCE.

(*a*) *Langdon* v. *Goole* (1681), 3 Lev. 21; *Lambert* v. *Branthwaite* (1732), 2 Str. 945.

(*b*) *Loggins* v. *Titherton* (1613), Yelv. 225.

(*c*) *Hulbert* v. *Long* (1617), Cro. Jac. 607; *Cromwell* v. *Grunsden* (1698), 2 Salk. 462; *Coles* v. *Hulme* (1828), 8 B. & C. 568, where the obligor acknowledged himself bound in 7,700 without mentioning any species of money, and

SECT. 4. Validity

Execution.

171. As to the execution of a bond, the ordinary rules as to the execution of deeds apply (*d*). If the instrument is delivered and retained by the obligor, such delivery is valid and effectual, provided there is nothing to show that it was intended not to become immediately operative (*e*); and delivery to a third person, though not an agent of the obligee, is sufficient (*f*). Signature is not necessary at common law (*g*). A bond delivered to a third person may, however, be intended to operate only as an escrow (*h*); but if the delivery is to the obligee himself as upon conditions performed, it will take effect immediately, notwithstanding the non-performance of the conditions (*i*).

Execution by one of several joint obligors.

Where two or more persons are intended to be bound jointly, or jointly and severally (*k*), and the bond is executed by one of them only, it will operate at law as his several bond (*l*). But in equity he may be entitled to have it delivered up to be cancelled as being contrary to intention (*m*).

Date.

A bond may be valid though undated or bearing a false or impossible date, because all deeds take effect from the time of delivery (*a*).

Validity of condition.

172. A condition, to be valid, must be for the performance of an act which is possible and lawful, and it must not be repugnant to the obligation.

Impossibility.

Where a condition underwritten or indorsed is for the performance of an act which is impossible, the condition is void but the obligatory part of the bond valid (*b*); but where such a condition is incorporated with the obligatory part, the bond is altogether void (*c*). A condition is not invalid merely because it provides for the performance of an act or the happening of an event which, though possible, is extremely improbable (*d*).

One of two acts impossible.

Where a condition is for the performance of two distinct acts, one of which is impossible, the obligor is bound to perform the other (*e*); but if both acts were possible at the time of the execution

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there being a recital of indebtedness in various sums expressed in pounds sterling, the court supplied the word "pounds" in the obligatory part.

(*d*) See title DEEDS AND OTHER INSTRUMENTS.

(*e*) *Doe* d. *Garnons* v. *Knight* (1826), 5 B. & C. 671.

(*f*) *Alford* v. *Lee* (1586), Cro. Eliz. 54.

(*g*) *Cromwell* v. *Grunsden* (1698), 2 Salk. 462; and compare *Ex parte Hodgkinson* (1815), 19 Ves. 291, at p. 296. But *quære* whether it might not be held to be necessary by reason of universal custom.

(*h*) *Murray* v. *Stair* (*Earl*) (1823), 2 B. & C. 82.

(*i*) Vin. Abr. tit. Faits, O; *Anon.* (1668), 1 Vent. 9; Shep. Touch. 59.

(*k*) As to joint and joint and several bonds, see pp. 88, 91, *post*.

(*l*) *Elliot* v. *Davis* (1800), 2 Bos. & P. 338.

(*m*) *Underhill* v. *Horwood* (1804), 10 Ves. 209, 225. So if a bond is made joint only, instead of joint and several, by mistake, it will be rectified in equity (*ibid.*, at p. 227). Compare *Cooper* v. *Evans* (1867), L. R. 4 Eq. 45.

(*a*) Shep. Touch. 72. Thus, a bond dated in the minority of an infant will be binding if executed by him after attaining his majority (*Cromwell* v. *Grunsden* (1698), 2 Salk. 462).

(*b*) *Fullerton* v. *Agnew* (1703), 1 Salk. 172; *Duveyier* v. *Fellowes* (1832), 1 Cl. & Fin. 39, H. L.; *Holmes* v. *Ivy* (1680), 2 Show. 15.

(*c*) Com. Dig. tit. Condition, D 2.

(*d*) *Campbell* v. *French* (1795), 6 Term Rep. 200, *per* Lord KENYON, at p. 211.

(*e*) *Da Costa* v. *Davis* (1798), 1 Bos. & P. 242.

of the bond, and one of them is made impossible by the act of the obligee, the obligor is altogether excused (*f*).

False grammar etc.

173. False grammar (*g*) and defective spelling (*h*) do not affect the validity of a bond provided the intention is clear; and, for the purpose of giving effect to the intention, the court will, where necessary, transpose, disjoin, reject, and supply words (*i*).

Uncertainty.

Where the condition of a bond is expressed in such language as to be unintelligible (*k*), or is so uncertain that its meaning cannot be ascertained, but the obligatory part is clear, the condition is void, and the obligation binding (*l*).

Repugnancy.

When the condition is repugnant to the obligation, the condition is void and the obligation binding (*m*).

Unlawfulness.

174. If the condition of a bond or the consideration for which it is given is unlawful, the bond is wholly void; and parol evidence is admissible to prove the true nature of the transaction where it does not appear on the face of the instrument (*n*).

Partial unlawfulness.

Where the condition is entire, and any portion of it is unlawful, the bond is entirely void (*o*); but if it consists of several distinct parts, some of which are lawful and others unlawful, or if there are several independent conditions, some lawful and others unlawful, the bond is valid, and subject only to such parts of the condition or such of the conditions, as the case may be, as are lawful (*p*).

The following are instances of bonds given on conditions or for considerations which are unlawful (*q*):—

(1) Bonds in consideration of future illicit cohabitation (*r*);

(*f*) Com. Dig. tit. Obligation, K 2; *Duvergier* v. *Fellowes* (1832), 1 Cl. & Fin. 39, H. L. See further, p. 93, *post*.

(*g*) Shep. Touch. 55, 87; *Parkhurst* v. *Smith* (1742), Willes, 327, 332; *Dobson* v. *Keys* (1610), Cro. Jac. 261.

(*h*) *Sims* v. *Urry* (1676), 2 Cas. in Ch. 225; *Dennis* v. *Snape* (1687), Comb. 60; *Cromwell* v. *Grunsden* (1698), 2 Salk. 462.

(*i*) *Langdon* v. *Goole* (1681), 3 Lev. 21; *Vernon* v. *Alsop* (1662), 1 Lev. 77; *Holmes* v. *Ivy* (1680), 2 Show. 15; *Maulevrer* v. *Hawxby* (1670), 2 Saund. 78.

(*k*) *Marker* v. *Cross* (1614), 2 Buls. 133.

(*l*) Shep. Touch. 373. Compare *Maulevrer* v. *Hawxby*, *supra*; *Vernon* v. *Alsop*, *supra*.

(*m*) Shep. Touch. 373; Com. Dig. tit. Condition, D; *Roberts* v. *Harnage* (1704), 2 Salk. 659; *Wells* v. *Tregusan* (1708), 2 Salk. 463.

(*n*) *Collins* v. *Blantern* (1767), 2 Wils. 347, 1 Smith, L. C., 11th ed., p. 369; *Paxton* v. *Popham* (1808), 9 East, 408; *Greville* v. *Atkins* (1829), 9 B. & C. 462; *Lound* v. *Grimwade* (1888), 39 Ch. D. 605.

(*o*) *Collins* v. *Blantern*, *supra*; *Norton* v. *Syms* (1614), Moore (K. B.) 856; *Baker* v. *Hedgecock* (1888), 39 Ch. D. 520; *Yale* v. *R.* (1721), 6 Bro. Parl. Cas. 31.

(*p*) *Green* v. *Price* (1845), 13 M. & W. 695; *Re Burdett*, *Ex parte Byrne* (1888), 20 Q. B. D. 310, C. A.; *Newman* v. *Newman* (1815), 4 M. & S. 66; *Collins* v. *Gwynne* (1841), 5 Moo. & P. 276, 282; *Yale* v. *R.*, *supra*.

(*q*) As to the condition becoming unlawful, see p. 93, *post*; as to unlawful contracts generally, see title CONTRACT.

(*r*) *Walker* v. *Perkins* (1764), 3 Burr. 1568. But a bond given in consideration of past illicit intercourse on the determination of the connection is valid (*Annandale* v. *Harris* (1727), 2 P. Wms. 432; *Turner* v. *Vaughan* (1767), 2 Wils. 339; *Priest* v. *Parrot* (1751), 2 Ves. Sen. 160; *Nye* v. *Moseley* (1826), 6 B. & C. 133), provided there is no intention to continue the connection in the future

SECT. 4. Validity.

(2) Bonds in general or unreasonable restraint of trade (*s*);
(3) Bonds in restraint of marriage (*t*);
(4) Marriage brocage bonds (*a*);
(5) Bonds conditioned for the commission of a crime or tort (*b*);
(6) Simoniacal resignation bonds (*c*);
(7) Bonds for money lost at gaming (*d*);
(8) Bonds tending to affect the due administration of criminal justice (*e*).

Post obit bonds.

Post obit bonds, whether absolute or contingent, are not as such invalid (*f*). But where the consideration is inadequate, or the rate of interest exorbitant, relief may be granted in equity, especially in the case of expectant heirs and reversioners (*g*).

Bond in lieu of security void for unlawfulness.

Where a bond or other security has been given or a debt incurred for an unlawful consideration, and a bond is given in lieu thereof or as security therefor, that bond is also void if the obligee has knowledge of the circumstances (*h*); but the validity of the subsequent bond is not affected by the unlawfulness of the original consideration if the obligee is unaware of it (*i*).

SECT. 5.—*Interpretation.*

Construction according to intention.

175. The rules as to the interpretation of deeds generally, which for the most part apply to bonds, are dealt with elsewhere (*k*). The main rule is that regard must be had to the intention of the parties, as ascertained from the instrument as a whole (*l*), and, in

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(*Friend* v. *Harrison* (1827), 2 C. & P. 584; *Re Vallance* (1884), 26 Ch. D. 353).

(*s*) *Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181, 1 Smith, L. C., 11th ed. p. 406; *Baker* v. *Hedgecock* (1888), 39 Ch. D. 520; and contrast *Gravely* v. *Barnard* (1874), L. R. 18 Eq. 518. See further, title CONTRACT.

(*t*) *Hartley* v. *Rice* (1808), 10 East, 22.

(*a*) *Roberts* v. *Roberts* (1730), 3 P. Wms. 66, 75; *Drury* v. *Hooke* (1686), 1 Vern. 412.

(*b*) Shep. Touch. 372; *Collins* v. *Blantern* (1767), Wils. 347.

(*c*) See title ECCLESIASTICAL LAW.

(*d*) 9 Anne, c. 14, s. 1; *Sigel* v. *Jebb* (1819), 3 Stark. 1; and contrast *Bubb* v. *Yelverton* (1870), L. R. 9 Eq. 471. See title GAMING AND WAGERING.

(*e*) *Lound* v. *Grimwade* (1888), 39 Ch. D. 605, where one of the considerations for a bond was that criminal proceedings should be so conducted that the name of a certain person should not be mentioned; *Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561, C. A. (indemnifying bail); *Williams* v. *Bayley* (1866), L. R. 1 H. L. 200.

(*f*) See *Adames* v. *Hallett* (1868), L. R. 6 Eq. 468, as to the rights of an obligee under a voluntary *post obit* bond.

(*g*) *Aylesford (Earl)* v. *Morris* (1873), 8 Ch. App. 484; *Fry* v. *Lane* (1888), 40 Ch. D. 312; *Nevill* v. *Snelling* (1880), 15 Ch. D. 679; *Cooke* v. *Lamotte* (1851), 15 Beav. 234. See further on this subject, title FRAUDULENT AND VOIDABLE CONVEYANCES; and as to relief against these and other bonds under the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), title MONEY AND MONEY-LENDING.

(*h*) *Amory* v. *Meryweather* (1824), 2 B. & C. 573 (bond in lieu of a promissory note given in respect of illegal stock-jobbing transactions); *Fisher* v. *Bridges* (1854), 3 E. & B. 642.

(*i*) *Cuthbert* v. *Haley* (1799), 8 Term Rep. 390.

(*k*) See title DEEDS AND OTHER INSTRUMENTS.

(*l*) *National Provincial Bank of England* v. *Marshall* (1888), 40 Ch. D. 112, C. A.; *Hulbert* v. *Long* (1617), Cro. Jac. 607; *Cromwell* v. *Grunsden* (1698), 2 Salk. 462; *Coles* v. *Hulme* (1828), 8 B. & C. 568; *Holmes* v. *Ivy* (1680), 2 Show. 15, where a condition for the delivery of 35,000 tiles, to the value of £144, at 15*s.* 6*d.*

order to give effect to the intention, the court will, where necessary, transpose or reject words (*m*) and supply accidental omissions (*n*).

But the intention must be ascertained from the terms of the instrument itself, parol evidence not being admissible to explain, add to, or contradict it (*o*); though, where the terms are ambiguous, regard may be had to the circumstances of the case in order to explain the ambiguity.

Parol evidence inadmissible.

The obligatory part of a bond, being for the benefit of the obligee, is always construed most strongly against the obligor, but the condition, being for the benefit of the obligor, is construed most strongly in his favour (*p*).

Construction of obligatory part and condition.

176. Recitals may operate in restraint of the condition where the words of the condition import a larger liability than that contemplated by the recitals (*q*), especially in favour of sureties (*r*). But where the condition is for repayment of money to be advanced, the amount being limited by the recitals to a certain sum, an advance in excess of such sum does not avoid the bond in the

Condition controlled by recitals.

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per thousand, was held good for £144, though the number of tiles at the price mentioned did not amount to that sum.

(*m*) *Mauleverer* v. *Hawxby* (1670), 2 Saund. 78, where the concluding words of the condition, "then the condition to be void," were rejected as surplusage; *Wells* v. *Wright* (1678), 2 Mod. Rep. 285, where the condition provided that, if default was made in performance thereof, the *obligation* should be void; *Anon.*, cited *Bache* v. *Proctor* (1780), 1 Doug. 382, 384, where the condition provided that the bond should be void if the obligor did *not* pay; *Vernon* v. *Alsop* (1662), 1 Lev. 77.

(*n*) *Coles* v. *Hulme* (1828), 8 B. & C. 568, where the word "pounds" was supplied in the obligatory part by reference to the condition; *Langdon* v. *Goole* (1681), 3 Lev. 21, where the name of the obligee was supplied by reference to the recital; *James* v. *Tallent* (1822), 5 B. & Ald. 889, where in a condition for the payment of an annuity for the support of two illegitimate children and their mother during their joint lives the words "and during the life of the survivor" were supplied; *Bache* v. *Proctor*, *supra*, where the condition was that the obligor should render a fair and just account in writing of all sums received, and it was held that neglect to pay over such sums was a breach of the condition; *Waugh* v. *Bussell* (1814), 5 Taunt. 707, where the words "one pound" were read as "one hundred pounds."

(*o*) *Buckler* v. *Millerd* (1688), 2 Vent. 107; *Mease* v. *Mease* (1774), 1 Cowp. 47, where it was sought to show that the bond was given by way of indemnity against another bond; *Tippins* v. *Coates* (1853), 18 Beav. 401. See further, title EVIDENCE.

(*p*) Shep. Touch. 375.

(*q*) *Pearsall* v. *Summersett* (1812), 4 Taunt. 593; *Payler* v. *Homersham* (1815), 4 M. & S. 423; *Liverpool Waterworks Co.* v. *Atkinson* (1805), 6 East, 507, where, the recital being that obligor had agreed to collect rents etc. for twelve months, the condition was that if he should at all times during the continuance of such his employment use due diligence and render the obligees from time to time a true account, and should also so long as he should continue to be employed by them from time to time observe and perform the orders of their committee, the obligation to be void, and it was held that the condition that he should account and pay all sums received etc. was limited to twelve months.

(*r*) *Arlington* v. *Merricks* (1672), 2 Saund. 411, where the recital was of the appointment of a deputy postmaster for six months, while the condition was that if he duly and faithfully executed the duties of the office during all the time he should continue deputy postmaster, the obligation to be void, and it was held that the obligor was only bound for six months; *African Co.* v. *Mason* (1714), cited 1 Str. 227, where a condition for a receiver's accounting for all sums received was limited by the recital to moneys received at a particular place.

SECT. 8. Interpretation.

absence of an express stipulation to that effect (*s*). The effect is merely to limit the liability of the obligor to the sum mentioned in the recitals (*s*).

Obligation unaffected by recitals.

The condition will not be controlled or limited by recitals which are not clearly inconsistent therewith (*t*), nor will recitals affect the obligatory part of a bond if that part is clear and unambiguous, because recitals are not considered to form part of the obligation, but to be incorporated with and form part of the condition (*a*).

Effect of indorsement.

177. The condition may be restrained by a memorandum indorsed on the bond, if it appears to have been the intention of the parties that the memorandum should form part of the condition, and it was indorsed on the bond before execution (*b*).

No time fixed for performance.

178. Where the condition is for payment of money, and no time is fixed for payment, the money is payable immediately (*c*); where it is for the performance of any other act, the act must be performed within a reasonable time (*d*).

Several, joint and several, and joint bonds.

179. Where a bond is entered into by two or more persons by which they bind themselves for a certain sum of money each, they are liable severally only (*e*). Where they bind themselves and each

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(*s*) *Parker* v. *Wise* (1817), 6 M. & S. 239; *Gordon* v. *Rae* (1858), 8 E. & B. 1065, at pp. 1086, 1087.

(*t*) *Australian Joint Stock Bank* v. *Bailey*, [1899] A. C. 396, where A. and B., having given to a bank a joint and several guarantee limited to £2,500 for overdrafts to a customer, afterwards gave a joint and several bond, in which it was recited that the same customer desired advances in excess of the £2,500, the condition being for repayment of the balance of the current account, and it was held, the guarantee being invalid, that the condition, being plainly to secure payment of all sums advanced, was not limited by the recitals to sums in excess of the £2,500; *Bird* v. *Lake* (1863), 1 Hem. & M. 111.

(*a*) *Ingleby* v. *Swift* (1833), 10 Bing. 84, where a bond in the penal sum of £1,000 was not reduced to £500 by a recital that the obligor had taken a farm of the obligee, and it had been agreed that he should enter into a bond with sureties in the penal sum of £500 for the due payment of the rent, and it was held that even the liability of the sureties was not limited to the amount mentioned in the recital; *Sansom* v. *Bell* (1809), 2 Camp. 39.

(*b*) *Broke* v. *Smith* (1601), Moore (K. B.), 679; *Hurst* v. *Jennings* (1826), 5 B. & C. 650; *Burgh* v. *Preston* (1800), 8 Term Rep. 483, where an indorsement that the obligee had given an undertaking not to sue on the bond until after the obligor's death was held to make the bond in effect payable only by his representatives; *Reed* v. *Norris* (1837), 2 My. & Cr. 361, where, a son being indebted to his father in a bond conditioned for payment of £1,000, with interest, the father and son joined in a bond, the son as surety, for £500, given by the father to a third person, a memorandum being indorsed on the £1,000 bond that the son was not to be called upon for payment until the father had paid all principal and interest under the £500 bond, and it was held that the indorsement did not affect the obligation of the son to pay interest under the £1,000 bond, but that the principal sum could not be called for until all sums payable under the other bond had been discharged.

(*c*) *Farquhar* v. *Morris* (1797), 7 Term Rep. 124; Shep. Touch. 369.

(*d*) Co. Litt. 208 a, b.

(*e*) *Collins* v. *Prosser* (1823), 1 B. & C. 682, where the bond was for payment of £1,000, "for which payment we bind ourselves, and each of us for himself, for the whole and entire sum of £1,000 each"; *Armstrong* v. *Cahill* (1880), 6 L. R. Ir. 440, where a bond expressed, "We . . . are held and firmly bound in the sum of £50 each . . . to which payment . . . we hereby bind us and

of them, the liability is joint and several (*f*). Where there are no words of severance, the obligation is *primâ facie* only joint, but it may be construed as joint and several if that appears to have been the intention having regard to the terms of the instrument as a whole (*g*).

SECT. 6.—*Operation and Incidents.*

SUB-SECT. 1.—*In General.*

Liability under single and double bonds.

180. The effect of a single bond (*h*) is simply to create a specialty debt for the amount of the obligation. The effect of a double or conditional bond (*i*) at common law was to impose a liability on the obligor to perform the condition, or on a breach thereof to pay the sum named in the obligatory part; but where that sum is a penalty the obligee is now, by the operation of two statutes hereafter referred to (*k*), which superseded the ancient jurisdiction of equity to grant relief against penalties, only entitled on breach of the condition to recover a sum commensurate with the actual loss sustained by the breach (*k*).

Binding on heirs and real estate.

181. A bond executed after December 31, 1881, though not expressed to bind the heirs, operates to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the obligor, subject to the expression of an intention to the contrary (*l*).

Priority in administration of assets.

182. Bond debts for valuable consideration no longer have the priority over simple contract debts which they formerly had in the administration of the assets of a deceased obligee, nor, on the other hand, are voluntary bonds now postponed till after the satisfaction of debts for valuable consideration (*m*).

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each of us, our and each of our heirs, etc.," was held the separate bond of each for £50. For a form of such bond, see Encyclopædia of Forms, Vol. II., p. 538.

(*f*) In the following cases the obligation was held to be joint and several: "Know all men that we are bound . . . for payment whereof I bind myself, my heirs etc. . . . Sealed with our seals" (*Sayer* v. *Chaytor* (1699), Lutw. 695); where A. and B. were expressed to jointly and severally bind themselves, the condition being that if they or either of them duly paid an annuity to C. for life in the following manner, namely, one moiety by A. during his life and the other moiety by B. during the life of A., and after the death of A. the whole by B., his heirs etc. during the life of C., the bond to be void (*Church* v. *King* (1836), 2 My. & Cr. 220); where three bound themselves jointly and their respective heirs etc. to pay etc. conditioned to be void if they or either of them paid etc. (*Tippins* v. *Coates* (1853), 18 Beav. 401). For a form of such bond, see Encyclopædia of Forms, Vol. II., p. 536.

(*g*) As to this, see p. 91, *post*. A bond, though joint at law, may be construed as joint and several in equity; see *Primrose* v. *Bromley* (1759), 1 Atk. 88; *Devaynes* v. *Noble* (1816), 1 Mer. 530, 539; *Lane* v. *Williams* (1693), 2 Vern. 292; *Levy* v. *Sale* (1877), 37 L. T. 709; *Sumner* v. *Powell* (1816), 2 Mer. 30; *Beresford* v. *Browning* (1875), L. R. 20 Eq. 564; *Richardson* v. *Horton* (1843), 6 Beav. 185.

(*h*) See p. 80, *ante*.

(*i*) See p. 80, *ante*.

(*k*) See pp. 93 *et seq.*, *post*.

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 59. So do simple contract debts since 1833.

(*m*) See title EXECUTORS AND ADMINISTRATORS.

SECT. 6. Operation and Incidents.

Merger of simple contract debt.

183. Where a bond is given to secure the payment of a simple contract debt, the simple contract debt will merge in the specialty (*n*), provided that the parties are the same, and that the specialty is co-extensive with the simple contract debt (*o*), and provided that there is no expressed intention to the contrary (*p*).

Where no merger.

But if the specialty is not co-extensive with the debt secured thereby, as where a bond conditioned for the payment of a limited amount was given to secure the payment of a sum then due, and such further sums as might become due, without specifying any limit to such further sums, it will not operate as a merger (*q*). Nor will there be any merger where the bond is only taken by way of collateral or additional security (*r*).

Injunction when agreement secured by bond.

184. Where there is a covenant or agreement not to do a certain act, and a bond is given with a penalty conditioned to be forfeited on doing the act, the court will not refrain by reason of the giving of the bond from granting an injunction to restrain a breach of the covenant or agreement, unless it appears to have been the intention of the parties that the obligor should be entitled to do the act on condition of paying the penalty (*s*). *Primâ facie*, if a person agrees not to do a certain thing, and to pay a certain sum if he does do it, there are two independent agreements and he is not entitled to break one agreement on condition of his performing the other (*s*).

Estoppel of obligor by recitals in bond.

185. Where a bond contains recitals, the obligor is estopped from denying the truth of the facts recited, but not so the obligee (*a*). Thus, if it be recited that the obligor has received certain moneys due to the obligee, the obligor will not be permitted to prove that he never in fact received such moneys (*b*). So, if a bond is conditioned for the payment of rent of premises recited to be demised by an indenture at a certain specified rent, the obligor is estopped from showing that the indenture was never executed, or that a lower rent was reserved thereby than that mentioned in the recital, even if such was the fact (*c*). Nor where a particular consideration

(*n*) *Price* v. *Moulton* (1851), 10 C. B. 561; *Owen* v. *Homan* (1851), 3 Mac. & G. 378; *Rolfe* v. *Peterson* (1772), 2 Bro. Parl. Cas. 436; *Woodward* v. *Gyles* (1690), 2 Vern. 119.

Boulter v. *Mayor* (1865), 19 C. B. (N. S.) 76.

(*p*) *Commissioner of Stamps* v. *Hope*, [1891] A. C. 476.

(*q*) *Norfolk Rail. Co.* v. *M'Namara* (1849), 3 Exch. 628; *Holmes* v. *Bell* (1841), 3 Man. & G. 213.

(*r*) *Holmes* v. *Bell*, *supra*; *Twopenny* v. *Young* (1824), 3 B. & C. 208.

(*s*) *French* v. *Macale* (1842), 2 Dr. & War. 269; *Hardy* v. *Martin* (1783), 1 Cox, Eq. Cas. 26; *Clarkson* v. *Edge* (1863), 33 Beav. 227; *Gravely* v. *Barnard* (1874), L. R. 18 Eq. 518; *Bird* v. *Lake* (1863), 1 Hem. & M. 111; *Jones* v. *Heavens* (1877), 4 Ch. D. 636; *London and Yorkshire Bank, Ltd.* v. *Pritt* (1887), 56 L. J. (CH.) 987; *National Provincial Bank of England* v. *Marshall* (1888), 40 Ch. D. 112, C. A., where the condition of the bond was that if the obligor should pay to the obligees £1,000 as liquidated damages in case the obligor should at any time within two years after he should have retired or been dismissed from the service of the obligees accept any employment etc., and it was construed as intended to impose an obligation not to enter such employment, and an injunction was granted accordingly, though the obligor was willing to pay the £1,000.

(*a*) *Baker* v. *Dewey* (1823), 1 B. & C. 704; *Bountree* v. *Jacob* (1809), 2 Taunt. 141.

(*b*) *Shelley* v. *Wright* (1773), Willes, 9.

(*c*) *Lainson* v. *Tremere* (1834), 1 Ad. & El. 792; *Hosier* v. *Searle* (1800), 2 Bos. & P. 299; *Thornhil* v. *King* (1599), Cro. Eliz. 757.

is recited can the obligor show that the consideration was in fact different, except for the purpose of showing that it was unlawful, and that the bond is therefore void (*d*).

186. A bond given to two or more obligees (*e*) may be given to them jointly or severally, but not jointly and severally (*f*). The general rule is, that if the interest of the obligees is joint, the bond will be deemed to have been given to them jointly, and if their interests are several, then severally (*g*). In the case of a joint bond, the right passes to the survivors on the death of one of the obligees, and they alone can enforce the obligation, the representatives of the deceased not being entitled to sue (*h*). If the bond is several, the representatives of a deceased obligee may sue, or join with the survivors in suing, thereon (*i*). A bond executed after December 31, 1881, with two or more jointly, to pay money or do any other act, is deemed, in the absence of the expression of an intention to the contrary, to include an obligation to pay the money or do the act to or for the benefit of the survivor or survivors, and of any other person to whom the right to sue on the bond devolves (*k*); and if the money is expressed to be owing to two or more on a joint account, it is deemed to remain money belonging to them on joint account, as between them and the obligor, so as to entitle the survivor or survivors, or the representatives of the last survivor, to give a good discharge (*l*).

Joint, several, and joint and several bonds. Two or more obligees.

187. Two or more obligors may be bound jointly, severally, or jointly and severally (*m*). If bound severally, each incurs a separate liability according to the terms of the bond, which will bind his estate and real and personal representatives. If bound jointly only, the obligation devolves upon the survivors on the death of an obligor, and the estate and representatives of a deceased obligor, other than those of the last survivor, are under no liability (*n*). But a bond, though joint in form, and though it would be construed as creating a joint obligation only at law, may in equity, in the administration of the estate of a deceased obligor, be construed as joint and several, especially in the case of a bond given by partners, or in substitution for a pre-existing joint and several liability (*o*). Where the obligors are bound jointly and severally, the real and personal representatives

Two or more obligors.

(*d*) *Hill* v. *Manchester and Salford Waterworks Co.* (1831), 2 B. & Ad. 544.

(*e*) As to actions on joint, and joint and several, bonds, see p. 102, *post*; and as to the discharge of such bonds, see pp. 98, 99, *post*.

(*f*) *Bradburne* v. *Botfield* (1845), 14 M. & W. 559.

(*g*) See *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537; *Haddon* v. *Ayres* (1858), 1 E. & E. 118; *Palmer* v. *Mallet* (1887), 36 Ch. D. 411, C. A.

(*h*) *Martin* v. *Crompe* (1697), 1 Ld. Raym. 340; *Anderson* v. *Martindale* (1801), 1 East, 497.

(*i*) *Withers* v. *Bircham* (1824), 3 B. & C. 254; *Palmer* v. *Sparshott* (1842), 4 Man. & G. 137.

(*k*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 60.

(*l*) *Ibid.*, s. 61.

(*m*) See pp. 80, 88, *ante*.

(*n*) *White* v. *Tyndall* (1888), 13 App. Cas. 263.

(*o*) *Bereaford* v. *Browning* (1675), L. R. 20 Eq. 564; *Lane* v. *Williams* (1693), 2 Vern. 292; *Devcynes* v. *Noble* (1816), 1 Mer. 530; *Primrose* v. *Bromley* (1739), 1 Atk. 88; *Levy* v. *Sale* (1877), 37 L. T. 709; *Sumner* v. *Powell* (1816), 2 Mer. 30; *Richardson* v. *Horton* (1843), 6 Beav. 185.

SECT. 6. **Operation and Incidents.**

of a deceased obligor are liable jointly and severally with the survivors (*p*).

SUB-SECT. 2. - *Performance or Breach of the Condition.*

Condition to be strictly performed.

188. In order to avoid a bond, the condition must be strictly performed, so as to carry out the object and intention of the parties (*q*). If a particular day is named either for the payment of money, or for the performance of any other act, the payment must be made or the act performed on or before the day mentioned (*r*). When the condition is for the payment of money, and no time is mentioned for payment, the money is payable immediately (*s*); and when it is for the performance of any other act, the act must be performed within a reasonable time (*t*).

Demand not necessary.

In neither case is it necessary that there should be any demand for payment or performance (*u*) in the absence of an express stipulation to that effect (*w*).

Default in one of several acts.

189. Where the condition requires payment by instalments or the performance of several acts, the bond will become absolute on default in respect of any one instalment, or in performance of any one of such acts (*x*).

Precedent act of obligee.

190. But where the performance of the condition by the obligor depends on some precedent act on the part of the obligee, the obligation of the obligor does not attach unless and until the precedent act is duly performed (*y*). Thus, in the case of a bond conditioned for the performance of one of two things within a certain time at the election of the obligee, performance is excused unless the obligee makes his election within the time limited (*z*). But when the precedent act has been duly performed, it is not necessary, as a general rule, in order that the liability of the obligor should attach, that he should have notice thereof (*a*).

When impossibility of performance an excuse.

191. Performance of the condition is excused, and the obligor discharged from the bond, if, being possible at the time of the

(*p*) *Burns* v. *Bryan* or *Martin* (1887), 12 App. Cas. 184; *Tippins* v. *Coates* (1853), 18 Beav. 401; *Church* v. *King* (1836), 2 My. & Cr. 220.

(*q*) 2 Wms. Saund. 47 t; *Taylor* v. *Bird* (1750), 1 Wils. 280; *Bigland* v. *Skelton* (1810), 12 East, 436; *Bache* v. *Proctor* (1780), 1 Doug. 382; *Cutler* v. *Southern* (1666), 1 Saund. 116; *Ker* v. *Mitchell* (1786), 2 Chit. 487; *Sparkes* v. *Martindale* (1807), 8 East, 593; *Skinners' Co.* v. *Jones* (1837), 3 Bing. (N. C.) 481; *London, Brighton, and South Coast Rail. Co.* v. *Goodwin* (1849), 3 Exch. 736; *Goad* v. *Empire Printing and Publishing Co., Ltd.* (1888), 52 J. P. 438.

(*r*) *Bigland* v. *Skelton*, *supra*; *Hodgson* v. *Bell* (1797), 7 Term Rep. 97; Com. Dig. tit. Condition, E and G; Bac. Abr. tit. Condition.

(*s*) *Farquhar* v. *Morris* (1797), 7 Term Rep. 124; Shep. Touch. 369; Vin. Abr. tit. Condition, C 6; *Gibbs* v. *Southam* (1834), 5 B. & Ad. 911; and contrast *Carter* v. *Ring* (1813), 3 Camp. 459.

(*t*) Co. Litt. 208 a, b.

(*u*) *Gibbs* v. *Southam*, *supra*; Vin. Abr. tit. Condition, C 6.

(*w*) *Carter* v. *Ring*, *supra*; *Capp* v. *Lancaster* (1597), Cro. Eliz. 548; *Fitzhugh* v. *Dennington* (1704), 2 Salk. 585.

(*x*) *Friar* v. *Grey* (1850), 15 Q. B. 891, 910; *Coates* v. *Hewit* (1744), 1 Wils. 50

(*y*) 2 Wms. Saund. 107 b, note 3; Vin. Abr. tit. Condition, V c; *Buckland* v. *Barton* (1793), 2 Hy. Bl. 136; *Campbell* v. *French* (1732), 6 Term Rep. 200.

(*z*) Bac. Abr. tit. Condition, P 3.

(*a*) *Ker* v. *Mitchell* (1786), 2 Chit. 487; *Cutler* v. *Southern*, *supra*; Com. Dig. tit. Condition, 975.

execution of the bond, performance has become impossible by the act of God (*b*), the act of the legislature (*c*), or the act of the obligee (*d*). So, if the condition is in the disjunctive, and gives the obligor the option of performing one or other of two things, the bond will generally be discharged, if, both being possible at the time of the execution of the bond, the performance of either of them becomes impossible by the act of God (*e*), or the act of the obligee (*f*); though, in the case of discharge by the act of God, the question probably depends in each case on the intention of the parties (*g*). But the obligor is not excused by performance becoming impossible where the impossibility is caused by his own act or neglect (*h*).

SUB-SECT. 3.—*Amount recoverable on Breach of Condition.*

Limited to amount of penalty and costs.

192. The amount recoverable on a bond forfeited by breach of the condition is in all cases limited, both at law and in equity, to the amount of the penalty fixed by the obligatory part, with costs, even where the principal and interest payable according to the condition, or the damages sustained by the breach, exceed that sum (*i*). If, however, a judgment is recovered on the bond, it will carry interest until satisfied, though the amount of the judgment, with interest, may exceed the amount of the penalty (*j*). And where interest has been paid as interest, and has been applied as such, the amount ultimately payable may exceed the amount of the penalty, provided the principal and interest payable at any one time never exceeds that amount (*k*).

Where the sum named in the obligatory part is not a penalty, as in the case of a bond for a specified sum, conditioned for payment of the same sum with interest, the rule that the amount recoverable is limited to the sum named in the obligatory part does not apply (*l*).

(*b*) Bac. Abr. tit. Condition, N and Q; *Thomas* v. *Howell* (1692), 1 Salk. 170; Shep. Touch. 372; Vin. Abr. tit. Condition, G c.; Co. Litt. 206 a; Com. Dig. tit. Condition, D 1; *Brown* v. *London Corporation* (1861), 9 C. B. (N. S.) 726, *per* WILLIAMS, J., at p. 747, affirmed 13 C. B. (N. S.) 828; *Leitrim (Earl)* v. *Stewart* (1870), I. R. 5 C. L. 27.

(*c*) *Davis* v. *Cary* (1850), 15 Q. B. 418.

(*d*) Co. Litt. 206 b; Vin. Abr. tit. Obligation, R 2—4; Com. Dig. tit. Condition, K 2, L 5; *Duvergier* v. *Fellowes* (1828), 2 Moo. & P. 384, 411.

(*e*) *Laughter's Case* (1595), 5 Co. Rep 21 b; *Leitrim (Earl)* v. *Stewart*, *supra*.

(*f*) *Duvergier* v. *Fellowes*, *supra*; Com. Dig. tit. Obligation, K. 2.

(*g*) *Barkworth* v. *Young* (1856), 4 Drew. 1, 25. See further, *Anon.* (1688), 1 Salk. 170.

(*h*) *Bigland* v. *Skelton* (1810), 12 East, 436. Compare *Beswick* v. *Swindells* (1834), 3 Nev. & M. (K. B.) 159, 5 Nev. & M. (K. B.) 378.

(*i*) *Hatton* v. *Harris*, [1892] A. C. 547; *Wilde* v. *Clarkson* (1795), 6 Term Rep. 303; *Clarke* v. *Seton* (1801), 6 Ves. 411; *Hughes* v. *Wynne* (1832), 1 My. & K. 20; *Mackworth* v. *Thomas* (1800), 5 Ves. 329; *Brangwin* v. *Perrot* (1777), 2 Wm. Bl. 1190; *White* v. *Sealy* (1778), 1 Doug. 49; *Shutt* v. *Procter* (1816), 2 Marsh. 226. The rule that no more can be recovered than the penalty and costs is a general rule applicable to all bonds, and replevin bonds are no exception to the rule (*Branscombe* v. *Scarbrough* (1844), 6 Q. B. 13); see title DISTRESS AND REPLEVIN. In *Grant* v. *Grant* (1830), 3 Sim. 340, a decree was made in equity for the full payment of principal and interest though it exceeded the penalty of the bond, on the ground that the obligor had prevented the obligee from recovering by vexatious proceedings, but such a case could hardly occur nowadays. And see *Mathews* v. *Keble* (1868), 3 Ch. App. 691. *Lonsdale (Lord)* v. *Church* (1788), 2 Term Rep. 388, must be considered overruled.

(*j*) *M'Clure* v. *Dunkin* (1801), 1 East, 436.

(*k*) *Knipe* v. *Blair*, [1900] 1 I. R. 372.

(*l*) *Francis* v. *Wilson* (1824), 1 Ry. & M. 105.

SECT. 6. Operation and Incidents.

Common money bonds under statute of Anne.

193. Where an action is brought on any bond containing a condition making it void on the payment of a lesser sum, the payment of the principal and interest due by the condition, though not strictly in accordance therewith, may be pleaded as effectually as if the payment had been according to the condition (*m*); and if at any time pending any such action the defendant brings into court the amount of the principal and interest due and costs, the money so brought in must be taken in full satisfaction (*n*). The effect of these provisions is that, in the case of a money bond with a penalty, no sum can be recovered in excess of the principal and interest payable according to the condition (*o*).

Assigning breaches of bond for performance of agreement under statute of William III.

194. In an action on a bond conditioned for the performance of a covenant or agreement in any indenture, deed, or writing, the plaintiff must (*p*) assign a breach, or as many breaches as he thinks fit, of the condition; and though he is entitled, on proving a breach of the condition, to judgment for the full amount of the penalty fixed by the bond, he can only actually recover by execution the amount of the damages sustained by the breach or breaches assigned (*q*), the judgment remaining in force as security for such damages as may be sustained by any further breach (*r*).

Limitation of amount recoverable to damage sustained.

The amount actually recoverable under any bond within this enactment is therefore limited to the damages, not exceeding the penalty (*s*), sustained by the non-performance of the condition (*t*).

Bonds within the statutes of Anne and William III. respectively.

195. The only bonds within the statute of Anne are bonds conditioned for the payment of a lesser sum at a specified time. Bonds conditioned for the payment of a specified sum by instalments (*u*), or for payment of an annuity (*w*), are within the statute of William III., and not within the statute of Anne, and on default in payment of an instalment breaches must accordingly be assigned. A *post obit* bond, when the money becomes payable, is within the statute of Anne (*x*). A bond conditioned for the payment of a principal sum at a future date, with interest payable periodically in the meantime, is within the statute of William III. until the principal sum has become payable, and if an action is brought before that time on default in payment of interest, breaches must be assigned (*a*); but

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(*m*) Stat. 4 & 5 Anne, c. 16, s. 12. Part payment may also be pleaded (*Husband* v. *Davis* (1851), 10 C. B. 645).

(*n*) Stat. 4 & 5 Anne, c. 16, s. 13.

(*o*) See *England* v. *Watson* (1842), 9 M. & W. 333.

(*p*) Stat. 8 & 9 Will. 3, c. 11, s. 8. Though the word "may" is used in the statute, it is compulsory (*Rolfe* v. *Rosewell* (1794), 5 Term Rep. 538; *Friar* v. *Grey* (1850), 15 Q. B. 891, 910; *Walcot* v. *Goulding* (1799), 8 Term Rep. 126). But it is not necessary in any case for the Crown to assign breaches (*R.* v. *Peto* (1826), 1 Y. & J. 169, 171).

(*q*) *Hardy* v. *Bern* (1794), 5 Term Rep. 636.

(*r*) *Judd* v. *Evans* (1795), 6 Term Rep. 399. See p. 102, *post*.

(*s*) *Mackworth* v. *Thomas* (1800), 5 Ves. 329.

(*t*) *Hardy* v. *Bern*, *supra*; *Harrup* v. *Armitage* (1823), 12 Price, 441.

(*u*) *Willoughby* v. *Swinton* (1805), 6 East, 550; *Murray* v. *Stair* (*Earl*) (1823), 2 B. & C. 82, 90; *Preston* v. *Dania* (1872), L. R. 8 Exch. 19.

(*w*) *Collins* v. *Collins* (1759), 2 Burr. 820; *Walcot* v. *Goulding*, *supra*; *Mackworth* v. *Thomas*, *supra*.

(*x*) *Smith* v. *Bond* (1833), 10 Bing. 125, at p. 132.

(*a*) *Wheelhouse* v. *Ladbrooke* (1858), 3 H. & N. 291 (there is no power in such

after the date fixed for payment of the principal the statute of Anne applies, and it is not necessary to assign breaches (*b*).

An arbitration bond conditioned for the performance of the award is within the statute of William III., and breaches must be assigned, though the damages may be ascertained by the award (*c*). And where a bond was conditioned for the payment of a sum certain, but by a deed of the same date it was agreed that the obligee should be entitled to enter up judgment when he thought fit, it was held that the bond was substantially for performance of an agreement, and that breaches must be assigned (*d*).

When agreement to pay interest implied.

196. When a bond is conditioned for the payment of a lesser sum of money, interest is recoverable though not expressly reserved, an agreement for payment of interest being implied; and if no date for payment is specified, interest runs from the date of the bond (*e*). But this implication only arises in the case of a penalty bond, that is, where the sum named in the obligatory part is in excess of that named in the condition. A bond in a specified sum conditioned for the payment of the same sum, without interest being mentioned, is, in effect, a single bond, and the amount recoverable is the principal sum without interest (*f*).

Penalty bonds only within the statutes.

197. Neither the statute of Anne nor the statute of William III. has any application to bonds in which the sum named in the obligatory part is not in the nature of a penalty.

Instalments.

Where a bond is conditioned for the payment of a sum of money by stated instalments, and it is provided that in default of payment of any one instalment the whole sum remaining unpaid shall become payable, the acceleration of the payment of the remaining instalments is not a penalty, and on default in respect of any instalment the entire sum may be claimed (*g*).

Agreement to accept part payment.

And if a creditor agrees to accept part payment of a debt in full discharge, and takes a bond for payment of the full amount conditioned to be void on part payment, whether in one sum or by instalments, the full amount of the debt can be claimed in the event of a breach of the condition, though only in respect of one instalment, the amount in the obligatory part not being a penalty, but the sum actually due (*h*).

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a case to stay proceedings on payment of the interest due and costs, the plaintiff being entitled to judgment for the penalty as security for the debt under the statute of William III.); *Hodgkinson* v. *Wyatt* (1843), 1 Dow. & L. 668; *Judd* v. *Evans* (1795), 6 Term Rep. 399; *Gowlett* v. *Hanforth* (1774), 2 Wm. Bl. 958; *Tighe* v. *Crafter* (1810), 2 Taunt. 387; *Skinners' Co.* v. *Jones* (1837), 4 Scott, 271.

(*b*) *Roakes* v. *Manser* (1845), 1 C. B. 531; *Smith* v. *Bond* (1833), 10 Bing. 125; *James* v. *Thomas* (1833), 5 B. & Ad. 40; and see *Shaw* v. *Worcester* (*Marquis*) (1830), 6 Bing. 385.

(*c*) *Welch* v. *Ireland* (1805), 6 East, 613.

(*d*) *Hurst* v. *Jennings* (1826), 5 B. & C. 650.

(*e*) *Re Dixon*, [1900] 2 Ch. 561, C. A.; *Farquhar* v. *Morris* (1797), 7 Term Rep. 124.

(*f*) *Hogan* v. *Page* (1798), 1 Bos. & P. 337.

(*g*) *Protector Loan Co.* v. *Grice* (1880), 5 Q. B. D. 592, C. A.; *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685.

(*h*) *Re Neil*, *Ex parte Barden* (1881), 16 Ch. D. 675; *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1.

SECT. 6. Operation and Incidents.

So, if a bond is conditioned for the payment of a principal sum at a future day, and interest at stated periods in the meantime, the principal to become payable immediately in default of the regular payment of interest, the acceleration in the time for payment of the principal is not in the nature of a penalty, and on a breach in respect of the payment of interest the whole sum due for principal and interest may be recovered (*i*).

Principal becoming due on default in payment of interest.

Distinction between penalty and liquidated damages.

198. Where a bond is conditioned for the performance of an act or acts other than the payment of money, the question whether the sum named in the obligatory part is to be deemed a penalty or liquidated damages depends on the circumstances of the particular case and the presumed intention of the parties (*k*). Where it is in the nature of liquidated damages, the statute of William III. does not apply, and on breach of the condition the sum named in the obligatory part is recoverable (*l*). The principles by which the courts are guided in determining whether the amount agreed to be paid on a breach is a penalty or liquidated damages are discussed in detail in another part of this work (*m*). The following is a very brief summary of some of the leading rules:—

Rules for ascertaining whether penalty or liquidated damages.

(1) The fact that the sum is described as a penalty or as liquidated damages is not conclusive. Indeed, it is almost immaterial (*n*).

(2) Where the condition depends upon the performance of one act or the happening of one event only, and the sum in which the obligor is bound is not largely in excess of the possible damage which may be sustained by the breach, it is *primâ facie* liquidated damages (*o*).

(3) Where the amount of the damage sustained by breach of the condition must necessarily be small in proportion to the sum in which the obligor is bound, the sum is a penalty (*p*).

(4) Where the condition is for the performance of several acts, or happening of several events, some of which are of serious and others of trifling or less serious importance, the sum in the obligatory part of the bond is a penalty (*q*).

(*i*) *Goad* v. *Empire Printing and Publishing Co., Ltd.* (1888), 52 J. P. 438.

(*k*) *Wallis* v. *Smith* (1882), 21 Ch. D. 243; *Willson* v. *Love*, [1896] 1 Q. B. 626, C. A.

(*l*) *Strickland* v. *Williams*, [1899] 1 Q. B. 382, C. A.

(*m*) See title DAMAGES.

(*n*) *Kemble* v. *Farren* (1829), 6 Bing. 141; *Re White and Arthur* (1901), 84 L. T. 594; *Wallis* v. *Smith*, *supra*; *Willson* v. *Love*, *supra*; *Law* v. *Redditch Local Board*, [1892] 1 Q. B. 127, C. A.; *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda* (*Don José Ramos*), [1905] A. C. 6, *per* Lord HALSBURY, at p. 9; *Public Works Commissioners* v. *Hill*, [1906] A. C. 368, *per* Lord DUNEDIN, at p. 375. But see *Diestal* v. *Stevenson*, [1906] 2 K. B. 345, *per* KENNEDY, J., at p. 350.

(*o*) *Strickland* v. *Williams*, *supra*, where the condition was obedience to an injunction to refrain from trespassing on the obligee's land, and the sum in which the obligor was bound was £100; *Law* v. *Redditch Local Board*, *supra*; [illegible] *Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda* (*Don José* [illegible]), *supra*; *Atkyns* v. *Kinnier* (1850), 4 Exch. 776.

(*p*) *Wallis* v. *Smith*, *supra*; *Law* v. *Redditch Local Board*, *supra*; *Willson* v. *Love*, *supra*; *Elphinstone* (*Lord*) v. *Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332.

[illegible] v. *Monkland Iron and Coal Co.*, *supra*; *Willson* v. *Love*,

SECT. 7.—*Assignment.*

SECT. 7. Assignment.

199. The obligation created by a bond being a legal chose in action, any absolute assignment thereof not purporting to be by way of charge only, of which express notice in writing is given to the obligor, is effectual (subject to all equities which would have been entitled to priority over the right of the assignor (*r*)) to transfer the legal right thereto, and all remedies for the same, as from the date of the notice (*s*). Assignment at law.

In equity the obligation may be assigned by a verbal agreement for valuable consideration, subject to all equities existing at the time of notice of the assignment being given to the obligor (*t*). In equity.

Although, as a general rule, the assignee of a bond takes subject to all equities, and acquires no better right than the assignor, the obligor may be estopped by his conduct from denying the validity of the bond as against an assignee for value without notice, or from setting up other defences which would have been available against the assignor (*u*). Estoppel as against assignee.

SECT. 8.—*Discharge of the Obligation.*

200. The obligation of a bond may be discharged in any one of six ways:—

(1) By due performance of the condition, or, in certain cases, by performance thereof becoming impossible (*a*). Performance.

(2) By payment, after breach of the condition, of the amount recoverable, in the case of a bond within the statute of Anne (*b*). Payment.

(3) By accord and satisfaction (*c*). Since the Judicature Acts an accord and satisfaction, though by parol, and whether before or after breach, may be pleaded to a claim on a bond (*c*). Accord and satisfaction.

(4) By release or covenant not to sue (*d*). Release.

[1896] 1 Q. B. 626, C. A.; *Wallis* v. *Smith* (1882), 21 Ch. D. 243; *Kemble* v. *Farren* (1829), 6 Bing. 141; *Law* v. *Redditch Local Board*, [1892] 1 Q. B. 127, C. A.

(*r*) See *Graham* v. *Johnson* (1869), L. R. 8 Eq. 36, where, the obligor being entitled, as against the obligee, to cancellation of the bond, it was held that an assignee for valuable consideration was in no better position and could not enforce the bond as against the obligor; *Payne* v. *Mortimer* (1859), 4 De G. & J. 447. See also *Glasse* v. *Marshall* (1845), 15 Sim. 71; *Chambers* v. *Manchester and Milford Rail. Co.* (1864), 5 B. & S. 588, *per* BLACKBURN, J., at p. 611; *Re Cork and Youghal Rail. Co.* (1869), 4 Ch. App. 748, *per* Lord HATHERLEY, at p. 760.

(*s*) Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6). And see *Vertue* v. *East Anglian Railways Co.* (1850), 5 Exch. 280, as to the transfer of bonds under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16).

(*t*) For assignments generally, including equitable assignments, see title CHOSES IN ACTION.

(*u*) *Re South Essex Estuary Co., Ex parte Chorley* (1870), L. R. 11 Eq. 157; *Re Hercules Insurance Co., Brunton's Claim* (1874), L. R. 19 Eq. 302, cases where companies were estopped from denying the validity of bonds given by them in the hands of assignees for value without notice; *Dickson* v. *Swansea Vale Rail. Co.* (1868), L. R. 4 Q. B. 44. See also *Hawker* v. *Hallewell* (1850), 25 L. J. (CH.) 558.

(*a*) See pp. 92, 93, *ante*.

(*b*) 4 Anne, c. 16, s. 12; and see p. 94, *ante*.

(*c*) *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537. See further, title CONTRACT.

(*d*) See titles CONTRACT; GUARANTEE; and *Major* v. *Major* (1852), 1 Drew. 165;

SECT. 8. **Discharge of the Obligation.**

(5) By cancellation, by or with the consent of the obligee, with the intention to cancel the bond (*e*). But a cancellation by the obligor or a stranger without the consent of the obligee, or a cancellation by mistake or accident, without the intention of cancelling, will not affect the obligation (*f*). If, however, a bond is produced by the obligor in a cancelled state, it is presumed to have been cancelled *animo cancellandi* by or with the consent of the obligee (*g*).

Cancellation.

Alteration.

(6) By a material alteration by the obligee after execution (*h*). An immaterial alteration will not affect the validity of the bond (*i*); nor will an alteration by the obligor, because a person is not permitted to take advantage of his own wrong (*k*). Alterations made before the bond is completely executed, with the assent of all the parties, do not affect its validity (*l*); and blanks may be filled up, even after execution, by consent of all the parties (*m*). But if, after a bond is executed by some only of several obligors, a material alteration is made without their consent, they are discharged, though they may subsequently assent to the alteration and partly perform the condition of the bond (*n*).

Where two or more obligees.

201. A bond given to two or more obligees jointly may be discharged by a payment to (*o*), or accord and satisfaction with (*p*), any one of them; and, in the absence of fraud (*q*), a release by one constitutes a good defence against them all (*r*), though it is otherwise

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Shore v. *Shore* (1847), 2 Ph. 378; *Hodges* v. *Smith* (1599), Cro. Eliz. 623. But an intention to release is not sufficient (*Jorden* v. *Money* (1854), 5 H. L. Cas. 185; *Re Holmes* (1861), 5 L. T. 382).

(*e*) 3 Prest. Abst. 103; *Seaton* v. *Henson* (1678), 2 Lev. 220. See further, title DEEDS AND OTHER INSTRUMENTS.

(*f*) *Ex parte Smith* (1843), 3 Mont. D. & De G. 378; *Raper* v. *Birkbeck* (1812), 15 East, 17; *Wilkinson* v. *Johnston* (1824), 3 B. & C. 428; *Bolton* v. *Carlisle* (*Bishop*) (1793), 2 Hy. Bl. 259; *Vanhoven* v. *Giesque* (1706), 4 Bro. Parl. Cas. 622.

(*g*) *Alsager* v. *Close* (1842), 10 M. & W. 576; and compare *Re Dixon*, [1900] 2 Ch. 561, C. A.

(*h*) *Pigot's Case* (1615), 11 Co. Rep. 26 b. See further, title DEEDS AND OTHER INSTRUMENTS.

(*i*) Shep. Touch. 69; *Waugh* v. *Bussell* (1814), 5 Taunt. 707.

(*k*) Shep. Touch. 69.

(*l*) *Zouch* v. *Clay* (1671), 1 Vent. 185; *Matson* v. *Booth* (1816), 5 M. & S. 223.

(*m*) *Hudson* v. *Revett* (1829), 2 Moo. & P. 663, 692; *Texira* v. *Evans*, cited in *Master* v. *Miller* (1793), 1 Anst. 225, Ex. Ch., per Wilson, J., at p. 229.

(*n*) *Adams* v. *Bateson* (1829), 6 Bing. 110. In *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75, a bond by the terms of which four sureties jointly and severally bound themselves, the liability of two of them being limited to £50 each, and of the other two to £25 each, having been executed by three of them, the fourth, whose liability was limited to £50, executed it, adding to his signature "£25 only"; and the obligee accepted the bond so executed without objection. It was held that the first three signatories were discharged by the alteration, and that the fourth was also discharged, because he had executed it as a joint and several, and not as a several, bond.

(*o*) *Powell* v. *Brodhurst*, [1901] 2 Ch. 164; *Husband* v. *Davis* (1851), 10 C. B. 645.

(*p*) *Wallace* v. *Kelsall* (1840), 7 M. & W. 264. Compare *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537.

(*q*) *Barker* v. *Richardson* (1827), 1 Y. & J. 362.

(*r*) *Wallace* v. *Kelsall*, *supra*; *Wilkinson* v. *Lindo* (1840), 7 M. & W. 81; *Wild* v. *Williams* (1840), 6 M. & W. 490; *Jones and Matthews* v. *Herbert* (1817), 7 Taunt. 421.

in the case of a covenant not to sue (*s*). In the case of fraud, a release given by one of several joint obligees will in equity be ordered to be delivered up to be cancelled (*t*). And where the interests of the obligees are several, a bond, though joint in form, will be construed as a several bond (*a*), in which case an accord and satisfaction with, or release by, one or more, will not affect the rights of the others (*b*). But in the case of bonds executed after December 31, 1881, if the money is expressed to be owing to two or more on a joint account, it is deemed to remain money belonging to them on joint account as between them and the obligor, and the receipt in writing of the survivors or last survivor, or of the personal representatives of the last survivor, is, unless a contrary intention be expressed in the bond, a good discharge, notwithstanding notice of severance of the joint account (*c*).

SECT. 8. Discharge of the Obligation.

202. A release of one of two or more obligors jointly, and not severally, bound, operates as a release of all in equity as well as at law (*d*). The same rule applies in the case of a joint and several bond if the release is an absolute and formal release (*e*); but if it purports to be a release of the particular obligor only, or expressly reserves the right to sue the others, it will not operate to discharge them, unless their right of contribution is taken away or injuriously affected by the release (*f*).

Where two or more obligors. Release.

A covenant not to sue one or some of two or more joint, or joint and several, obligors, does not operate to discharge the other or others (*g*).

Covenant not to sue.

If the seal of one of two or more obligors bound jointly, or jointly and severally, is torn off, by or with the consent of the obligee, *animo cancellandi*, the bond is discharged as regards them all (*h*); but where they are bound severally only, the destruction of the seal of one or some of them does not affect the liability of the others (*i*).

Destruction of seal.

SECT. 9.—*Statute of Limitations.*

203. The remedy by action on a bond is barred after twenty years from the accrual of the right of action (*k*), except in the case

Remedy barred after twenty years.

(*s*) *Walmsley* v. *Cooper* (1839), 11 Ad. & El. 216.
(*t*) *Barker* v. *Richardson* (1827), 1 Y. & J. 362.
(*a*) *Haddon* v. *Ayers* (1858), 1 E. & E. 118; *Withers* v. *Bircham* (1824), 3 B. & C. 254; *Palmer* v. *Sparshott* (1842), 4 Man. & G. 137.
(*b*) *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537, explained in *Powell* v. *Brodhurst*, [1901] 2 Ch. 164. As to cancellation, see *Ex parte Smith* (1843), 3 Mont. D. & De G. 378.
(*c*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 61.
(*d*) *North* v. *Wakefield* (1849), 13 Q. B. 536; *Re Hodgson* (1885), 31 Ch. D. 177, 188, C. A.
(*e*) *North* v. *Wakefield*, *supra*; *Re Wolmershausen* (1890), 62 L. T. 541; *Bower* v. *Swadlin* (1738), 1 Atk. 294.
(*f*) *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755.
(*g*) *Hutton* v. *Eyre* (1815), 6 Taunt. 289; *Dean* v. *Newhall* (1799), 8 Term Rep. 168; *Lacy* v. *Kynaston* (1702), 12 Mod. Rep. 548, 551.
(*h*) *Seaton* v. *Hewson* (1678), 2 Lev. 220; *Bayly* v. *Garford* (1641), March, 125; *Collins* v. *Prosser* (1823), 1 B. & C. 682.
(*i*) *Collins* v. *Prosser*, *supra*.
(*k*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3. See generally, title LIMITATION OF ACTIONS.

SECT. 9. Statute of Limitations.

of a bond given by a mortgagor of land as collateral security for the mortgage debt, when the remedy by action on the bond is barred at the same time as the remedy against the land, that is to say, after twelve years (*l*).

Extension of time.

If, however, at the time when the cause of action accrues, the person entitled to sue is an infant or person of unsound mind, he may sue within twenty years from the removal of the disability; and if at the time of the accrual of the cause of action the person liable to be sued is beyond the seas, he may be sued within twenty years after his return (*m*).

Acknowledgment or part payment.

Moreover, if an acknowledgment is made either by writing signed by the person liable to be sued or his agent, or by part payment (*n*) or part satisfaction on account of any principal or interest then due on the bond, the action may be brought for the amount remaining unpaid within twenty years after the acknowledgment, or in the case of infancy or unsoundness of mind on the part of the person entitled to sue, or absence beyond seas on the part of the person liable to be sued, then within twenty years after the disability has ceased or of the return from beyond the seas, as the case may be (*o*).

When time begins to run.

204. In the case of a conditional bond, time does not begin to run for the purposes of the Statute of Limitations until breach of the condition (*p*); and where the condition is for payment of an annuity or of a principal sum by instalments, or interest at stated times, or for the performance of several acts in succession, a new cause of action arises on each successive breach, unless it is provided that the whole sum shall become due on default in payment of interest or of any one instalment, as the case may be; and an action may be brought in respect of such of the sums as accrued due, or such of the acts as ought to have been performed, within the twenty years preceding the commencement of the proceedings, though more than twenty years may have elapsed since the first or any other breach of the condition (*q*).

Acknowledgment to stranger.

205. It is not necessary, to interrupt or prevent the operation of the statute, that the acknowledgment should be made to the obligee or his agent. It is sufficient if made to a stranger (*r*). And an

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(*l*) *Fearnside* v. *Flint* (1883), 22 Ch. D. 579. This is not so, however, where the bond is given, not by the mortgagor, but by a surety, when the longer period applies (*Re Powers* (1885), 30 Ch. D. 291, C. A.). Moreover, such a bond remains enforceable so long as the mortgage debt is kept alive (*ibid.*; and compare *Re Frisby* (1889), 43 Ch. D. 106, C. A.). See further, titles MORTGAGE; LIMITATION OF ACTIONS.

(*m*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 4, as amended by Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 10.

(*n*) See *Re Dixon*, [1900] 2 Ch. 561, C. A.; *Amos* v. *Smith* (1862), 1 H. & C. 238.

(*o*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 5, as amended by Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 10.

(*p*) *Sanders* v. *Coward* (1846), 15 M. & W. 48; *Re Dixon*, *supra*.

(*q*) *Arnott* v. *Holden* (1852), 18 Q. B. 593; *Blair* v. *Ormond* (1851), 17 Q. B. 423; *Re Dixon*, *supra*; *Amos* v. *Smith*, *supra*.

(*r*) *Moodie* v. *Bannister* (1859), 28 L. J. (CH.) 881; *Forsyth* v. *Bristowe* (1853), 8 Exch. 716.

acknowledgment made after the expiration of the twenty years will operate to revive the obligation (*s*).

Conflict of laws.

206. Where an action is brought in England on a bond executed abroad, the question whether or not the remedy is barred by the operation of a statute of limitations is governed by English law, and not the law of the place where the bond was executed (*t*).

SECT. 10.—*Lost Bonds.*

Action on lost bond.

207. An action may be brought on a lost bond, and the obligation enforced, subject to a proper indemnity being given to the defendant, to the satisfaction of the Court (*a*).

SECT. 11.—*Actions on Bonds.*

Where claim may be by writ specially indorsed.

208. Where the sum named in the obligatory part of a bond is not in the nature of a penalty, as in the case of a single bond, or a bond for payment of a certain sum conditioned for payment of the same sum by instalments the whole to become due on default in respect of any instalment, or a bond for payment of a sum by way of liquidated damages conditioned for the performance of an act in default of which the damages are payable, the claim for the amount of the obligation may be specially indorsed on the writ and proceedings for summary judgment be taken (*b*).

Money bonds under statute of Anne.

In an action also, on a common money bond to which the statute of Anne is applicable (*c*), the claim may be specially indorsed (*d*). The usual and proper course is to indorse the writ with a claim for the actual sum recoverable, that is to say, the sum named in the condition with interest, if the penalty is not exceeded thereby, or for the amount of the penalty if it is less than the amount of principal and interest; but where a writ was specially indorsed with a claim for the penalty, it was held that the indorsement was not invalid, and that judgment might be given for the sum actually due for principal and interest (*e*).

Bonds within statute of William III.

209. In the case of bonds within the statute of William III. (*f*), the writ cannot be specially indorsed (*g*). The plaintiff may indorse it generally either for the amount of the penalty, or as for a claim "upon a bond conditioned" etc., setting out the terms of the

(*s*) *Moodie* v. *Bannister* (1859), 28 L. J. (CH.) 881.

(*t*) *Alliance Bank of Simla* v. *Carey* (1880), 5 C. P. D. 429. See generally, title CONFLICT OF LAWS.

(*a*) See *Atkinson* v. *Leonard* (1791), 3 Bro. Ch. Rep. 218; *East India Co.* v. *Boldam* (1804), 9 Ves. 464.

(*b*) *I.e.*, under R. S. C., Ord. 14; see *ibid.*, Ord. 3, r. 6; *Strickland* v. *Williams*, [1899] 1 Q. B. 382, C. A.; *Goad* v. *Empire Printing and Publishing Co., Ltd.* (1888), 52 J. P. 438; and see pp. 93 *et seq.*, *ante*. See further, title PRACTICE AND PROCEDURE.

(*c*) See pp. 93, 94, *ante*.

(*d*) *Gerrard* v. *Clowes*, [1892] 2 Q. B. 11; *Re Dixon*, [1900] 2 Ch. 561, C. A.

(*e*) *Gerrard* v. *Clowes*, *supra*.

(*f*) See pp. 94, 95, *ante*.

(*g*) *Tuther* v. *Carulampi* (1888), 21 Q. B. D. 414 (a bond in a penalty of £500 conditioned for payment of an annuity two instalments of which were unpaid).

SECT. 11. Actions on Bonds.

condition. It is a common course simply to claim damages for the breach of the condition.

Where defendant fails to appear.

If the defendant fails to appear, the plaintiff may at once assign breaches by delivering a suggestion thereof to the defendant or his solicitor, and obtain judgment for the amount of the penalty on proof of service of the writ and default of appearance (*h*). He may not, however, issue execution on the judgment, but must issue a writ of inquiry for the assessment of the damages for the breaches assigned, and execution may only issue for the amount of the damages (*i*).

Where defendant appears.

If the defendant enters an appearance, and pleadings are ordered, the statement of claim must assign the breaches of the condition, and damages for them will be assessed; and though, on proving the breach or breaches, judgment will be given for the penalty, execution can only issue for the amount of the damages (*i*).

Payment into court.

Payment into court by the defendant is admissible to particular breaches only, and not to the whole action (*j*).

Judgment security against further breaches.

The judgment for the penalty remains in force as a security for such damages as may be sustained by further breaches, upon which the plaintiff may have a *scire facias* (*k*), suggesting the further breaches, to show cause why execution should not issue for the damages, to be ascertained by a writ of inquiry (*l*), or the damages may be recovered by an action on the judgment in respect of the further breaches.

Where two or more obligees or obligors.

210. In an action on a bond given to two or more jointly, all the obligees should be joined as plaintiffs (*m*). Similarly where two or more are jointly, and not severally, bound, they should all be joined as defendants (*n*). A judgment, though unsatisfied, against one or some of several joint obligors, who are not also bound

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(*h*) R. S. C., Ord. 13, r. 14. For form of suggestion of breaches, see Chitty's King's Bench Forms, 13th ed., p. 649.

(*i*) *Tuther* v. *Caralampi* (1888), 21 Q. B. D. 414; *Welch* v. *Ireland* (1805), 6 East, 613 (bond conditioned for performance of an award); 8 & 9 Will. 3, c. 11, s. 8; Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 16.

(*j*) R. S. C., Ord. 22, r. 1; *Preston* v. *Dania* (1872), L. R. 8 Exch. 19 (bond conditioned for payment of a lesser sum by instalments).

(*k*) As to *scire facias*, see title CROWN PRACTICE. For form of suggestion of further breaches, see Chitty's King's Bench Forms, 13th ed., p. 654.

(*l*) Stat. 8 & 9 Will. 3, c. 11, s. 8; *Judd* v. *Evans* (1796), 6 Term Rep. 399. The mode of procedure by means of a *scire facias* does not appear to have been abolished; see Chitty's Archbold's Practice, 14th ed., p. 1286; Lindley on Companies, 6th ed., p. 409; Yearly Practice, 1908, p. 102. Possibly leave to proceed on the judgment could now be obtained on a summons in the original action.

(*m*) *Hopkinson* v. *Lee* (1845), 6 Q. B. 964; *Keightley* v. *Watson* (1849), 3 Exch. 716; R. S. C., Ord. 11, r. 6. But if the interest of the obligees is several, one may sue without the other or others (*Haddon* v. *Ayers* (1858), 1 E. & E. 118; *Palmer* v. *Mallet* (1887), 36 Ch. D. 411).

(*n*) See R. S. C., Ord. 16, r. 11, as to the effect of non-joinder. An obligor is entitled as of right to have co-obligors liable jointly, and not severally, with him joined as co-defendants (*Pilley* v. *Robinson* (1887), 20 Q. B. D. 155; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504). In *White* v. *Hancock* (1846), 2 C. B. 830, it was held that where the obligor was expressed to be bound to the obligee in a certain sum to be paid to the obligee or a third person, the obligee was entitled to sue without noticing the third person.

severally, is a bar to any proceedings against the other or others (*o*); except where the judgment is entered in default of appearance (*p*), or in default of delivery of defence (*q*), or where it is given against one or more of the defendants who are refused leave to defend, which is granted to the others (*r*). In the case of a joint and several bond, the obligee may sue any one or more of the obligors at his option (*s*), and an unsatisfied judgment against some of them is no bar to subsequent proceedings against the others (*t*).

SECT. 12.—*Stamp Duties.*

Stamp duties.

211. The stamp duties on bonds are as follows (*u*):—

Money bonds.

(1) Bond (*a*) (other than a marketable security otherwise specially charged (*b*)):—

(a) Being the only, or principal, or primary security for the payment or repayment of money:—

	s.	d.
Not exceeding £10	0	3
Exceeding £10 and not exceeding £25	0	8
„ £25 „ „ £50	1	3
„ £50 „ „ £100	2	6
„ £100 „ „ £150	3	9
„ £150 „ „ £200	5	0
„ £200 „ „ £250	6	3
„ £250 „ „ £300	7	6
„ £300, for every £100 and also for any fractional part of £100 of the amount secured	2	6

(b) Being a collateral, or auxiliary, or additional, or substituted security, or by way of further assurance for the payment or repayment of money, where the principal or primary security is duly stamped:—

For every £100 and also for any fractional part of £100 of the amount secured. . . . . 6*d.*

But not in any case exceeding a duty of 10*s.* (*c*).

(c) Transfer, assignment, or disposition of any such bond, or of any money or stock secured thereby:—

For every £100 and also for any fractional part of £100 of the

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(*o*) *King* v. *Hoare* (1841), 13 M. & W. 494; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504.

(*p*) *Pim* v. *Coyle*, [1903] 2 I. R. 457.

(*q*) *Weall* v. *James* (1893), 68 L. T. 515, C. A.; *Francis Walton & Co.* v. *Topaksyan, Kevorkian, and Marler* (1905), 53 W. R. 657, C. A.

(*r*) R. S. C., Ord. 14, r. 5.

(*s*) R. S. C., Ord. 16, r. 6.

(*t*) *Lechmere* v. *Fletcher* (1833), 1 Cr. & M. 623.

(*u*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I. As to the penalties for not stamping or for delay in stamping, and the persons liable, see *ibid.*, s. 15, and title REVENUE.

(*a*) Including a bond, accompanied with a deposit of title-deeds, for making a mortgage or other security on property therein comprised, and a bond for making redeemable any disposition apparently absolute, but intended only as a security (*ibid.*, s. 86 (1) (c), (d)).

(*b*) As to bonds which are marketable securities, see titles COMPANIES; REVENUE.

(c) Revenue Act, 1903 (3 Edw. 7, c. 46), s. 7.

SECT. 12. Stamp Duties.

amount transferred, assigned, or disponed, exclusive of interest which is not in arrear . . . . . 6*d.*

And also, where any further money is added to the money already secured, the same duty as a principal security for such further money.

(d) Release, discharge, surrender, or renunciation of any such bond, or of the benefit thereof, or of the money thereby secured:—

For every £100 and also for any fractional part of £100 of the total amount or value of the money at any time secured . . . . . 6*d.*

The "amount secured" does not, in the case of a money bond with a penalty, mean the amount of the penalty, but the amount payable under the condition in order to avoid the bond, and it does not include interest, unless the interest is capitalised (*d*).

Annuity bonds.

(2) Bond in relation to any annuity upon the original creation and sale thereof (*e*):—

The same *ad valorem* duty on the amount or value of the consideration for the sale as upon a conveyance or transfer on sale of any property (*f*).

Bond—(a) Being the only, or principal, or primary security for any annuity (except on the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument:—

For a definite and certain period, so that the total amount to be ultimately payable can be ascertained, the same *ad valorem* duty as a bond for such total amount.

For life or any other indefinite period, for every £5 and also for any fractional part of £5 of the annuity or sum periodically payable (*g*). . . . . 2*s.* 6*d.*

(b) Being a collateral, or auxiliary, or additional, or substituted security for any of such purposes when the principal or primary instrument is duly stamped:—

Where the total amount to be ultimately payable can be ascertained, for every £100 and also for any fractional part of £100 of such total amount . . . . . 6*d.*

In any other case, for every £5 and also for any fractional part of £5 of the annuity or sum periodically payable . 6*d.*

(c) Being a contract for payment of a superannuation annuity, that is to say, a deferred annuity secured to any person in consideration of annual premiums payable until the annuitant attains a specified age, and so as to commence on his attaining that age:—

For every £5 and also for any fractional part of £5 of the annuity . . . . . 6*d.*

Excise or customs bonds.

(3) Bond given pursuant to the directions of any Act, or of the Commissioners of Inland Revenue or Commissioners of Customs,

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(*d*) See Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 86; and pp. 93, 94, *ante.*

(*e*) *Ibid.*, s. 60, Sched. I.

(*f*) See title SALE OF LAND.

(*g*) As to the meaning of "sum periodically payable," see *Clifford* v. *Commissioners of Inland Revenue*, [1896] 2 Q. B. 187; *Lewis* v. *Commissioners of Inland Revenue*, [1898] 2 Q. B. 290.

or any of their officers, for or in respect of any of the duties of excise or customs, or for preventing frauds or evasions thereof, or for any other matter or thing relating thereto:—

Where the penalty of the bond does not exceed £150, the same *ad valorem* duty as a bond for the amount of the penalty.

In any other case . . . . . 5*s*.

Exemptions.—(a) Any bond given upon, or in relation to, the receiving or obtaining, or for entitling any person to receive or obtain, any drawback of any excise or customs duty for or in respect of exported goods, wares, or merchandise.

(b) Any bond with reference to the exportation of coal or carriage of coal coastwise for the purpose of the security required by s. 101 of the Customs Consolidation Act, 1876 (*h*), or Sched. IV. to the Finance Act, 1901 (*i*).

Administration bonds.

(4) Bond on obtaining letters of administration. 5*s*.

Exemptions.—(a) Bond given by the widow, child, father, mother, brother, or sister of any common seaman, marine, or soldier dying in the King's service.

(b) Bond given by any person where the estate to be administered does not exceed £100 in value.

Fidelity bonds etc.

(5) Bond of any other kind whatsoever:—

Where the amount limited to be recoverable does not exceed £300, the same ad valorem duty as a bond for the amount limited.

In any other case . . . . . 10*s*.

(*h*) 39 & 40 Vict. c. 36.
(*i*) 1 Edw. 7, c. 7; see Revenue Act, 1902 (3 Edw. 7, c. 46), s. 6.

BOROUGH ENGLISH.

DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

BOROUGHS.

See LOCAL GOVERNMENT.

BOTTOMRY.

See ADMIRALTY; SHIPPING AND NAVIGATION.

BOUNDARIES, FENCES AND PARTY-WALLS.

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Part I.—Delimitation of Boundaries.

SECT. 1.—*In General.*

Definition.

212. A boundary is an imaginary line (*a*) which marks the confines or line of division of two contiguous estates (*b*). The term is also used to denote the physical objects by reference to which the line of division is described as well as the line of division itself. In this sense boundaries have been divided into natural and artificial, according to whether such physical objects have or have not been erected by the agency of man (*c*).

Boundaries, horizontal and vertical.

213. Boundaries are not necessarily confined to the surface where the ownership of the surface and minerals is severed. But where no such severance has taken place, the surface boundary probably carries with it the right to the column of air over the land

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(*a*) *A.-G.* v. *Chambers*, *A.-G.* v. *Rees* (1859), 4 De G. & J. 55, 85; *Wishart* v. *Wyllie* (1853), 1 Macq. 389.

(*b*) An ancient market may exist without metes and bounds (*Gingell* v. *Stepney Borough Council*, [1908] 1 K. B. 115, C. A.).

(*c*) See *Mackenzie* v. *Bankes* (1878), 3 App. Cas. 1324, 1339. As illustrations of natural or physical objects forming or locating boundaries, the following may be mentioned:—waters (*Scratton* v. *Brown* (1825), 4 B. & C. 485; *Bickett* v. *Morris* (1866), L. R. 1 Sc. & Div. 47; *Holford* v. *Bailey* (1849), 13 Q. B. 426); the sea-shore (*A.-G.* v. *Chambers* (1854), 4 De G. M. & G. 206); faults intersecting mines where the property consists of a mine (*Davis* v. *Shepherd* (1866), 1 Ch. App. 410); fences (Woolrych on Fences, p. 281); party-walls (*Matts* v. *Hawkins* (1813), 5 Taunt. 20; *Cubitt* v. *Porter* (1828), 8 B. & C. 257).

up to the sky (*d*), and certainly the soil to the centre of the earth (*e*), on the principle *Cujus est solum, ejus est usque ad cœlum et ad inferos* (*f*). SECT. 1. In General.

214. Whether a boundary is, or is not, included in property which it is described as bounding depends upon the particular circumstances of each case. Thus, in the case of adjoining properties bounded by a hedge and ditch there is no inaccuracy in describing either property as so bounded, though the boundary may be wholly included in one and excluded from the other (*g*). So, too, in the case of land bounded by a highway, private way, or river, a line drawn along the middle of the highway, private way, or river, is as a rule the boundary (*h*), provided that the grantor at the time of the grant owned to the centre, and there is nothing to show a contrary intention (*i*). But where the nature of the object named as a boundary (*e.g.*, a house or land) is such that an independent title thereto would in the natural course of events be made, the boundary object is excluded from the subject-matter of the grant (*j*). How far boundary included property bounded.

215. Boundaries are fixed either (1) by proved acts of the respective owners, or (2) by statutes or by orders of the authorities having jurisdiction, or (3), in the absence of such acts, statutes, or orders, by legal presumption. Modes of fixing boundaries.

SECT. 2.—*Boundaries fixed by Acts of the Parties.*

SUB-SECT. 1.—*By Agreement.*

216. Boundaries may be fixed by an agreement (*k*) made between two or more adjacent owners where their boundaries have become lost or confused. Such an agreement need not be in writing (*l*), and, *à fortiori*, need not be by deed; for, if it be fairly made, the boundaries so settled will be presumed to be the true and ancient limits (*m*), and therefore the agreement is not a conveyance, nor is Mere agreement sufficient.

(*d*) *Corbett* v. *Hill* (1870), L. R. 9 Eq. 671. This proposition has been doubted (*Pickering* v. *Rudd* (1815), 4 Camp. 219, *per* Lord ELLENBOROUGH, at p. 220); but see *Wandsworth Board of Works* v. *United Telephone Co.* (1884), 13 Q. B. D. 904, C. A., *per* BOWEN, L.J., at p. 919, where he said that he would be very loath to depart from it.

(*e*) *Devonshire* (*Duke*) v. *Pattinson* (1887), 20 Q. B. D. 263, C. A., *per* FRY, L.J., at p. 273; *Corbett* v. *Hill*, *supra*.

(*f*) *Solomon* v. *Vintners' Co.* (1859), 4 H. & N. 585, *per* POLLOCK, C.B., at p. 600.

(*g*) *Re Belfast Dock Act* (1867), 1 I. R. Eq. 128, 140.

(*h*) *Lord* v. *Sydney Commissioners* (1859), 12 Moo. P. C. C. 473, 497. See also pp. 120, 122, *post*.

(*i*) *Micklethwait* v. *Newlay Bridge Co.* (1886), 33 Ch. D. 133, 145, C. A.; *Re White's Charities*, [1898] 1 Ch. 659. For exceptions to the rule, see *Ecroyd* v. *Coulthard*, [1898] 2 Ch. 358, C. A.; and pp. 121 *et seq.*, *post*.

(*j*) *Lord* v. *Sydney Commissioners*, *supra*, at p. 497; and see the American

in agreements for the sale of land, see title SALE OF LAND.

(*l*) See *Hetherington* v. *Galt* (1905), 7 F. (Ct. of Sess.) 706, where the mutual boundary was adjusted by verbal agreement between the adjoining owners and marked by a line of trees planted at their joint expense.

(*m*) *Penn* v. *Baltimore* (*Lord*) (1750), 1 Ves. Sen. 444, 448.

SECT. 2. Boundaries fixed by Acts of the Parties.

it an agreement for the alienation of land so as to come within the provisions of the Statute of Frauds (*n*). Moreover, the settlement of boundaries is a mutual consideration sufficient to support a contract not under seal, even where the land is situate out of the jurisdiction (*o*).

SUB-SECT. 2.—*By Assurance.*

Description in deed of conveyance.

217. Boundaries may, and of course should, be fixed by the deed or deeds conveying one or both of the properties concerned. It is always a question for the jury whether a parcel of land is contained in the description of the land conveyed by deed or not (*o*). In a conveyance of land it should be described with the utmost accuracy (*p*), and it is the duty of the grantor to see that this is done, the rule being that the grant shall be construed most strongly against the grantor, except where the grantor is the Crown (*q*).

Mode of description.

The property may be described in any way sufficient to identify it (*r*), but the best method is by area, parish, and county, and, if they can be stated, by well-marked boundaries such as highways and rivers, or, if not, by stating the names of adjacent owners coupled with reference to a plan for the purposes of better identification. It is, however, unsafe to rely exclusively upon a plan, the lines on which are to be taken as a true description of the boundaries of the property conveyed just as if they were contained in the body of the deed (*s*); for the person who prepares the plan may easily make a mistake, which might be irreparable and would at all events necessitate either another deed or judicial rectification.

Effect of inaccuracy.

218. Inaccuracy in a statement of dimensions or in a plan does not vitiate or affect a sufficiently certain definition of the land conveyed, except where the dimensions are an essential part of the description or definition, and not merely a cumulative description (*t*).

Remedies for inaccuracy.

Where by a mistake common to both parties a piece of land not intended to be comprised in the conveyance is delineated on the plan annexed to the conveyance as being part of the property intended to be conveyed, the conveyance will be rectified (*u*); but if the mistake be unilateral the remedy is not rectification, but rescission; and in order to get rescission fraud or misrepresentation amounting to fraud must be proved (*w*).

(*n*) 29 Car. 2, c. 3, s. 4.

(*o*) *Penn* v. *Baltimore* (*Lord*) (1750), 1 Ves. Sen. 444. See title DEEDS AND OTHER INSTRUMENTS.

(*p*) As to the admissibility of extrinsic evidence in cases of ambiguously described boundaries, see p. 139, *post*.

(*q*) *Mellor* v. *Walmesley*, [1905] 2 Ch. 164, C. A. See title DEEDS AND OTHER INSTRUMENTS.

(*r*) *Doe* d. *Roberts* v. *Parry* (1844), 13 M. & W. 356.

(*s*) *Lyle* v. *Richards* (1866), L. R. 1 H. L. 222; *Llewellyn* v. *Jersey* (*Earl*) (1843), 11 M. & W. 183.

(*t*) *Mellor* v. *Walmesley*, *supra*, at p. 174.

(*u*) *Harris* v. *Pepperell* (1867), L. R. 5 Eq. 1, as explained in *May* v. *Platt*, [1900] 1 Ch. 616, *per* FARWELL, J., at p. 623.

(*w*) *May* v. *Platt*, *supra*; *Okill* v. *Whittaker* (1847), 2 Ph. 338. See titles MISREPRESENTATION AND FRAUD; MISTAKE.

If an ordnance officer makes a mistake in drawing a map which is the principal demonstration of the property comprised in a conveyance made under the direction of the court, and the grantee knows that the mistake has been made, and that the deed is expressed to convey more than either of the parties intends, the court may order the deed to be rectified and the grantee to pay the costs of the rectification (*a*).

Mistake known to grantee.

SUB-SECT. 3.—*By Undisturbed Possession.*

Statutes of Limitation.

219. The right to boundaries fixed by agreement or assurance may be lost, and a new boundary may be acquired under the Statutes of Limitation (*b*), by twelve years' undisturbed possession of the land falling between the old and the new boundaries. Thus, where the owner of a hedge and a ditch beyond it has covered in the ditch, and the adjoining owner has erected buildings and planted trees on the site of the ditch more than twelve years before action brought, the boundary will be the hedge, as the former owner of the ditch has discontinued the possession of its site by allowing these acts of adverse dominion; and climbing over the hedge once or twice a year to clip it will not be evidence of the continued possession of the site of the ditch, but only of a right in the nature of an easement (*c*). Similarly, filling up a ditch and sowing and cultivating the site of it together with the rest of the field will be a sufficient dispossession to bring the Statutes of Limitation into operation (*d*).

Discontinuance of possession essential.

220. In order that the statutes may operate, it is not sufficient to prove mere acts of ownership, that is to say, acts which an owner might do. Actual possession on the part of the person claiming under the statute and dispossession on the part of the former owner must be proved, for this reason, that if discontinuance of possession on the part of the former owner has not been proved, his right to bring an action has never arisen, and the statute has never commenced to run against him (*e*). Thus, where a field was bounded by a ditch which had become obliterated, and had been used for more than twenty years as part of the field, and where the owners of the field had always in their leases included the site of such ditch, but there was otherwise no adverse act committed against the owners of the ditch, who were road trustees, it was held that there had been no discontinuance of possession on the part of the owners of the ditch, so as to pass the property to the owner of the field (*f*).

(*a*) *Re Tottenham* (1868), L. R. 2 Eq. 375.

(*b*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), as amended by Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1. See further, title LIMITATION OF ACTIONS.

(*c*) *Marshall* v. *Taylor*, [1895] 1 Ch. 641, C. A.

(*d*) *Norton* v. *London and North Western Rail. Co.* (1879), 13 Ch. D. 268, C. A.

(*e*) *Marshall* v. *Robertson* (1905), 50 Sol. Jo. 75; *Leigh* v. *Jack* (1879), 5 Ex. D. 264; *Littledale* v. *Liverpool College*, [1900] 1 Ch. 19, C. A.; *Philpot* v. *Bath* (1904), 20 T. L. R. 589.

(*f*) *Searby* v. *Tottenham Rail. Co.* (1868), L. R. 5 Eq. 409.

SECT. 2. Boundaries fixed by Acts of the Parties.

Mere non-user on the part of the owner is not sufficient evidence of discontinuance of possession without some other acts of definite adverse possession on the part of the person claiming the land by long possession (*g*).

SECT. 3.—*Boundaries fixed by Statutory or Judicial Authority.*

SUB-SECT. 1.—*By the Board of Agriculture and Fisheries.*

Powers of Board of Agriculture and Fisheries.

221. The Board of Agriculture and Fisheries (*h*), formerly the Land Commissioners, are under the Inclosure Acts, 1845 to 1878, authorised to make orders fixing boundaries in certain cases (*i*).

Where lands inclosed under the Inclosure Acts.

For the purpose of shortening or straightening any boundary fences between land to be inclosed under the Inclosure Acts, 1845 to 1878, and any adjoining lands, the valuer appointed under the Acts may, with the consent in writing of the persons interested in the adjoining lands, set out and determine the boundaries, and, if necessary, draw and define new boundaries, between the lands to be inclosed and such adjoining lands (*j*).

Where lands inconveniently intermixed or divided.

Upon the application in writing of persons interested in parcels of land (not subject to be inclosed under the Inclosure Acts, or subject to be inclosed, but as to which no proceedings for an inclosure are pending) which are so intermixed or divided as to be inconvenient for occupation or cultivation, the Board may make a new division and allotment of the parcels at the expense of the persons signing the application, if it appears that such new division would be beneficial (*k*).

Copyholds intermixed.

Upon the application in writing of persons interested in any copyhold or customary lands which are intermixed or occupied with freeholds or with any copyhold or customary lands of another manor, the Board may, whether such lands are or are not subject to be inclosed and whether any proceedings for an inclosure are pending or not, appoint some person to determine and declare the situation and boundaries of such lands, provided the consent of the lords of the manors of whom such customary or copyhold lands are held be first had to such appointment (*l*). A copy of the award made under this section must be given to the lords of the manors to which it relates, and becomes a part of the court rolls (*m*).

(*g*) *Smith* v. *Lloyd* (1854), 9 Exch. 562.

(*h*) Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2; Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31). For the Board of Agriculture and Fisheries, see generally title AGRICULTURE, Vol. I., p. 297.

(*i*) The powers and duties of completing the general survey, and ascertaining the boundaries of counties, cities, boroughs, towns, parishes, districts and divisions in Great Britain (including the Isle of Man) under the Ordnance Survey Act, 1841 (4 & 5 Vict. c. 30), which were transferred to the Commissioners of Wales by the Survey Act, 1870 (33 Vict. c. 13), are now also vested in the Board of Agriculture and Fisheries (Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2 (1) (c); Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31)). See further, title LOCAL GOVERNMENT.

(*j*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 45.

(*k*) *Ibid.*, s. 148.

(*l*) Inclosure Act, 1846 (9 & 10 Vict. c. 70), s. 6.

(*m*) *Ibid.*, s. 6. As to copyholds generally, see title COPYHOLDS.

SECT. 3. Boundaries fixed by Authority.

The Board has the same power, subject to the same rules as to applications and consents, to appoint some person to set out and determine the boundaries of any leaseholds where they are intermixed with lands of copyhold or customary tenure and cannot be identified, provided the consent of the person who would have been the person interested if the lease had not been granted be obtained (*n*). Leaseholds.

Where an application is made to the Board for the regulation of one part of a common and for the inclosure of the residue, the Board has power to modify the boundaries between the part to be regulated and the residue by means of a provisional order (*o*). Commons.

222. Where any rent or fixed periodical payment issuing out of lands is to be apportioned, and there is any doubt as to the lands charged therewith, the Board must make inquiry and ascertain the identity, extent, and boundaries of the lands so charged (*p*). Apportionment of rent etc.

223. The valuer must draw up and engross under the direction of the Board any award made in the matter of an inclosure and describe the boundaries which have been ascertained and set out, and must also, unless the Board dispenses with the necessity therefor (*q*), annex a map to the engrossment (*a*). Awards must be confirmed by the Board under its seal (*b*), and, after being so confirmed, are conclusive evidence that all directions in relation thereto have been duly obeyed, and are binding upon all persons whomsoever (*c*), but are not conclusive evidence of the boundaries antecedently to the determination (*d*). Making and confirming of award.

The Board has power to correct any error or to supply any omission, whether fraudulent or otherwise, which may appear after confirmation in any award; and all expenses in connection with the correction must be borne by the person requiring it (*e*). Correction of award.

224. Where a question relating to the boundaries of lands hinders the making or execution of an agreement under the Tithe Commutation Act, 1836 (*f*), the landowners concerned may submit the question to reference, by any writing under their hands containing an agreement that such submission shall be made a rule of Court. The decision of the arbitrator is, for the purposes of the Act, conclusive. But the submission of persons having an estate less than a fee simple or fee tail does not bind persons entitled in reversion, Tithe commutation.

(*n*) Inclosure Act, 1846 (9 & 10 Vict. c. 70), s. 8.

(*o*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 2. As to commons generally, see title COMMONS.

(*p*) Inclosure Act, 1854 (17 & 18 Vict. c. 97), s. 10. As to apportionment generally, see title RENT-CHARGES AND ANNUITIES.

(*q*) Inclosure Act, 1859 (22 & 23 Vict. c. 43), s. 14.

(*a*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 101.

(*b*) *Ibid.*

(*c*) *Ibid.*, s. 105.

(*d*) Compare *R.* v. *St. Mary* (*Inhabitants*) (1821), 4 B. & Ald 462.

(*e*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 29.

(*f*) 6 & 7 Will. 4, c. 71, s. 24. This provision applies only to private estates, not to parishes (*Re Ystradgunlais Commutation* (1844), 8 Q. B. 52). As to tithe commutation generally, see title ECCLESIASTICAL LAW.

SECT. 3. **Boundaries fixed by Authority.**

remainder, or expectancy, without the sanction of the Board of Agriculture and Fisheries (*g*), who may direct such persons or any others interested in the question to be made parties to the reference.

Generally.

The Board is also empowered to settle disputes relating to the boundary of any lands whereby the making of any award under the Act is hindered (*h*); and the award, when made and confirmed by the Board, is binding on all parties (*i*).

Award under private Inclosure Act.

225. Where an award under a private Inclosure Act for inclosing and dividing lands of a manor describes a plot of land as being bounded on one side by a river, the boundary of the plot will be the near edge of the river and not the *medium filum*, if the river bed did not in fact form part of the lands which the Commissioners were authorised to allot (*j*).

SUB-SECT. 2.—*Under the Copyhold Act*, 1894.

Definition of boundaries on enfranchisement.

226. On an enfranchisement of copyhold or customary land, if it appears that the land is not defined on the court rolls by a plan, the valuers appointed under the Act by the Board of Agriculture and Fisheries (*k*) must, if requested in writing by the lord or the tenant, define the boundaries by means of a plan (*l*). Where, however, it appears, either by the court rolls or otherwise, that the boundaries have been treated for more than fifty years as intermixed with the boundaries of other lands and as being incapable of definition, then no plan can be made except by agreement between the lord and the tenant (*m*).

Where, after the appointment of valuers, there is any doubt as to the identity of any land, the lord or tenant may apply to the Board to define the boundaries of the land for the purposes of enfranchisement, and the Board must ascertain and define the boundaries in such manner as they think proper (*n*).

SUB-SECT. 3.—*Under the Land Transfer Acts*, 1875 *and* 1897.

Requirements for registration.

227. Land registered under the Land Transfer Act, 1875 (*o*), was required before 1898 to be described in such manner as the registrar thought best calculated to secure accuracy, but such description was not to be conclusive as to the boundaries or extent of the

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(*g*) The Board of Agriculture and Fisheries now exercises the powers of the Tithe Commissioners (Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31); Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30)).

(*h*) Tithe Commutation Act, 1836 (6 & 7 Will. 4, c. 71), ss. 45, 46. See *Girdlestone* v. *Stanley* (1839), 3 Y. & C. (EX.) 421.

(*i*) Tithe Commutation Act, 1836 (6 & 7 Will. 4, c. 71), s. 52.

(*j*) *Ecroyd* v. *Coulthard*, [1898] 2 Ch. 358, C. A.; *Hough* v. *Clark and Hull* (1907), 23 T. L. R. 682.

(*k*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 5. As to the enfranchisement of copyholds generally, see title COPYHOLDS.

(*l*) *Ibid.*, s. 52 (2).

(*m*) *Ibid.*, repealing and substantially re-enacting Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 42.

(*n*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 52 (3).

(*o*) 38 & 39 Vict. c. 87. As to land registration generally, see titles REAL PROPERTY AND CHATTELS REAL, SALE OF LAND.

registered land (*p*). These provisions were repealed in 1897 (*q*), and such land must now be described by means of the ordnance map with such verbal particulars as the applicant may require and the registrar or court may approve, regard being had to the ready identification of parcels, correct description of boundaries, and, so far as may be, uniformity of practice (*a*).

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If, however, it be desired to register the precise position of boundaries of any lands or parts thereof, notice of the intention to do so must be given to the owners and occupiers of the adjoining lands, with such plan or extract from the proposed description of the land as may be necessary to show clearly the fixed boundary proposed to be registered (*b*), and when the position and description of the boundaries have been thus determined, the necessary particulars must be added to the filed plan or general map and a note made in the property register that the boundaries have been fixed. The plan is then to be deemed to define accurately the fixed boundaries (*c*). In other cases the filed plan or general map will not determine the exact line of the boundary (*d*), notwithstanding that part or the whole of a wall, fence, road, stream, or other boundary is expressly included in or excluded from the title, or that it forms the whole of the land comprised in the title (*e*).

How far description of boundaries for registration purposes conclusive.

228. When the plan or reference to the general map cannot be prepared without a revision of the ordnance map or general map, the officers of the registry must make the necessary revision, if required to do so by the applicant, such revision to be made without charge where registration is compulsory (*f*).

Revision of ordnance map.

Plans and verbal descriptions may be renewed, revised, or corrected at any time upon the application of the registered proprietor, and upon the production of such evidence and the giving of such notices as the registrar may deem necessary. Revision or correction of any part of the general map may also be made at any time on the application of the registered proprietor of the land to which such part relates (*g*).

Revision and correction of plans etc.

Any conflict between the verbal particulars and the plan must be decided by the registrar, and, unless he otherwise directs, the plan must prevail (*h*).

Conflict between plan and verbal description.

SUB-SECT. 4.—*By the Court.*

229. The powers of the old courts of law, as distinguished from courts of equity, to give relief in the matter of disputed

Courts of law.

(*p*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 83 (5).
(*q*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 14 (1).
(*a*) *Ibid.*, s. 14 (2).
(*b*) Land Transfer Rules, 1903, r. 272; Land Transfer Rules, 1907, Schedule.
(*c*) *Ibid.*, 1903, r. 273; 1907, Schedule.
(*d*) Compare *Caton* v. *Hamilton* (1889), 53 J. P. 504.
(*e*) Land Transfer Rules, 1903, r. 274; Land Transfer Rules, 1907, Schedule.
(*f*) *Ibid.*, 1903, r. 277; 1907, Schedule.
(*g*) *Ibid.*, 1903, r. 281; 1907, Schedule.
(*h*) *Ibid.*, 1903, r. 282.

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boundaries, were very inadequate; for they had no power to establish and define old boundaries or to issue a commission to set out the boundaries between lands which had become intermingled and confused, or, in the event of the separation being impossible, to order new boundaries to be set out, or to order old inclosures and bounds to be restored (*i*).

Courts of equity.

230. In consequence of the inadequacy and inconvenience of the remedy at law, the courts of equity assumed jurisdiction in the case of disputed boundaries. At first this jurisdiction was exercised only with the consent of the parties (*k*), but later the necessity for consent was dispensed with where the party seeking relief showed (1) that there was a confusion of boundaries; (2) that he had no adequate remedy at law; (3) that the party against whom he claimed was under some equitable obligation to preserve the identity of boundaries (*l*); and (4) that he had a clear right to part of the land (*m*), or that such right was not disputed (*n*), as for example where a tenant or a copyholder had destroyed or not preserved the boundaries between his own property and that of his lessor or lord; and to the exercise of jurisdiction on such an equitable ground no objection has ever been taken.

(*i*) The only remedy at common law open for a person who claimed lands or any part of lands which had fallen into the hands of another owing to the loss or confusion of boundaries was to bring the ordinary action of ejectment, or, as it was known in the earlier days, trespass *de ejectione firmæ* (*A.-G.* v. *St. Aubyn* (*Sir J.*) (1811), Wight. 167, 230; *Hardcastle* v. *Shafto* (1792), 1 Anst. 184), which was also available for the recovery of the possession of copyholds (*per* BRIAN, C.J., Y. B. 21 Edw. 4, p. 80, pl. 27, and DANBY, C.J., Y. B. 7 Edw. 4, p. 18, pl. 16). Moreover, if a plaintiff recovered in an action of ejectment, and it so happened that the lands which he recovered were confused with lands of other tenure, he was not allowed to take out execution for what he pleased, but his judgment remained inoperative, as it did not set out the lands by metes and bounds, unless and until he had defined and separated the lands recovered from those with which they were confused (*Hardcastle* v. *Shafto*, *supra*). Similarly, at common law the proper mode of recovering rent issuing out of or charged upon lands was distress, and therefore, if the lands out of which the rent issued could not be distinguished, the owner was without remedy; compare *Holder* v. *Chambury* (1734), 3 P. Wms. 256; *Leeds* (*Duke*) v. *Powell* (1748), 1 Ves. Sen. 171; *Bouverie* v. *Prentice* (1778), 1 Bro. Ch. Rep. 200; *Re Herbage Rents*, [1896] 2 Ch. 811. As to the boundaries of lands charged with a rent-charge being confused, see title RENT-CHARGES AND ANNUITIES.

(*k*) See the form of a bill to set out metes and bounds and to perpetuate testimony in the case of *Hunt* v. *White*, set out at p. cxlvii., Vol. I., of "Calendar of the Proceedings in the Court of Chancery *temp.* Queen Elizabeth," published by the Record Commission, 1827, which recites that a previous commission was issued with the consent of the plaintiff's predecessor in title and the defendant.

(*l*) *Speer* v. *Crawter* (1817), 2 Mer. 410; *Harding* v. *Suffolk* (*Countess*) (1633), 1 Rep. Ch. 33.

(*m*) *Chapman* v. *Spencer* (1732), 2 Eq. Cas. Abr. 163; *Loker* v. *Rolle* (1795), 3 Ves. 3; *Chalk* v. *Wyatt* (1810), 3 Mer. 688, *per* Lord ELDON, L.C., at p. 688; *Ely* (*Bishop*) v. *Kenrick* (1732), Bunb. 322; *Webb* v. *Banks* (1739), 2 Eq. Cas. Abr. 164; *Grierson* v. *Eyre* (1804), 9 Ves. 341, 345.

(*n*) *Boteler* v. *Spelman* (1673), Cas. *temp.* Finch, 96; *Peckering* v. *Kimpton* (1630), Toth. 39; *Wintle* v. *Carpenter* (1680), Cas. *temp.* Finch, 462; *Rous* v. *Barker* (1725), 4 Bro. Parl. Cas. 660; *Willis* v. *Parkinson* (1817), 2 Mer. 507; *Clifton* v. *Gwynne* (1822), Taml. 236.

231. It is apprehended that the same principles would still apply, and that a mere confusion of boundaries is not *per se* sufficient ground (except by consent) to support a claim for a commission (*o*), which would only be granted where some equity is shown arising out of the inequitable conduct of one of the parties (*p*).

When commission issued.

In the following cases it has been held that the facts were sufficient to entitle the plaintiff to the equitable relief of a commission: (1) where the defendant ploughed up or otherwise actively confused the boundaries (*q*); (2) where several offices had existed for some time in the hands of one individual, and in consequence the lands allotted to the different offices had become confused (*r*); (3) in the case of a debtor's lands lying intermixed with others the court issued a commission upon the application of a creditor in aid of his writ of *elegit* apparently upon mere proof that the boundaries were confused (*s*).

In respect of land out of which rent issues.

So, although the proper mode of recovering a quit rent is distress, nevertheless there may be special circumstances justifying the interference of equity (*t*). Thus, a commission has been issued to ascertain the boundaries of the lands out of which a rent issues notwithstanding that the plaintiff's title to the rent was disputed, with a direction that it should be determined after the return of the commissioners (*a*). If the rent be small when compared with the costliness of the contemplated proceedings, the court will generally direct an inquiry to be made at chambers to set out the boundaries rather than adopt the more expensive course of issuing a commission (*b*).

Where boundaries cannot be distinguished.

232. As a rule the commission will direct that, in the event of the boundaries being so confused and obliterated that the commissioners are unable to distinguish them, they are to set out new lands of equal value with those the boundaries of which have been confused (*c*).

Costs.

233. There is no settled rule as to the costs of a commission, but the general rule seems to be that each party must bear the costs in proportion to his interest (*d*). If, however, the confusion of

(*o*) *Bute* (*Marquis*) v. *Glamorganshire Canal Co.* (1845), 1 Ph. 681, 684.

(*p*) *Speer* v. *Crawter* (1817), 2 Mer. 410; *Miller* v. *Warmington* (1820), 1 Jac. & W. 484; *O'Hara* v. *Strange* (1847), 11 I. Eq. R. 262; cases cited in *Wake* v. *Conyers* (1759), 1 Eden, 331. Compare *Winterton* v. *Egremont* (*Lord*), cited 2 Anst. 392.

(*q*) See note (*n*), p. 116, *ante*.

(*r*) *Kennedy* v. *Trott* (1849), 6 Moo. P. C. C. 449.

(*s*) *Mullineux* v. *Mullineux* (1616), Toth. 39. See also cases where charity trustees have intermixed charity lands with other lands, thus confusing the boundaries (*A.-G.* v. *Bowyer* (1800), 5 Ves. 300; *S.-G.* v. *Bath Corporation* (1848), 18 L. J. (CH.) 275; *A.-G.* v. *Stephens* (1855), 6 De G. M. & G. 111); and title CHARITIES.

(*t*) *Holder* v. *Chambury* (1734), 3 P. Wms. 256.

(*a*) *Bowman* v. *Yeat* (1681), Cas. in Ch. 145.

(*b*) *Spike* v. *Harding* (1878), 7 Ch. D. 871; *Searle* v. *Cooke* (1890), 43 Ch. D. 519, 527, C. A. No recent example of a commission being granted to ascertain boundaries is to be found in the books.

(*c*) *Ambler's Case* (1770), cited 4 Ves. 184; *Willis* v. *Parkinson* (1817), 2 Mer. 507; *A.-G.* v. *Stephens* (1855), 1 K. & J. 724, 751; *Peckering* v. *Kimpton* (1630), Toth. 39.

(*d*) *Calmady* v. *Calmady* (1795), 2 Ves. 568. But see also *Norris* v. *Le Neve*

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boundaries has arisen owing to the fault of some person under an obligation to preserve them, then the party in default will be ordered to pay all the costs (*e*). On the other hand, where a commission was issued to define the boundaries of two manors belonging to the plaintiff and the defendant, and it appeared after the trial that there was no doubt about the boundaries, and they were in accordance with the contention of the defendant, the plaintiff was directed to pay all the costs (*f*).

When Crown rights involved.

234. In suits against the Crown, where the rights of the Crown are immediately in question, the person seeking relief must apply to the Crown itself by petition of right; but where the rights of the Crown are only incidentally involved in the suit, the Court may require the Attorney-General to be joined as a defendant (*g*).

SECT. 4.—*Boundaries fixed by Legal Presumption.*

SUB-SECT. 1.—*Nature of Presumption.*

Præsumptiones juris.

235. All the presumptions recognised and obtaining in the case of boundaries are *præsumptiones juris* only, and not *præsumptiones juris et de jure* (*h*); that is to say, evidence to rebut the presumptions is always admissible, but, until it be produced, the presumptions necessarily hold (*i*).

SUB-SECT. 2.—*Sea-shore.*

What is the boundary line.

236. The boundary between the sea-shore (*j*) and the adjoining land is, as a general rule, in the absence of usage, the line of the medium high tide between the ordinary spring and neap tides (*k*); but the boundary of land described in a conveyance as bounded by the sea may, in certain circumstances, include the foreshore (*l*) below this line. Thus, user of the foreshore, coupled with the grant of the

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(1744), 3 Atk. 81, where it was decreed that each party should pay one-half of the costs, although the Lord Chancellor seems to have been inclined to order each party to bear the costs in proportion to the extent of his interest but for the great expense attending an inquiry.

(*e*) *Abergavenny* (*Lord*) v. *Thomas* (1739), West *temp.* Hard. 649.

(*f*) *Metcalfe* v. *Beckwith* (1726), 2 P. Wms. 376.

(*g*) *Miller* v. *Warmington* (1820), 1 Jac. & W. 484. See title CROWN PRACTICE.

(*h*) As to presumptions generally, see title EVIDENCE.

(*i*) *Beaufort* (*Duke*) v. *Swansea Corporation* (1849), 3 Exch. 413.

(*j*) The sea-shore consists of the land lying between the high and low water marks, and *primâ facie* the presumption is that it belongs to the Crown not only in the case of the sea itself, but also in the case of the arms of the sea (Hargreaves' Law Tracts, p. 5; *A.-G.* v. *Chambers* (1854), 4 De G. M. & G. 206; *A.-G.* v. *Chambers*, *A.-G.* v. *Rees* (1859), 4 De G. & J. 55. Compare *Mellor* v. *Walmesley*, [1905] 2 Ch. 164, C. A., *per* ROMER, L.J., at p. 176), and in this respect there is no distinction between the sea and a tidal river (*Bridgwater Trustees* v. *Bootle-cum-Linacre* (1866), L. R. 2 Q. B. 4). See title WATERS AND WATERCOURSES. As to the public right of passing and repassing along the shore, see title HIGHWAYS, STREETS AND BRIDGES.

(*k*) *A.-G.* v. *Chambers*, *supra*; *A.-G. of the Straits Settlement* v. *Wemyss* (1888), 13 App. Cas. 192. Compare *Lowe* v. *Govett* (1832), 3 B. & Ad. 863.

(*l*) For a definition of the term "foreshore," see title WATERS AND WATERCOURSES.

adjacent manor, is sufficient evidence from which a title to the foreshore as against the Crown may be inferred (*m*); whilst, on the other hand, a possessory title to the foreshore is sufficient as against a trespasser, without evidence of user sufficient to displace the title of the Crown (*n*). If, therefore, the plaintiff produces some evidence of title to the foreshore, the defendant will be debarred from proving any acts of ownership by the Crown, except such as have been done with the knowledge of the plaintiff; and if it appears that a portion of the beach which is covered with shingle varies according to the state of the wind and the tide, the Crown grant of parcel of the foreshore will be construed liberally against a trespasser, and held to include the whole beach both below and above high water mark (*o*).

Land described as bounded by sea-shore.

Where land is described in a conveyance as situate on the sea-shore, and the exact dimensions of each side of the plot are given as well as the area, and it is stated to be bounded on the south by other land of the grantor, on the east and north by certain roads, and on the west by the sea-shore, and reference is made to a plan which shows the same dimensions as in the description, and it appears that there is a strip of land between the plot and the medium high water mark, the land between the plot and the foreshore does not pass by the conveyance, but the grantor is estopped from saying that the land to the west is anything but foreshore, and the grantee is entitled to free access to the sea from the plot over the strip of land and the foreshore (*p*).

Part of beach opposite to land.

An agreement to let "the flat part of a beach opposite to" the land of a riparian owner will not give him the right to project the boundary lines of his land where it is in the shape of a triangle with the base parallel to the sea-shore, but will only include that part of the beach within straight lines drawn from the end of the base of the triangle and perpendicular to the high water mark (*q*).

Shifting of boundary line.

237. The boundary of land abutting upon the sea-shore may vary from time to time, and in the case of a conveyance of land described as bounded by the sea-shore, then, as the medium high and low water marks shift, so does the boundary of the land shift also; for there may be a movable freehold (*a*). Thus, if the sea gradually and by imperceptible degrees recedes and leaves a quantity of land uncovered, then as the ordinary rules of accretion apply, and the land so gained belongs to the owner of the adjoining land, the boundary will be correspondingly advanced (*b*). Conversely, the

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(*m*) *A.-G.* v. *Jones* (1862), 2 H. & C. 347; *Re Belfast Dock Act* (1867), L. R. 1 Eq. 128; *Beaufort (Duke)* v. *Swansea Corporation* (1849), 3 Exch. 413; *Lord Advocate* v. *Young* (1887), 12 App. Cas. 544. See further, title WATERS AND WATERCOURSES.

(*n*) *Hastings Corporation* v. *Ivall* (1874), L. R. 19 Eq. 558.

(*o*) *Ibid.*

(*p*) *Mellor* v. *Walmesley*, [1905] 2 Ch. 164, C. A.

(*q*) *Crook* v. *Seaford Corporation* (1871), 6 Ch. App. 551.

(*a*) *Scratton* v. *Brown* (1825), 4 B. & C. 485; *Smart & Co.* v. *Suva Town Board*, [1893] A. C. 301.

(*b*) *Mellor* v. *Walmesley*, *supra*, at p. 173; *R.* v. *Yarborough (Lord)* (1824), 3 B. & C. 91; *Doe* d. *Seebkristo* v. *East India Co.* (1856), 10 Moo. P. C. C. 140; *Ford* v. *Lacy* (1861), 7 H. & N. 151, *per* BRAMWELL, B., at p. 156. Compare *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.

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boundary will recede if the sea or an arm of the sea by gradual and imperceptible progress encroach upon the land of a subject; for the land thereby covered with water belongs to the Crown or to the owner of the foreshore, as the case may be (*c*).

These principles do not apply where the change occurs owing to the sudden advance or recession of the sea, or where the boundaries are well known and have not disappeared by reason of the influx of the sea (*d*).

SUB-SECT. 3.—*Lakes.*

Presumption as to boundary line.

238. Where land is said to be bounded by a lake, the boundary line will exclude the bed of the lake, if there are different proprietors on each side, and the titles are such as to show that one has the exclusive possession of the lake, or, even where the titles do not show it, if there is evidence of possession for such a long time as to show either that there has been exclusive possession by one proprietor, or that there has been promiscuous possession (*e*). In the absence of all evidence to the contrary, the question is doubtful. It has been suggested that the boundary line will be drawn along the middle of the lake, the *solum* or *fundus* of the lake being considered to belong in severalty to the several riparian proprietors if more than one, and the space inclosed by lines drawn from the boundaries of each property *usque ad medium filum aquæ* being deemed appurtenant to the land of each proprietor exactly as in the case of a river (*f*). On the other hand, where land is described as bounded by a large inland lake, like Lough Neagh, it has been suggested that the boundary line excludes the bed of the lake, since it is doubtful whether the presumption that the bed and soil of a stream belongs to the riparian proprietors *ad medium filum aquæ* applies in such a case (*g*); for there is no absurdity in supposing that the owner of all the land lying around a large lake should have reserved the soil of the lake; but, on the contrary, various reasons may be suggested why it would be advisable to reserve it (*h*), nor is there any authority for the suggestion sometimes made that the Crown is entitled as of common right to the soil of large inland lakes (*i*).

SUB-SECT. 4.—*Rivers.*

Tidal rivers.

239. Where land is said to be bounded by a river, a distinction must be taken between tidal rivers and non-tidal rivers; for, in those

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(*c*) *Re Hull and Selby Railway* (1839), 5 M. & W. 327.

(*d*) *A.-G.* v. *Chambers* (1854), 4 De G. M. & G. 206; Hale, De Jure Maris, 14, 28; *A.-G.* v. *Chambers*, *A.-G.* v. *Rees* (1859), 4 De G. & J. 55. See title WATERS AND WATERCOURSES.

(*e*) *Mackenzie* v. *Bankes* (1878), 3 App. Cas. 1324, *per* Lord BLACKBURN, at p. 1340.

(*f*) *Ibid.*, *per* Lord SELBORNE, at p. 1338, discussing the Scotch law on the subject. The application of the *medium filum* rule to a lake, however, is not easy; for obviously, since all the adjoining owners abut, for practical purposes, on the outside of a convex curve, their boundaries might have to meet in a single point near the middle of the lake in order to divide the *fundus* in proportion to their respective frontages. Compare *Cochrane* v. *Minto* (*Earl*) (1815), 6 Pat. App. 139; and see, as to rivers, p. 121, *post*.

(*g*) *Bristow* v. *Cormican* (1878), 3 App. Cas. 641, *per* Lord BLACKBURN, at p. 666.

(*h*) *Bloomfield* v. *Johnston* (1867), I. R. 8 C. L. 68.

(*i*) *Bristow* v. *Cormican*, *supra*, *per* Lord BLACKBURN, at p. 666.

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parts of rivers where the tide flows and reflows, the soil between the medium high water mark and medium low water mark *primâ facie* belongs to the Crown (*k*), and therefore the boundary between the bed of a tidal river and the adjoining land is, as a general rule, the line of medium high water mark (*l*).

Non-tidal rivers.

240. But in the case of non-tidal rivers or streams, whether navigable or not, the boundary is in general the line of mid-stream, inasmuch as, in the absence of all evidence to the contrary, the *alveus*, or bed, of such rivers and streams is presumed to belong to the riparian owners *usque ad medium filum aquæ* (*m*). Thus, where there is a conveyance of land said to be bounded by a river, then, even although it is described by reference to a plan and by quantity, the true construction of the instrument is that half the bed of the river passes under the conveyance, unless there is enough in the circumstances or enough in the expression of the instrument to show that it is not the intention of the parties (*n*). This presumption applies whether the land be freehold, leasehold, or copyhold (*o*), and also where land is described as so bounded in an Act of Parliament (*p*), but it is questionable whether it applies to land so described in an award under an Inclosure Act (*q*).

The fact that the grantor is the owner of the land on both sides of the river will not rebut the presumption which arises that a conveyance of the land on one side of the river only passes one-half the soil of the bed (*r*). But the presumption will be rebutted by evidence that since the date of the deed the grantor and his tenants have always fished without any interruption, and that the grantee and his tenants have never fished (*s*).

Application of rule on curved bank.

Where adjoining properties are situated *ex adverso* of the convex side of a curve in a tidal river, the actual *medium filum* being approximately an arc of a circle, the correct method of determining the foreshore boundary between the properties is to draw a perpendicular to a tangent of the arc forming the actual *medium filum*

(*k*) Hale, De Jure Maris, pp. 12, 25; *Constable's Case* (1601), 5 Co. Rep. 106 a; *Lyon* v. *Fishmongers' Co.* (1875), 10 Ch. App. 679; *Lord Advocate for Scotland* v. *Hamilton* (1852), 1 Macq. 46; *R.* v. *Smith* (1780), 2 Doug. 441; *Gann* v. *Whitstable* (*Free Fishers*) (1864), 11 H. L. Cas. 192; *Fitzhardinge* (*Lord*) v. *Purcell*, [1908] 2 Ch. 139. As to the subject's right of navigation, see title WATERS AND WATERCOURSES.

(*l*) *A.-G.* v. *Chambers* (1854), 4 De G. M. & G. 206; *Bridgwater Trustees* v. *Bootle-cum-Linacre* (1866), L. R. 2 Q. B. 4 (parish boundary); *Mellor* v. *Walmesley*, [1905] 2 Ch. 164, C. A., at pp. 179, 180; Hale, De Jure Maris, pp. 12, 25.

(*m*) Hargreaves' Law Tracts, p. 5; *Wishart* v. *Wyllie* (1853), 1 Macq. 389; *Wright* v. *Howard* (1823), 1 Sim. & St. 190. Compare *R.* v. *Landulph* (*Inhabitants*) (1834), 1 Moo. & R. 393; *Edleston* v. *Crossley & Sons, Ltd.* (1868), 18 L. T. 15.

(*n*) *Micklethwait* v. *Newlay Bridge Co.* (1886), 33 Ch. D. 133, C. A.; *Devonshire* (*Duke*) v. *Pattinson* (1887), 20 Q. B. D. 263, C. A.; *Dwyer* v. *Rich* (1871), I. R. 6 C. L. 144, *dissentiente* FITZGERALD, J., on the question of evidence only.

(*o*) *Tilbury* v. *Silva* (1890), 45 Ch. D. 98.

(*p*) *R.* v. *Strand Board of Works* (1863), 4 B. & S. 526.

(*q*) *Ecroyd* v. *Coulthard*, [1898] 2 Ch. 358, C. A., *per* LINDLEY, M.R., at p. 366. Compare *Hindson* v. *Ashby*, [1896] 2 Ch. 9; *Great Torrington Commons Conservators* v. *Moore Stevens*, [1904] 1 Ch. 347; *Simcox* v. *Yardley Rural District Council* (1905), 69 J. P. 66; *Hough* v. *Clark and Hall* (1907), 23 T. L. R. 682.

(*r*) *Devonshire* (*Duke*) v. *Pattinson*, *supra*.

(*s*) *Micklethwait* v. *Newlay Bridge Co.*, *supra*.

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by joining the end of the land boundary at high water mark to the centre of the circle (*t*).

Where in the middle of a non-tidal river there is an island as old as or older than the banks on either side, then, if the ordinary presumption applies (*a*), the *medium filum aquæ* should, if the plaintiff can prove no title to the island, be drawn through the stream between the island and the plaintiff's land (*b*).

Island in mid-stream.

Boundary when presumption rebutted.

241. Where the ordinary presumption is rebutted, and the bed of the river is the property of some person other than the riparian owners, the boundary is the water line when the river is in its normal state, without reference to the extraordinary freshets of the winter or spring or the extreme droughts of the summer or autumn (*c*).

Effect of accretion on boundaries.

242. If by gradual and imperceptible accretions in the ordinary course of nature land is added to the riverside, such land belongs to the riparian owners, and the boundary line correspondingly advances (*d*). But where the boundary on the waterside is shown by a wall or by something so clear and visible that it is easy to see whether accretions as they become perceptible are on one side of the boundary or on the other, it would appear that the doctrine of accretion does not apply (*e*). Nor is it applicable where a tidal (*f*) or non-tidal (*g*) river separating two estates suddenly changes its course.

SUB-SECT. 5.—*Highways and Private Ways.*

Presumption in case of highway.

243. Where land is bounded by a highway, the boundary is, as a general rule, a line drawn along the middle of the highway, for the owners of land adjoining the highway are presumed, in the absence of all evidence to the contrary, to own the soil *usque ad medium filum viæ* and all above the soil subject only to the right of passage for the King and his subjects (*h*), and this presumption also obtains in the case of copyholders and leaseholders (*i*).

(*t*) *Nimmo* v. *Caledonian Rail. Co.* (1903), 5 F. (Ct. of Sess.) 1001. See the plan annexed to the report of this case.

(*a*) See p. 121, *ante*.

(*b*) *Great Torrington Commons Conservators* v. *Moore Stevens*, [1904] 1 Ch. 347.

(*c*) *Hindson* v. *Ashby*, [1896] 2 Ch. 1, C. A., *per* A. L. SMITH, L.J., at p. 25, quoting *Alabama* (*State*) v. *Georgia* (*State*) (1859), 64 U. S. 505, 515.

(*d*) *Lopez* v. *Muddun Mohun Thakoor* (1870), 13 Moo. Ind. App. 467; *Thakurain Ritraj Koer* v. *Thakurain Sarfuraz Koer* (1905), 21 T. L. R. 637, at p. 638. See *Re Hull and Selby Rail. Co.* (1839), 5 M. & W. 327, 332; *Mellor* v. *Walmesley*, [1905] 2 Ch. 164, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 173; *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.

(*e*) Hale, De Jure Maris, c. i. and c. vi.; Y. B. 22 Lib. Ass. Edw. 3, 106, pl. 93. But see *Hindson* v. *Ashby*, *supra*, at p. 13, where LINDLEY, L.J., left the question whether these authorities are applicable to cases of land having no boundary next flowing water, except the water itself, for reconsideration and decision when it should arise.

(*f*) *Carlisle Corporation* v. *Graham* (1869), L. R. 4 Exch. 361, 368.

(*g*) *Thakurain Ritraj Koer* v. *Thakurain Sarfuraz Koer*, *supra*.

(*h*) *Anon.* (1773), Lofft, 358; *Goodtitle* v. *Alker and Elmes* (1757), 1 Burr. 133, 146; *Cooke* v. *Green* (1823), 11 Price, 736; *Dovaston* v. *Payne* (1795), 2 Hy. Bl. 527, *per* HEATH, J., at p. 531; *Stevens* v. *Whistler* (1809), 11 East, 51. See title HIGHWAYS, STREETS AND BRIDGES.

(*i*) *Doe* d. *Pring* v. *Pearsey* (1827), 7 B. & C. 304.

Where the land of one person is separated from the land of another by a private way, the same presumption arises (*j*).

In the case of a highway running between fences, in the absence of anything to the contrary, the presumption is that the fences have been put up to divide the adjoining closes from the highway (*k*), and that the whole of the land between the fences has been dedicated to the use of the public (*l*). Therefore the public are not confined to the metalled part of the road only, but have the right of passage along the whole space between the fences (*m*), even though the width of the highway be varying and unequal (*n*), nor will a highway authority be restrained from cutting down trees growing upon the unused part of a highway, if they are an obstruction, even although such trees have been growing for twenty-five years; but the refusal to so restrain the authority will be without prejudice to the rights of the owners of the soil to remove the trees when felled for the purposes of sale etc. (*o*). On the other hand, if a highway pass through the uninclosed waste of a manor, there is no presumption that the whole space between the fences has been dedicated to the public (*p*).

Roadside waste.

244. A conveyance of land described as bounded by a highway will pass the moiety of the highway *usque ad medium filum viæ*, unless there be something in the context to exclude that construction; for it would be absurd to suppose that the grantor reserved the right to the soil of the highway, which in nearly every case is wholly unprofitable (*q*).

Conveyance of land bounded by highway.

Where, however, the soil of a highway, although belonging to the adjoining owners, does not belong to them in equal portions, a conveyance of the land adjoining the highway passes the property in the soil of the highway so far as it is in the grantor, on the principle that the conveyance passes the property to the grantee so far as it is vested in the conveying party (*r*).

The presumption that the boundary line is drawn along the middle of the highway applies to a conveyance of land situated in towns as well as in the country (*s*), though less evidence is required

(*j*) *Holmes* v. *Bellingham* (1859), 29 L. J. (C. P.) 132. See, for private ways generally, title EASEMENTS AND PROFITS À PRENDRE.

(*k*) *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342.

(*l*) *Ibid.*; *Harvey* v. *Truro Rural District Council* (1903), 19 T. L. R. 576. The presumption is, however, rebuttable, see *A.-G.* v. *Moorsom-Roberts* (1908), 72 J. P. 123; *Corsellis* v. *London County Council*, [1908] 1 Ch. 13, C. A. See title HIGHWAYS, STREETS AND BRIDGES.

(*m*) *R.* v. *United Kingdom Electric Telegraph Co., Ltd.* (1862), 31 L. J. (M. C.) 166; *Nicol* v. *Beaumont* (1883), 50 L. T. 112.

(*n*) *Locke-King* v. *Woking Urban District Council* (1898), 77 L. T. 790.

(*o*) *Turner* v. *Ringwood Highway Board* (1870), L. R. 9 Eq. 418.

(*p*) *Neeld* v. *Hendon Urban District Council* (1899), 81 L. T. 405; *Belmore (Countess)* v. *Kent County Council*, [1901] 1 Ch. 873; *Tutill* v. *West Ham Local Board of Health* (1873), L. R. 8 C. P. 447. Compare *A.-G.* (*Cork County Council*) v. *Perry*, [1904] 1 I. R. 247, C. A.

(*q*) *Lord* v. *Sydney Commissioners* (1859), 12 Moo. P. C. C. 473; *Berridge* v. *Ward* (1861), 10 C. B. (N. S.) 400; *Doe* d. *Pring* v. *Pearsey* (1827), 7 B. & C. 304; *Hodges* v. *Lawrance* (1854), 18 J. P. 347; *Gillingham* v. *Gwyer* (1867), 16 L. T. 640; *Haynes* v. *King* (1893), 63 L. J. (CH.) 21.

(*r*) *Re White's Charities*, [1898] 1 Ch. 659.

(*s*) *Ibid.*

SECT. 4. **Boundaries fixed by Legal Presumption.**

to rebut it (*t*), and also applies to a statute describing land as bounded by a highway (*u*).

When presumption does not arise.

245. But where a person owning land conveys part to one person, and part to another, and the question arises as to the ownership of a strip of waste land lying between the land of one of the grantees and a high-road, and it is not clear in which of the conveyances the strip is comprised, no presumption of ownership in the adjoining owner arises from the fact that it lies between the highway and land clearly included in the conveyance to him (*w*).

The presumption does not arise in cases where the land conveyed is described as bounded by intended streets (*x*), nor where a plot of land forming a part of a building estate is described as abutting on a road and separated therefrom by a thick line drawn on a plan annexed to the conveyance, and the admeasurements exclude any portion of the highway (*a*).

A lease of a house described as abutting on a highway in a town will not pass any part of the highway where it was constructed by the lessors under the powers of an Act of Parliament for the purpose of forming a communication between certain parts of the town and it appears that the site thereof was land wanted for the purposes of the Act (*b*).

SUB-SECT. 6.—*Railways.*

Presumption as to railways.

246. The presumption that a grant of land described as bounded by a highway passes one-half of the soil of the highway does not obtain in the case of conveyances of land described as bounded by a railway, and therefore a grant of land so described will not pass a right to the minerals under the railway (*c*).

SUB-SECT. 7 —*Hedges and Ditches.*

Presumption as to hedges and ditches.

247. No man making a ditch may cut into his neighbour's soil, but usually he makes it at the very extremity of his own land, forming a bank on his own side with the soil which he excavates from the ditch, on the top of which bank a hedge is usually planted (*d*). Therefore, where two fields are separated by a hedge or bank and an artificial ditch, the hedge or bank and ditch *primâ facie* belong to the owner of the field in which the ditch is not (*e*). This being the origin of the presumption, it is very doubtful whether it is applicable when it is not known that the ditch is artificial (*f*).

(*t*) *Beckett* v. *Leeds Corporation* (1872), 7 Ch. App. 421.
(*u*) *R.* v. *Strand Board of Works* (1863), 4 B. & S. 526, 551.
(*w*) *White* v. *Hill* (1844), 6 Q. B. 487.
(*x*) *Leigh* v. *Jack* (1879), 5 Ex. D. 264, C. A.
(*a*) *Plumstead Board of Works* v. *British Land Co.* (1874), L. R. 10 Q. B. 16.
(*b*) *Mappin Brothers* v. *Liberty & Co., Ltd.*, [1903] 1 Ch. 118.
(*c*) *Thompson* v. *Hickman*, [1907] 1 Ch. 550. *See* title RAILWAYS AND CANALS.
(*d*) *Vowles* v. *Miller* (1810), 3 Taunt. 137.
(*e*) *Neye* v. *Reed* (1827), 1 Man. & Ry. (K. B.) 63, *per* BAYLEY, J., at p. 65; and *Guy* v. *West* (1808), cited 2 Selwyn's N. P., 13th ed., p. 1244.
(*f*) *Marshall* v. *Taylor*, [1895] 1 Ch. 641, C. A.

Acts of ownership such as trimming and pollarding a fence and cleaning a ditch, even though continued for many (*e.g.*, fifty) years by an adjoining owner, do not rebut the presumption that the ditch and fence belong to the adjoining owner on whose side the ditch is not, at any rate if the acts were done without knowledge on the part of the latter (*g*).

An impression prevails in some districts that the owner of a bank and ditch is entitled to four feet of width for the base of the bank and four feet of width for the ditch, but, apart from any local custom, there is no rule to this effect (*h*).

When presumption does not arise.

248. Where two estates are divided by two ditches one on each side of a hedge or bank, or by two hedges or banks one on each side of a ditch, or by an old hedge or bank without any ditches at all, then there is no presumption as to the ownership of the hedges, ditches, or banks, but it must be proved by acts of ownership exercised over them (*i*), and if the adjoining owners on each side concurrently exercise acts of ownership, that is evidence of a tenancy in common in the hedge, ditch, or bank.

If, however, it is known what quantity of land each of the owners originally contributed towards the formation of the ditch or bank, the original boundary would not be disturbed, but each proprietor would continue to hold his share of the ditch or bank in severalty (*k*).

Hedges and ditches beside highways.

249. The same principles apply in the rare case of hedges and ditches running along the side of a public highway where the soil of the highway is not in the owners of the adjoining land. Thus, where an owner of land adjoining such a highway makes a hedge and ditch the ownership is in him, for the land which constitutes a ditch is in point of law a part of the close (*l*). On the other hand, it may be that the ditch has been constructed by the owners of the road, and in that case it remains a parcel of the road, and is not a parcel of the adjoining close (*m*).

Where a highway of a definite width is laid out under an Inclosure Act, there is no presumption that an adjoining ditch and hedge form part of the highway, if the highway by itself is of the definite width (*n*).

(*g*) *Henniker* v. *Howard* (1904), 90 L. T. 157; *Craven (Earl)* v. *Pridmore* (1902), 18 T. L. R. 282.

(*h*) *Vowles* v. *Miller* (1810), 3 Taunt. 137. In some places a right of "freeboard" or "deerleap" extending several feet beyond the hedge is claimed by local custom, see note (*p*), p. 126, *post*.

(*i*) *Guy* v. *West* (1808), cited 2 Selwyn's N. P., 13th ed., p. 1214. Compare *Re Belfast Dock Act* (1867), I. R. 1 Eq. 128.

(*k*) Woolrych, Party Walls and Fences, p. 283. Compare *Matts* v. *Hawkins* (1813), 5 Taunt. 20.

(*l*) *Doe* d. *Pring* v. *Pearsey* (1827), 7 B. & C. 304. As to the duty of fencing highways, see title HIGHWAYS, STREETS AND BRIDGES.

(*m*) *Scarby* v. *Tottenham Rail. Co.* (1868), L. R. 5 Eq. 409.

(*n*) *Simcox* v. *Yardley Rural District Council* (1905), 69 J. P. 66.

Part II.—Rights and Duties of Owners as to Fences.

SECT. 1. In General.

SECT. 1.—*In General.*

Definition of fences.

250. Although fences are frequently used to designate the situation of boundaries, none the less they are primarily guards against intrusion, and therefore in this sense the term includes not only hedges, banks, and walls, but also ditches (*o*).

Freeboard.

The term "freeboard" or "freebord" land is commonly applied to a strip of land, varying in width according to local custom, outside and adjoining the fence of a manor park, forest, or other estate, which belongs to or of which a right of user is claimed by the owner of the land within the fence (*p*).

SECT. 2.—*Trees on or near Boundaries.*

Rights as regards overhanging trees.

251. Where the branches of a tree belonging to one landowner or occupier overhang the soil of another adjoining landowner or occupier, the latter may at any time cut off so much of the branches as overhangs his land without notice to the former (*q*), provided that in so doing he does not trespass on the adjoining land. But an adjoining owner is not entitled to lop the tree as a precautionary measure before it overgrows his land merely because he knows that in the course of time the boughs will probably overhang his land (*r*).

When right of action exists.

Although an adjoining owner has the right to trim hedges and lop the branches of trees belonging to another which overhang his land, yet the watching to see when trimming and lopping are necessary and the operation of trimming and lopping are burdens which ought not to be cast upon a neighbour by the acts of an adjoining owner. Thus, a person who has planted poisonous trees near his boundary and permits the branches to extend over the land of an adjoining owner will be liable in case they are eaten by the latter's cattle for any consequent injury to the cattle (*s*). On the same principle, an action for an injunction and for damages will lie against an owner who allows the branches of his trees to overhang his boundary and thereby cause injury to his neighbour's crops (*t*). But if the overhanging trees are not in fact doing any damage, it seems that the only right of the person whose land is overhung is to cut back the overhanging portions (*u*).

(*o*) Woolrych, Party Walls and Fences, p. 281.

(*p*) See Sol. Jo. 1901, p. 118; Mon. Angl. Part II., fol. 241; Selden Society, Pleas of the Forest. Thus, Richmond Park has a freeboard of sixteen and a half feet outside the boundary wall.

(*q*) *Lemmon* v. *Webb*, [1895] A. C. 1; and see *Pickering* v. *Rudd* (1815), 4 Camp. 219.

(*r*) *Norris* v. *Baker* (1616), 1 Roll. Rep. 393.

(*s*) *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex. D. 5, 10.

(*t*) *Smith* v. *Giddy*, [1904] 2 K. B. 448.

(*u*) *Ibid.*, *per* KENNEDY, J., at p. 451. The fact that the plaintiff possesses this remedy is no answer to an action for damages if any have in fact been sustained (*ibid.*, *per* WILLS, J., at p. 451).

On the other hand, no action will lie if the cattle of the adjoining owner trespass by reaching over the boundary line and so eat the foliage of poisonous trees the branches of which do not extend over the boundary (*a*), or probably if poisonous leaves from trees growing naturally on the land are blown on to the adjoining land, and cause injury to the cattle eating them (*b*).

Damage from trees which do not overhang.

252. No right to have trees overhanging the land of another can be acquired by prescription or under the Statutes of Limitation, since the trees grow from year to year (*c*).

Lapse of time.

253. If a man is unable to lop his tree without the boughs falling upon the land of his neighbour, he may well justify the felling upon his neighbour's land, because otherwise he could not lop at all (*d*); and if a tree grows so that the fruit falls upon the land of another, the owner of the tree may enter upon the other's land for the purpose of taking possession of the fruit (*e*).

Entry on neighbour's land.

254. Where the roots of a tree project into the soil of another, although it is possible that the owner of the soil may cut the roots in his land, none the less he will acquire no property in the tree (*f*).

Projecting roots.

SECT. 3.—*Dangerous Fences.*

255. If a person chooses to fence with material of such a kind as he must have known would decay and be likely to cause damage in the ordinary course of things, he will be liable for the natural result of his acts (*g*). Similarly, the owner of a cattle market who takes a toll for his own benefit is responsible if the fences of the

Liability for user of dangerous materials.

(*a*) *Ponting* v. *Noakes*, [1894] 2 Q. B. 281. Compare *Wilson* v. *Newberry* (1871), L. R. 7 Q. B. 31. See also title AGRICULTURE, Vol. I., pp. 296, 297.

(*b*) *Smith* v. *Giddy* (1904), 73 L. J. (Q. B.) 894, at p. 896, where the case is more fully reported than in [1904] 2 K. B. 448. Compare *Giles* v. *Walker* (1890), 18 Q. B. D. 655, where thistle seed was blown on to adjoining land. It is conceived that if poisonous trees were planted artificially the owner would be liable for damage done by their leaves being blown on to adjoining land, on the principle of *Sic utere tuo ut alienum non lædas*, unless the owner could plead *vis major* or act of God, *e.g.*, "a high gale"; see *Smith* v. *Giddy* (1904), 73 L. J. (Q. B.) 894, *per* KENNEDY, J., at p. 896.

(*c*) *Lemmon* v. *Webb*, [1895] A. C. 1; and see *Pickering* v. *Rudd* (1815), 4 Camp. 219.

(*d*) *Duke and Dunstan's Case* (1586), Godb. 52.

(*e*) Y. B. Lib. Ass. 8 Edw. 4; *Millan* v. *Vandrye* (1626), Poph. 161, 163.

(*f*) *Masters* v. *Pollie* (1619), 2 Roll. Rep. 141, where, in an action of trespass for breaking into the plaintiff's close and taking away his boards, the defendant contended that, as the roots extended into his soil and had been nourished by it, he was entitled to a share of the tree, but it was held that, as the body of the tree was in the plaintiff's land, the whole of the tree belonged to the plaintiff, though it was admitted that, had the plaintiff planted the tree in the soil of the defendant, it would have been otherwise; see *Hetherington* v. *Galt* (1905), 7 F. (Ct. of Sess.) 706.

(*g*) *Firth* v. *Bowling Iron Co.* (1878), 3 C. P. D. 254, where a tenant, who was under liability to fence for the benefit of the adjoining tenant, used wire-rope for the purpose, which decayed from long exposure, and fell on to the latter's land, and was swallowed by and killed his cattle, and the former was held liable. The result, it is conceived, would be the same if the cattle had licked off the pieces from the fence and suffered injury.

SECT. 3. **Dangerous Fences.**

cattle-pens are in a dangerous condition, *e.g.*, spiked and of insufficient height, and the cattle are injured in consequence (*h*).

Barbed wire.

Fences along highways may not be constructed of barbed wire, if its use is likely to be injurious to persons or animals lawfully using such highways (*i*).

SECT. 4.—*Erection, Maintenance and Repair of Fences.*

SUB-SECT. 1.—*No General Liability to fence.*

Extent of landowner's duty to fence against his neighbour.

256. The owners of adjoining closes are not bound to fence either against or for the benefit of each other (*a*), the general rule being that a man is only bound to take care that his cattle or other animals do not trespass upon the lands of his neighbour (*b*).

A landlord who leases a part of his land and retains the rest in his hands is under no obligation, apart from express agreement, to keep the fences in repair so as to prevent the lessee's cattle from straying on to his land (*c*); for the occupier, as distinguished from the owner, is as a rule bound to repair and maintain fences (*d*), and for this purpose he is allowed, as between himself and his landlord, reasonable estovers (*e*).

No general duty to fence against the public.

257. The owner of land across or by the side of which a highway runs is under no duty, as a general rule, to fence off his land from the highway (*f*). Similarly, there is no general duty cast upon an owner of land to fence in any excavation made in his land (*g*), so long as the excavation does not adjoin a highway (*h*), and therefore persons straying from a highway do so, as a general rule, at their peril (*i*).

(*h*) *Lax* v. *Darlington Corporation* (1879), 5 Ex. D. 29.

(*i*) This was so even before the passing of the Barbed Wire Act, 1893 (56 & 57 Vict. c. 32) (*Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199). See further, title HIGHWAYS, STREETS AND BRIDGES.

(*a*) *Star* v. *Rookesby* (1710), 1 Salk. 335; *Churchill* v. *Evans* (1809), 1 Taunt. 529; *Hilton* v. *Ankesson* (1872). 27 L. T. 519.

(*b*) *Lawrence* v. *Jenkins* (1873), L. R. 8 Q. B. 274, 278; *Boyle* v. *Tamlyn* (1827), 6 B. & C. 329. See title ANIMALS, Vol. I., pp. 376, 380. As to the liability of an owner who is under an obligation to fence, and fails to do so, for the damage done by his animals on the land of another, or to another's animals on his land, see p. 132, *post*.

(*c*) *Erskine* v. *Adeane* (1873), 8 Ch. App. 756.

(*d*) *Cheetham* v. *Hampson* (1791), 4 Term Rep. 318. See *Star* v. *Rookesby*, *supra*; *Holbach* v. *Warner* (1623), Cro. Jac. 665; and title LANDLORD AND TENANT.

(*e*) Co. Litt. 41 b.

(*f*) *Binks* v. *South Yorkshire Rail. and River Dun Co.* (1862), 3 B. & S. 244; *Potter* v. *Parry* (1859), 7 W. R. 182; and compare *Hardcastle* v. *South Yorkshire Rail. Co.* (1859), 4 H. & N. 67. For the fencing of highways generally, see title HIGHWAYS, STREETS AND BRIDGES; and see pp. 129, 130, *post*, for exceptions to the above rule.

(*g*) *Cornwell* v. *Metropolitan Commissioners of Sewers* (1855), 10 Exch. 771, *per* POLLOCK, C.B., at p. 773; *Blythe* v. *Topham* (1607), Cro. Jac. 158.

(*h*) See p. 129, *post*.

(*i*) *Hardcastle* v. *South Yorkshire Rail. Co.*, *supra*; *Binks* v. *South Yorkshire Rail. and River Dun Co.*, *supra*; *Jordin* v. *Crump* (1841), 8 M. & W. 782, *per* ALDERSON, B., at p. 788; *Hawken* v. *Shearer* (1887), 56 L. J. (Q. B.) 284, at p. 286; *Hounsell* v. *Smyth* (1860), 7 C. B. (N. S.) 731. For the exceptions to this rule, see pp. 129, 130, *post*. As to injuries to persons on the lands of others, see generally, title TORT.

SUB-SECT. 2.—*Special Liability to fence.*

SECT. 4. Erection, Maintenance and Repair of Fences.

258. A liability to erect or repair a fence may exist at common law (*k*); it may also be created by Act of Parliament (*l*), agreement (*m*), or prescription (*n*).

(1) At common law.

Where there is an excavation (*o*) in land which amounts to a public nuisance (*p*) by reason of its adjoining a highway (*q*), or being sufficiently near to it to be dangerous if left unfenced (*r*), a duty is cast on the person occupying the land (*s*) to fence the excavation. If he neglects this duty, he is liable for any injury caused to persons lawfully passing along the highway, or to their property, even though the obligation of fencing the highway is by statute expressly imposed on someone else (*t*), except where the excavation has existed from time immemorial (*u*), or, at all events, was made before the dedication of the highway (*w*). A similar duty appears to exist where the excavation, though not near a highway, is near a private way which the public are invited to use (*x*).

Excavations adjoining highways.

Except where a duty to fence against the public (*a*) exists, the owner is only bound to prevent injury to persons lawfully on the land (*b*), or to their property (*c*). Thus, where the person opening a pit or shaft or enlarging an old quarry is not the owner of the surface, he is bound to fence so as to prevent injury to cattle belonging to the owner of the surface (*d*). And where a person in

Duty to protect persons lawfully on land.

(*k*) See p. 129, *post*.

(*l*) See p. 130, *post*.

(*m*) *Hilton* v. *Ankesson* (1872), 27 L. T. 519; *Green* v. *Eales* (1841), 2 Q. B. 225; and see p. 131, *post*.

(*n*) *Lawrence* v. *Jenkins* (1873), L. R. 8 Q. B. 274; *Barber* v. *Whiteley* (1865), 34 L. J. (Q. B.) 212; *Boyle* v. *Tamlyn* (1827), 6 B. & C. 329; and see p. 132, *post*.

(*o*) As, for example, an area (*Barnes* v. *Ward* (1850), 9 C. B. 392) or canal (*Manley* v. *St. Helens Canal and Rail. Co.* (1858), 2 H. & N. 840).

(*p*) *Barnes* v. *Ward*, *supra*; *Cornwell* v. *Metropolitan Commissioners of Sewers* (1855), 10 Exch. 771, *per* MARTIN, B., at p. 774. For nuisances generally, see title NUISANCE.

(*q*) *Barnes* v. *Ward*, *supra*. See *Hounsell* v. *Smyth* (1860), 7 C. B. (N. S.) 731.

(*r*) *Hardcastle* v. *South Yorkshire Rail. and River Dun Co.* (1859), 4 H. & N. 67, *per* POLLOCK, C.B., at p. 75; *Hadley* v. *Taylor* (1865), L. R. 1 C. P. 53.

(*s*) *Hadley* v. *Taylor*, *supra*; and compare *Cheetham* v. *Hampson* (1791), 4 Term Rep. 318; *Bishop* v. *Bedford Charity Trustees* (1859), 1 E. & E. 697. But the owner, though not in occupation, is liable where, as between himself and the occupier, he has undertaken the duty of fencing (*Payne* v. *Rogers* (1794), 2 Hy. Bl. 349). Compare *Bush* v. *Steinman* (1799), 1 Bos. & P. 404.

(*t*) *Wettor* v. *Dunk* (1864), 4 F. & F. 298.

(*u*) *Cornwell* v. *Metropolitan Commissioners of Sewers*, *supra* (ditch); *Wilson* v. *Halifax Corporation* (1868), L. R. 3 Exch. 114, *per* KELLY, C.B., at p. 118.

(*w*) *Fisher* v. *Prowse* (1862), 2 B. & S. 770; *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221.

(*x*) *Binks* v. *South Yorkshire Rail. and River Dun Co.* (1862), 3 B. & S. 244, *per* BLACKBURN, J., at p. 254; *Corby* v. *Hill* (1858), 4 C. B. (N. S.) 556, *per* BYLES, J., at p. 561.

(*a*) See p. 130, *post*.

(*b*) *Corby* v. *Hill*, *supra*, *per* WILLES, J., at p. 567; *Holmes* v. *North Eastern Rail. Co.* (1871), L. R. 6 Exch. 123, Ex. Ch. As to the distinction between persons lawfully on the land and bare licensees, see *Indermaur* v. *Dames* (1867), L. R. 2 C. P. 311; *Southcote* v. *Stanley* (1858), 1 H. & N. 247; *Hounsell* v. *Smyth*, *supra*, *per* WILLIAMS, J., at p. 743; and title TORT.

(*c*) *Blythe* v. *Topham* (1607), Cro. Jac. 158.

(*d*) *Re Williams* v. *Groucott* (1863), 4 B. & S. 149; *Hawken* v. *Shearer* (1887), 56 L. J. (Q. B.) 284; *Sybray* v. *White* (1836), 1 M. & W. 435, *per* PARKE, B., at

SECT. 4. Erection, Maintenance and Repair of Fences.

(2) By statute.

the exercise of statutory powers diverts a public footpath, it is his duty to protect, by fencing or otherwise, reasonably careful persons from injury by going astray at the point of diversion (*e*).

259. Any owner opening a pit or shaft in his land within twenty-five yards of a carriage or cart way is under a statutory duty to protect it by a proper fence (*f*), and is liable for injury occasioned by the failure to do so; and the fact that any person injured by the neglect to fence is a trespasser would seem to be immaterial (*g*).

Pits or shafts within twenty-five yards of highway etc.

Moreover, in the case of disused mines, the omission on the part of the owner of the mine, and every other person interested therein, to fence any shaft or side entrance within fifty yards of any highway, road, footpath, or place of public resort, or in any open or uninclosed ground, is made by statute (*h*) a nuisance under s. 91 of the Public Health Act, 1875 (*i*).

Ecclesiastical property.

260. It is the duty of a bishop, rector, parson, vicar, or other ecclesiastical person to repair and maintain the fences of the lands held respectively by them *jure ecclesiæ*, and such persons are chargeable to their successors for a failure so to do (*k*).

Allotments under the Inclosure Acts.

261. Allotments made under the Inclosure Act, 1845 (*l*), must, except as in the Act mentioned, be inclosed, ditched, and fenced, and the fences maintained, at the expense of the respective allottees and as directed by the valuer (*m*). If the owner or occupier of an allotment neglects to make the requisite fences, the owner or occupier of any other allotment in the same inclosure, if aggrieved by such neglect, may after due notice in writing make the fences or ditches himself and recover the cost from the defaulting owner or occupier (*n*).

Railway company.

262. A railway company is under a statutory duty (*o*) to make and at all times to maintain proper fences between the railway

p. 440. See *Churchill* v. *Evans* (1809), 1 Taunt. 529, where two persons had concurrent possession of a close, the one having the right to quarry and the other having rights of pasture etc. and, the court being divided, the question whether either one was bound to guard against casual damage to the other arising out of the enjoyment of his right was not decided, but it was held that the one could not distrain the cattle of the other damage feasant.

(*e*) *Hurst* v. *Taylor* (1885), 14 Q. B. D. 918.

(*f*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 70. See title HIGHWAYS, STREETS AND BRIDGES.

(*g*) Compare *Jordin* v. *Crump* (1841), 8 M. & W. 782.

(*h*) Coal-mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 37; Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 13. For the fencing of mines generally, see title MINES, MINERALS AND QUARRIES.

(*i*) 38 & 39 Vict. c. 55. See further, titles PUBLIC HEALTH ETC.; NUISANCE.

(*k*) Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 4; and see title ECCLESIASTICAL LAW. As to the fences of churchyards and burial grounds, see title BURIAL AND CREMATION, pp. 411, 412, 516, 529, 530, 535, 544, *post*.

(*l*) 8 & 9 Vict. c. 118. See title ALLOTMENTS, Vol I., pp. 335 *et seq*.

(*m*) *Ibid.*, s. 83. See s. 72 as to fencing of allotments made for the purpose of providing stone etc. for repair of roads, s. 73 as to fencing of allotments vested in parochial authorities, and s. 113 as to fencing of inclosed portions of commons set out as regulated pastures, and generally, as to allotments, title ALLOTMENTS, Vol. I.

(*n*) Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 12. This section does not take away any other remedy which the aggrieved party may have.

(*o*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68. See fully, as to the duty of a railway company in this behalf, title RAILWAYS AND CANALS.

and the adjoining land (*p*). This duty is, however, not one of general application, so as to compel the railway to fence against the world (*q*), except in the case of level crossings (*r*). It is a duty towards the owners and occupiers of the adjoining land only (*s*), and the company may be discharged from it by the payment of compensation (*a*).

(3) By agreement.

263. The erection and repair of fences may be made the subject of an agreement (*b*). Where part of an estate is being sold, it is important that the contract should state expressly who is to erect or maintain the boundary fence between the part sold and the part retained. In the absence of any such statement, neither party will be under any obligation to fence, though each of them must take precautions to prevent his cattle or animals from trespassing on the land of the other (*c*). A covenant to repair all the external parts of the demised premises renders the covenantor liable to repair a boundary wall adjoining other buildings (*d*).

Implied agreement.

The agreement may also, it seems, be implied. Thus, in the case of an ancient inclosure it is a fair and reasonable presumption that the lord imposed as part of the terms on which the exclusive possession was to be granted to the incloser that for the future he would take upon himself the duty of fencing as against the cattle of the commoners; and an inclosure of the waste lands under an Inclosure Act will not put an end to the liability (*e*).

Covenant running with land.

Where, in a suit for specific performance, it appears that a covenant has been entered into by a former purchaser of the property with the owners and occupiers for the time being of certain adjoining lands to make and maintain the boundary fences, and the expressed intention was that the covenant should run with the

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(*p*) The railway company is not obliged to fence one part of its property from another (*Roberts* v. *Great Western Rail. Co.* (1858), 4 C. B. (N. S.) 506), except where necessary for the protection of persons lawfully using such property (*Marfell* v. *South Wales Rail. Co.* (1860), 8 C. B. (N. S.) 525).

(*q*) *Buxton* v. *North Eastern Rail. Co.* (1868), L. R. 3 Q. B. 549; *Ricketts* v. *East and West India Docks etc. Rail. Co.* (1852), 12 C. B. 160; and compare *Child* v. *Hearn* (1874), L. R. 9 Exch. 176; *Harrold* v. *Great Western Rail. Co.* (1866), 14 L. T. 440.

(*r*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 47; *Fawcett* v. *York and North Midland Rail. Co.* (1851), 16 Q. B. 610. The duty does not extend to level crossings on private railways (*Matson* v. *Baird* (1878), 3 App. Cas. 1082).

(*s*) Or persons claiming through them (*Dawson* v. *Midland Rail. Co.* (1872), L. R. 8 Exch. 8).

(*a*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68. But the payment of compensation to the owner does not discharge the company's liability towards the occupier (*Corry* v. *Great Western Rail. Co.* (1881), 7 Q. B. D. 322, C. A.).

(*b*) *Hilton* v. *Ankesson* (1872), 27 L. T. 519; *Firth* v. *Bowling Iron Co.* (1878), 3 C. P. D. 254.

(*c*) *Holbach* v. *Warner* (1623), Cro. Jac. 665; *Barber* v. *Whiteley* (1865), 34 L. J. (Q. B.) 212. But see *Doyle* v. *Drake* (1605), Moore (K. B.), 775, where four judges were equally divided in opinion on the question whether the vendor or the purchaser was under an obligation to fence.

(*d*) *Green* v. *Eales* (1841), 2 Q. B. 225.

(*e*) *Barber* v. *Whiteley*, *supra*. Compare *Haigh* v. *West*, [1893] 2 Q. B. 19, C. A.

SECT. 4. Erection, Maintenance and Repair of Fences.

land, the question of the obligation being binding on a future purchaser is too doubtful to admit of the title being forced upon him (*f*).

(4) By prescription.

264. A right to have fences kept in repair is not an easement within the terms of the Prescription Act, 1832 (*g*), and therefore a prescriptive right to have a fence kept in repair must be made out independently of that statute, and by force of the old law (*h*).

By prescription a landowner may be bound at his peril to maintain at all times, and without notice to repair it, a sufficient fence between his land and that of his neighbour. In that case, except in the case of damage by the act of God or *vis major*, he will be answerable for damage sustained by cattle escaping from his neighbour's close by reason of the defective state of the fence (*i*).

Further, the true nature of the prescription being that the landowner is bound at his own risk to have a sufficient fence always existing, he will be liable for any injury arising from the defective state of the fence, notwithstanding that he had no notice of the want of repair (*k*).

SUB-SECT. 3.—*Extent and Consequences of Liability to fence.*

How far landowner responsible for neglect to fence.

265. The liability to fence, when it exists, extends in many cases to the consequences arising from the neglect to fence. Thus, if a man allow his cattle to trespass, he will be answerable in damages for such injury caused by them as it is ordinarily in their nature to commit, or the animals may be distrained damage feasant, and impounded to secure compensation for the injury done (*l*). Conversely, if a man is under an obligation to fence for the benefit of the adjoining owner, and fails to do so, he will be liable if the animals of the adjoining owner stray on to his land and are there injured (*m*).

Duty extends to cattle lawfully on adjoining land only.

An obligation, where one exists, to fence and to keep the fence in repair does not extend beyond the adjoining close and such animals as may be lawfully there. Thus, where a person puts his cattle into his own field, and they escape into the adjoining field through a defect in the fence which the adjoining owner is bound to repair, and thence into the field of a third person through a gap in the fence which such person is bound to keep in repair, the third person is not prevented by his default from maintaining trespass against

(*f*) *Potter* v. *Parry* (1859), 7 W. R. 182.

(*g*) 2 & 3 Will. 4, c. 71. See title EASEMENTS AND PROFITS À PRENDRE.

(*h*) *Star* v. *Rookesby* (1710), 1 Salk. 335; *Nowel* v. *Smith* (1598), Cro. Eliz. 709; *Anon.* (1674), 1 Vent. 264; *Boyle* v. *Tamlyn* (1827), 6 B. & C. 329; *Lawrence* v. *Jenkins* (1873), L. R. 8 Q. B. 274.

(*i*) See cases cited in last note.

(*k*) *Lawrence* v. *Jenkins*, *supra*.

(*l*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608; *Powell* v. *Salisbury* (1828), 2 Y. & J. 391; *Lee* v. *Riley* (1865), 18 C. B. (N. S.) 722; *Ellis* v. *Loftus Iron Co.* (1874), L. R. 10 C. P. 10. As to distress damage feasant, see *Singleton* v. *Williamson* (1861), 7 H. & N. 410; and see generally, title ANIMALS, Vol. I., pp. 375 *et seq.*

(*m*) *Powell* v. *Salisbury*, *supra*; *Anon.* (1674), 1 Vent. 264; *Booth* v. *Wilson* (1817), 1 B. & Ald. 59, where the principle applied though the plaintiff was only the gratuitous bailee of the animal which escaped and was killed.

the owner of the cattle; for his obligation to fence extends only to the field adjoining his own and such animals as are lawfully there (*n*).

Conversely, the owner of cattle which escape into an adjoining close through a defect in fences which the adjoining owner was bound to repair can have no claim for any damage to the cattle, unless he had an interest in the close from which they escaped, that is to say, unless his cattle were lawfully in that close (*o*).

The same principles apply in the case of cattle escaping from the owner's land on to land adjoining a railway, and thence on to the railway; for the obligation on a railway company is only to fence as against the adjoining land (*p*).

Cattle injured which are not adjoining owner's property.

The right of action arising in consequence of defects in fences which an adjoining owner is bound to repair is not confined to injuries done to animals of which the person suing is the owner, but extends to injuries done to the animals of others in his possession, even although he may be only a gratuitous bailee (*q*).

Owner in default must replace straying cattle.

Where cattle belonging to one person stray on to the adjoining land through the defective state of the fences which the owner of the adjoining land is bound to keep in repair, the adjoining owner is not justified in simply driving them off his own land, but must put them back into the close from which they escaped by his default (*r*).

How far straying cattle liable to distress.

266. When cattle belonging to a stranger escape into the land of another either by breaking the fences if there is no defect in them, or by trespassing owing to a defect in the fences which neither the landlord nor his tenant is bound to repair, they may be distrained immediately for any rent due (*s*). But if they escape through the defect of fences which the landlord or his tenant is bound to repair, they cannot be distrained by the landlord for rent due, although they have been levant and couchant, unless the owner of the cattle, after notice that they are on the land, neglects or refuses to drive them away within a reasonable time; for otherwise the landlord would be taking advantage of his own wrong (*t*).

However, the lord of a manor or grantee of a rent-charge in a similar case may distrain the cattle after they have been levant and couchant, although no notice is given to the owner; for, there being no such obligation on the lord of the manor or on the owner of the rent-charge to fence as there is on the landlord, notice is not necessary (*a*).

(*n*) *Right* v. *Baynard* (1674), Freem. (K. B.) 379; *Sackvill (Sir Geo.)* v. *Milward* (1444), Vin. Abr. tit. Fences, D 4; and compare *Dovaston* v. *Payne* (1795), 2 Hy. Bl. 527.

(*o*) *Pomfret* v. *Ricroft* (1680), 1 Wm. Saund. 557, 560.

(*p*) *Ricketts* v. *East and West India Docks etc. Rail. Co.* (1852), 12 C. B. 160. As to fencing railways, see title RAILWAYS AND CANALS.

(*q*) *Rooth* v. *Wilson* (1817), 1 B. & Ald. 59. Compare *Broadwater* v. *Blot* (1817), Holt (N. P.), 547. See title BAILMENT, Vol. I., p. 564.

(*r*) *Carruthers* v. *Hollis* (1838), 8 Ad. & El. 113.

(*s*) *Jones* v. *Powell* (1826), 5 B. & C. 647; Co. Litt. 47 b.

(*t*) *Poole* v. *Longueville* (1670), 2 Saund. 282; *Kimp* v. *Cruwes* (1696), 2 Lut. 1573; *Elmore* v. *Tucker* (1704), 6 Mod. Rep. 198.

(*a*) *Saffery* v. *Elgood* (1834), 1 Ad. & El. 191; Co. Litt. iii. 265; and see cases cited in preceding note.

Erection, Maintenance and Repair of Fences.

267. A man is not bound to fence against his own land, and therefore, where a man is bound to fence against adjoining land, his obligation to maintain the fences comes to an end when he purchases that land (*b*). And further, if a duty to fence against adjoining land has been once extinguished by the unity of possession and ownership, it will not be revived by the lands afterwards passing into the hands of different persons (*c*). In order, however, that a prescriptive right may be extinguished by unity of ownership, the two estates must be equal in duration, in quality, and in all other circumstances of right (*d*).

Effect of unity of possession.

Making of new highway.

The liability of an owner to fence against adjoining land is not extinguished by his allowing a new highway to be made on part of his land, thereby destroying a portion of the fence (*e*).

Part III.—Party-Walls.

Meaning of party-wall.

268. The term "party-wall" may be used in four different senses (*f*), as meaning (1) a wall of which two adjoining owners are tenants in common (*g*); (2) a wall divided longitudinally into two strips one belonging to each of the adjoining owners (*h*); (3) a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements (*i*); (4) a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety (*j*).

A wall may be in part of its length and height a party-wall and as regards the rest an external wall (*k*).

(*b*) *Sackvill* (*Sir Geo.*) v. *Milward* (1411), Vin. Abr. tit. Fences, A 1; Y. B. 22 H. 6, 78.

(*c*) *Polus* v. *Henstock* (1671), 1 Vent. 97.

(*d*) *R.* v. *Hermitage* (*Inhabitants*) (1693), Carth. 239, 241. See further, as to this, title EASEMENTS AND PROFITS À PRENDRE.

(*e*) *Winter* v. *Charter* (1829), 3 Y. & J. 308

(*f*) *Watson* v. *Gray* (1880), 14 Ch. D. 192, *per* FRY, J., at p. 194. The law with reference to party-walls within the administrative county of London is contained in the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), the London Building Act 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), and the London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), and is fully treated under title METROPOLIS.

(*g*) *Wiltshire* v. *Sidford* (1827), 1 Man. & Ry. (K. B.) 404; *Cubitt* v. *Porter* (1828), 8 B. & C. 257.

(*h*) *Matts* v. *Hawkins* (1813), 5 Taunt. 20.

(*i*) *Watson* v. *Gray*, *supra*, *per* FRY, J., at p. 195.

(*j*) *Ibid.*

(*k*) *Weston* v. *Arnold* (1873), 8 Ch. App. 1084, 1090; *Drury* v. *Army and Navy Auxiliary Co-operative Supply*, [1896] 2 Q. B. 271. See *Culchert* v. *Girdlers Co.* (1876), 1 Q. B. D. 231; *Knight* v. *Pursell* (1879), 11 Ch. D. 412.

PART III. Party-Walls.

Divided ownership of party-wall.

269. Where a wall is built on the boundary of two adjoining pieces of land, so that the centre of the wall coincides with the boundary line, the adjoining owners are not tenants in common of the wall, even although the wall was erected at their joint expense, but the property in the wall follows the property in the land upon which it stands where the quantity of the land contributed by each proprietor is known. There is therefore no transfer of the property of either proprietor to the other, but both of them remain owners of their respective lands in severalty as before, each having the ordinary remedy for any injury done to his portion of the wall (*l*).

Ownership in common.

In the event, however, of the circumstances in which the wall was built and the amount of land contributed by each adjoining owner being unknown, it is presumed that the wall belongs to the adjoining proprietors as tenants in common (*m*).

The common user by adjoining owners of a party wall separating their properties is *primâ facie* evidence that the wall and the land on which it stands belong equally to them as tenants in common (*n*).

Rights and duties of owners where party-wall owned in severalty.

270. Where a wall is not common property, but one-half of it belongs exclusively to one proprietor and the other half of it exclusively to the other, either proprietor may pull down that portion of the wall standing on his own land, although sufficient support may not be left for the portion of the wall which belongs to his neighbour (*o*), provided the work be done reasonably and without negligence (*p*).

The mere circumstance of the juxtaposition of the walls of two adjoining owners casts no obligation upon the owner pulling down his wall to give notice to the other of his intention, and gives no right to the other to have his wall shored up (*q*).

The owner of premises adjoining those pulled down must shore up his own premises on the inside and do everything reasonably necessary for their preservation; but at the same time his omission to do so will not prevent his recovering if the pulling down be irregularly and improperly done and injury is thereby caused; for the person so pulling down his house may be liable, although the owner of the house may not have done all that he ought for his own protection (*r*).

(*l*) *Matts* v. *Hawkins* (1813), 5 Taunt. 20; *Hutchinson* v. *Mains* (1832), Alc. & N. 155. Compare *Sheffield Improved Industrial and Provident Society* v. *Jarvis*, [1871] W. N. 208; *Waddington* v. *Naylor* (1889), 60 L. T. 480; *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508. It is a question for the jury whether a party-wall is in fact fairly built half on each side of the boundary, and any minute inaccuracy of measurement must be disregarded (*Reading* v. *Barnard* (1827), 1 Mood. & M. 71).

(*m*) *Wiltshire* v. *Sidford* (1827), 1 Man. & Ry. (K. B.) 404; *Cubitt* v. *Porter* (1828), 8 B. & C. 257.

(*n*) *Cubitt* v. *Porter*, *supra*; *Wiltshire* v. *Sidford*, *supra*, at p. 408; *Jones* v. *Read* (1876), I. R. 10 C. L. 315; *Standard Bank of British South America* v. *Stokes* (1878), 9 Ch. D. 68, at p. 71.

(*o*) *Wigford* v. *Gill* (1592), Cro. Eliz. 269; *Wiltshire* v. *Sidford*, *supra*, at p. 408.

(*p*) *Kempston* v. *Butler* (1861), 12 I. C. L. R. 516.

(*q*) *Chadwick* v. *Trower* (1839), 6 Bing. (N. C.) 1; *Kempston* v. *Butler* *supra*; *Peyton* v. *London Corporation* (1829), 9 B. & C. 725.

(*r*) *Walters* v. *Pfeil* (1829), 1 Mood. & M. 362.

PART III. Party-Walls.

The fact that the property injured was in so ruinous a condition that it could not have stood much longer affords no answer to an action for the injury, but may be taken into consideration by the jury in assessing the damages (*s*).

Extent of right of support.

271. There is no obligation towards a neighbour cast by law upon the owner of a house to keep it repaired in a lasting and substantial manner. The only duty is to keep it in such a state that his neighbour may not be injured by its fall. The house may be in a ruinous state, provided that it be shored sufficiently, or the house may be demolished altogether (*t*).

Therefore a person who excavates without negligence close to his boundary, and in so doing shakes the foundations of a wall of his neighbour so that the wall falls down, is not liable for such injury in the absence of proof that either by prescription or by reason of presumed grant or implied reservation he is under some duty to support the wall (*a*).

Effect of original unity of possession.

Where houses have been erected in contiguity by the same owner upon a plot of ground and therefore necessarily require mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support, so that the owner who sells one of the houses grants as against himself such a right, and on his own part also reserves the right, whether the houses are parted with at one or at separate times (*b*).

Creation of easements by grant of moiety of wall.

If a man grants a divided moiety of an outside wall of his own house with the intention of making such wall a party-wall between such house and an adjoining house to be built by the grantee, the law implies the grant and reservation in favour of the grantor and grantee respectively of such easements as may be necessary to carry out what was the common intention of the parties with regard to the user of the wall, the nature of those easements varying with the particular circumstances of each case (*c*). Subject, however, to such easements, the owner of each moiety of the wall may deal with his part as he pleases, and so long as he uses it for the contemplated objects, and without negligence or want of due care, he is not responsible for any nuisance or inconvenience thereby occasioned (*d*). Apart from any special local custom or express contract, neither party is subject to any liability if, by reason of natural decay or other circumstances beyond his control, his half of the wall falls down or otherwise passes into such a condition that the easement thereon becomes impossible or difficult of exercise (*e*). But each party is

(*s*) *Dodd* v. *Holme* (1834), 1 Ad. & El. 493.

(*t*) *Chauntler* v. *Robinson* (1849), 4 Exch. 163.

(*a*) *Gayford* v. *Nicholls* (1854), 9 Exch. 702; *Wyatt* v. *Harrison* (1832), 3 B. & Ad. 871; *Murchie* v. *Black* (1865), 19 C. B. (N. S.) 190; *Smith* v. *Thackerah* (1866), L. R. 1 C. P. 564. See the remarks in *A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301, at p. 308, on *Smith* v. *Thackerah*, *supra*. As to the acquisition of a prescriptive right to support, see *Dalton* v. *Angus* (1881), 6 App. Cas. 740; and titles EASEMENTS AND PROFITS À PRENDRE; MINES, MINERALS AND QUARRIES.

(*b*) *Richards* v. *Rose* (1853), 9 Exch. 218. Compare *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31, C. A., disapproving *Pyer* v. *Carter* (1857), 1 H. & N. 916.

(*c*) *Jones* v. *Pritchard*, [1908] 1 Ch. 630, 635, following *Richards* v. *Rose*, *supra*, and *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.*, [1907] A. C. 476.

(*d*) *Jones* v. *Pritchard*, *supra*, at p. 636.

(*e*) *Ibid.*, at p. 637.

entitled to repair the other's half of the wall in question so far as is reasonably necessary for the enjoyment of any easement impliedly granted or reserved (*f*).

No right to support, however, exists where the houses do not adjoin (*g*).

User of party wall for building purposes.

272. If either of two adjoining owners whose land is separated by a party-wall utilise the party-wall for the purpose of building, or pull down the wall for the purpose of rebuilding, he is bound to see that reasonable skill and care are exercised in the operation, and that it is carried out without delay, and he cannot escape this obligation by delegating the performance to a contractor (*h*).

Where two persons own adjoining houses separated by a party-wall, neither may underpin the wall unless it can be done without injury to the other's house (*i*).

When tenant in common of party-wall can maintain trespass.

273. One tenant in common of a party-wall cannot maintain trespass against another for an injury done to the wall, unless there has been a complete ouster or some destruction of the common property (*k*). The destruction of the whole wall for the purpose of erecting a better as soon as possible is not such a destruction as would enable one tenant in common to maintain trespass against another (*l*). But where one tenant in common after pulling down a building on his side of the wall increased the height and built a house with the roof occupying the entire width of the top, and also inserted a stone with an inscription stating that the wall was his, it was held that there was an ouster sufficient to enable the other tenant in common to maintain trespass (*m*).

If one of two tenants in common of a party-wall excludes the other from using it by placing an obstruction on the wall, the only remedy of the latter is to remove the obstruction (*n*).

(*f*) *Jones* v. *Pritchard*, [1908] 1 Ch. 630, 638, discussing *Taylor* v. *Whitehead* (1781), 2 Doug. 749; *Pomfret* v. *Ricroft* (1680), 1 Wms. Saund. 560.

(*g*) *Solomon* v. *Vintners' Co.* (1859), 4 H. & N. 585, where the houses of the plaintiff and defendant were separated by a house belonging to a third person, all three houses having been for a considerable number of years obviously out of the perpendicular and depending on each other for support, and it was held, there being no connection between the houses either in title or possession, that the plaintiff could not recover damages from the defendant for pulling down his house, in consequence of which the house adjoining the defendant's house fell, thereby depriving the plaintiff's house of support.

(*h*) *Pfluger* v. *Hocken* (1858), 1 F. & F. 142; *Hughes* v. *Percival* (1883), 8 App. Cas. 443; *Cribb* v. *Kynoch, Ltd.*, [1907] 2 K. B. at p. 559. As to the effect of the employment of a contractor upon the liability of the employer, see generally title TORT.

(*i*) *Bradbee* v. *Christ's Hospital* (1843), 4 Man. & G. 714, 761; *Standard Bank of British South America* v. *Stokes* (1878), 9 Ch. D. 68. See *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508.

(*k*) *Murly* v. *M'Dermott* (1838), 8 Ad. & El. 138; *Voyce* v. *Voyce* (1820), Gow, 201 (hedge grubbed up); *Murray* v. *Hall* (1849), 7 C. B. 441 (actual expulsion); *Jones* v. *Read* (1876), I. R. 10 C. L. 315 (taking down wall without intention to rebuild); *Standard Bank of British South America* v. *Stokes*, *supra*, at p. 72. See *Noye* v. *Reed* (1827), 1 Man. & Ry. 63; *Jacobs* v. *Seward* (1872), L. R. 5 H. L. 464.

(*l*) *Cubitt* v. *Porter* (1828), 8 B. & C. 257; *Jones* v. *Read*, *supra*.

(*m*) *Stedman* v. *Smith* (1857), 8 E. & B. 1; *Watson* v. *Gray* (1880), 14 Ch. D. 192

(*n*) *Watson* v. *Gray*, *supra*; *Cubitt* v. *Porter*, *supra*, at p. 265.

PART III. Party-Walls.

274. The question of contribution by adjoining owners to the expense of building a party-wall may depend on express contract (*o*), or on a contract implied from common user (*p*) or other circumstances (*q*), or on a local custom (*r*).

Partition.

275. Where two parties are tenants in common of a party-wall, either of them may enforce partition of the wall against the wish of the other (*s*), and notwithstanding any practical difficulty or inconvenience (*t*).

Statute of Limitations.

276. Where a man erects a house against a wall which belongs to and is situate on the land of the adjoining owner, using it to form one side of the house, length of time will not give the former a statutory title to the wall (*a*), though probably he would require an easement of support for his roof (*b*).

Where there is a boundary wall, and an inscription is allowed to remain on it stating to all the world that it belongs to the adjoining proprietor, no question of the Statute of Limitations, or of adverse possession, or of cesser of possession, can arise (*c*).

Part IV.—Evidence of Boundaries.

SECT. 1.—*Nature of Evidence.*

SUB-SECT. 1.—*In General.*

Indication by physical objects.

277. Evidence of boundaries differs in kind and in degree. As a general rule, where a deed refers to known physical and natural objects by means of which the boundaries of land conveyed are described, and also contains a statement of area, the former will control the latter in case of discrepancy (*d*); and if reference is made to some physical object not in existence at the time, and the parties

(*o*) *Stuart* v. *Smith* (1816), 2 Marsh. 435.

(*p*) *Christie* v. *Mitchison* (1877), 36 L. T. 621.

(*q*) *Irving* v. *Turnbull*, [1900] 2 Q. B. 129. Compare *Thacker* v. *Wilson* (1835), 3 Ad. & El. 142; *Re Stone and Hastie*, [1903] 2 K. B. 463, C. A. Where a party-wall held in common by adjoining owners falls into such a ruinous state that rebuilding is imperative, and one owner takes upon himself the whole burden of carrying out the work, it is conceived that the court would compel the other owner to contribute his share on the ground that the expenditure was in the nature of salvage. See the American case *Campbell* v. *Mesier* (1820), 4 John. Ch. Rep. 334.

(*r*) *Robinson* v. *Thompson* (1890), 89 L. T. Jo. 137.

(*s*) *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508, where a longitudinal partition was directed.

(*t*) See *Turner* v. *Morgan* (1803), 8 Ves. 143 (partition of a house), and cases there cited.

(*a*) *Phillipson* v. *Gibbon* (1871), 6 Ch. App. 428. See *Waddington* v. *Naylor* (1889), 60 L. T. 480; *Murly* v. *M'Dermott* (1838), 8 Ad. & El. 138.

(*b*) *Waddington* v. *Naylor*, *supra*. See further, title EASEMENTS AND PROFITS À PRENDRE.

(*c*) *Phillipson* v. *Gibbon*, *supra*, at p. 434. See also *Stedman* v. *Smith* (1857), 8 E. & B. 1; *Watson* v. *Gray* (1880), 14 Ch. D. 192.

(*d*) *Manning* v. *Fitzgerald* (1859), 29 L. J. (EX.) 24; *Lyle* v. *Richards* (1866), L. R. 1 H. L. 222.

subsequently erect some object intending it to conform to the deed, the boundary indicated by such object will be binding upon them, even although it may not actually conform to the line of boundary or to the acreage contained in the deed (*e*).

It is always a question for the jury whether a particular parcel of land is or is not contained in the description of the land conveyed by a deed (*f*).

SUB-SECT. 2.—*Extrinsic Evidence.*

A of extrinsi evidence.

278. Extrinsic evidence is admissible to put before the court the same knowledge of the subject-matter of the deed as was in the possession of the parties thereto at the time of its execution (*g*). It may also be admitted where the description of the boundaries is general or ambiguous (*h*), and the ambiguity is latent (*i*); and in this way ancient grants may be explained by evidence of modern usage (*k*), but no amount of user would prevail against the plain meaning of words (*l*). Evidence of user prior to a grant is also admissible to show what was intended to pass thereby (*m*).

Extrinsic evidence is admissible, in the case of a demise of land by admeasurement "with the houses now erected or being erected thereon," to show that the foundations of the houses were actually laid at the date of the demise and extended beyond the limits of the boundaries shown on the plan, with the result that the admeasurements and plan must be rejected as a *falsa demonstratio* (*n*).

Identification of plan.

279. Where an agreement refers specifically to a plan, oral evidence is admissible to identify the plan referred to, but where

(*e*) See *Taylor* v. *Parry* (1840), 1 Man. & G. 604.

(*f*) *Lyle* v. *Richards* (1866), L. R. 1 H. L. 222; *Doe* d. *Freeland* v. *Burt* (1787), 1 Term Rep. 701; *Kingsmill* v. *Millard* (1855), 11 Exch. 313; *Waterpark* (*Lord*) v. *Fennell* (1859), 7 H. L. Cas. 650.

(*g*) *Murly* v. *M'Dermott* (1838), 8 Ad. & El. 138; *Baird* v. *Fortune* (1861), 7 Jur. (N. S.) 926; *Van Diemen's Land Co.* v. *Table Cape Marine Board*, [1906] A. C. 92, P. C., at p. 98. Compare *Doe* d. *Preedy* v. *Holtom* (1835), 4 Ad. & El. 76. As to extrinsic evidence generally, see title DEEDS AND OTHER INSTRUMENTS.

(*h*) *Doe* d. *Gore* v. *Langton* (1831), 2 B. & Ad. 680, where property was conveyed with the "hereditaments thereunto belonging" and extrinsic evidence was admitted to show the boundaries of such hereditaments; *Waterpark* (*Lord*) v. *Fennell*, *supra*, where property was conveyed by name and parol evidence was admitted to connect property with that name; *Lister* v. *Pickford* (1865), 34 Beav. 576. See title SALE OF LAND.

(*i*) *Lyle* v. *Richards*, *supra*, *per* Lord WESTBURY, at p. 239; *Goodtitle* d. *Radford* v. *Southern* (1813), 1 M. & S. 299.

(*k*) *E.g.*, that an ancient grant of a manor included the sea coast down to low water mark (*Calmady* v. *Rowe* (1844), 6 C. B. 861; *Beaufort* (*Duke*) v. *Swansea Corporation* (1849), 3 Exch. 413; *A.-G.* v. *Jones* (1862), 2 H. & C. 347; *Le Strange* v. *Lowe* (1866), 4 F. & F. 1048; *A.-G. for Ireland* v. *Vandeleur*, [1907] A. C. 369); that the words "river L." in an ancient patent comprised the river bed so far or not so far as the sea (*Donegall* (*Marquis*) v. *Templemore* (*Lord*) (1858), 9 I. C. L. R. 374; see *Re Belfast Dock Act* (1867), I. R. 1 Eq. 128); and that a castle was within the boundary of a county hundred (*Newcastle* (*Duke*) v. *Broxtowe Hundred* (1832), 4 B. & Ad. 273).

(*l*) *Van Diemen's Land Co.* v. *Table Cape Marine Board*, *supra*, *per* Lord HALSBURY, L.C., at p. 97.

(*m*) *Ibid.*, at p. 98.

(*n*) *Manning* v. *Fitzgerald* (1859), 29 L. J. (EX.) 24. See also p. 147, *post*.

SECT. 1. Nature of Evidence.

there is not clear evidence to show what particular plan was agreed upon and there is no sufficient verbal description of the boundaries, the agreement will be void for uncertainty (*o*).

Agreement implied by conduct.

280. An agreement fixing boundaries may be implied from conduct. Thus, the fact that a lessee, knowing that his lessors had agreed with the owners of the adjoining land to appoint some person to stake out the boundaries between, actually put himself into communication with the person appointed, and was present when the boundaries were staked out, and raised no objection, is strong evidence of an agreement by him to the boundaries being so defined (*p*).

Conflicting descriptions.

281. If a deed contains two descriptions of the property conveyed, both being of sufficient and of equal certainty, and a variance is shown by extrinsic evidence to exist between them, that which comes first in the deed must prevail (*q*). If, however, the description of the land intended to be conveyed is couched in such ambiguous terms that it is doubtful what were intended to be the boundaries of the land, and the language of the descriptions equally admits of two different constructions, the one of which would make the quantity conveyed agree with the quantity mentioned in the deed, while the other would make the quantity altogether different, the former construction must prevail (*a*).

When extrinsic evidence inadmissible.

282. Extrinsic evidence is not admissible to contradict or vary clear descriptions of boundaries (*b*). Thus, if a deed contains a full description of the land, evidence that a strip of land not included in the description was always occupied by the owner of the land undoubtedly conveyed by the deed is not admissible to contradict the deed (*c*).

Rejection of surplusage.

283. Where there is no ambiguity in the descriptions contained in a deed, evidence to show that it was intended to convey more than appears in the description does not become admissible by reason of the fact that a further description is added with which the subject-matter clearly intended to be conveyed does not agree (*d*). The maxim *Falsa demonstratio non nocet cum de corpore constat* means that where the subject-matter is otherwise sufficiently

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(*o*) *Hodges* v. *Horsfall* (1829), 1 Russ. & M. 116.
(*p*) *Taylor* v. *Parry* (1840), 1 Man. & G. 604.
(*q*) *Roe* v. *Lidwell* (1859), 9 I. C. L. R. 184.
(*a*) *Herrick* v. *Sixby* (1867), L. R. 1 P. C. 436.
(*b*) Shep. Touch. 29.
(*c*) *Barton* v. *Dawes* (1850), 10 C. B. 261; *Boyle* v. *Mulholland* (1859), 10 I. C. L. R. 150; *Webber* v. *Stanley* (1864), 16 C. B. (N. S.) 698, 752; *Smith* v. *Ridgway* (1865), L. R. 1 Exch. 331; *Pedley* v. *Dodds* (1866), L. R. 2 Eq. 819, where a devise of A. farm "in the parish of R." was held not to include lands in other parishes previously occupied with A. farm. See title DEEDS AND OTHER INSTRUMENTS.
(*d*) *Goodtitle* d. *Radford* v. *Southern* (1813), 1 M. & S. 299; *Bradford* v. *Dublin and Kingstown Rail. Co.* (1858), 7 I. C. L. R. 624; *Doe* d. *Smith* v. *Galloway* (1833), 5 B. & Ad. 43; *Llewellyn* v. *Jersey* (*Earl*) (1843), 11 M. & W. 183; *Roe* v. *Lidwell*, *supra*; *Doe* d. *Renow* v. *Ashley* (1847), 10 Q. B. 663.

described and ascertained, the addition of a false description is rejected as surplusage (*e*).

SECT 1. Nature of Evidence.

But, on the other hand, *non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*, that is to say, where words of additional description are in fact applicable, *e.g.*, where they narrow or define the general description, they are not to be regarded as *falsa demonstratio* (*f*). If premises are described in general terms and a particular description be added, the latter controls the former (*g*).

General followed by particular description.

SUB-SECT. 3.—*Reputation.*

284. Evidence of reputation (*h*), in other words, hearsay evidence, such as a declaration made by a person since deceased, is admissible where the question relates to a matter of general or public interest (*i*), as, for example, to the boundaries of a town (*k*), parish (*l*), or manor (*m*), or to the boundaries between counties, parishes, hamlets or manors (*n*), or between a reputed manor and land belonging to a private individual (*o*), or between old and new land in a manor (*p*).

Reputation.

(*e*) *Jack* v. *M'Intyre* (1845), 12 Cl. & Fin. 151, where boundaries defined were held not to be limited by a specific reference to part of land situate within them; *Anstee* v. *Nelms* (1856), 1 H. & N. 225, where the description of the situation was wrong as regards the county but right as regards the parish and otherwise; *White* v. *Birch* (1867), 36 L. J. (CH.) 174, where a wrong description of land as "in my own occupation" was rejected as *falsa demonstratio;* but compare *Re Seal*, [1894] 1 Ch. 316, C. A., where the words "as the same are now occupied by me" were construed as limiting the parcels. See title DEEDS AND OTHER INSTRUMENTS.

(*f*) *Boyle* v. *Mulholland* (1859), 10 I. C. L. R. 150; *Doe* d. *Preedy* v. *Holtom* (1835), 4 Ad. & El. 76.

(*g*) *Doe* d. *Smith* v. *Galloway* (1833), 5 B. & Ad. 43; *Travers* v. *Blundell* (1877), 6 Ch. D. 436, C. A.; *Herrick* v. *Sixby* (1867), L. R. 1 P. C. 436; *Re Seal, supra; Re Brocket*, [1908] 1 Ch. 185, 196.

(*h*) "Reputation is in general weak evidence, and when it is admitted, it is the duty of the judge to impress on the minds of the jury how little conclusive it ought to be" (*Weeks* v. *Sparke* (1813), 1 M. & S. 679, *per* Lord ELLENBOROUGH, C.J., at p. 687). See generally as to evidence of reputation, *R.* v. *Bedford (Inhabitants)* (1855), 4 E. & B. 535, *per* Lord CAMPBELL, C.J., at p. 541; *Morewood* v. *Wood* (1792), 14 East, 327, 330; and title EVIDENCE.

(*i*) See *Evans* v. *Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241, C. A.; *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A., at p. 560, where the word "public" is explained.

(*k*) *Ireland* v. *Powell*, cited 7 Ad. & El. at p. 555, where the question was whether a turnpike was within the boundary of a town; *R.* v. *Bliss* (1837), 7 Ad. & El. 550.

(*l*) *R.* v. *Mytton* (1860), 2 E. & E. 557. See *Coombs* v. *Coether and Wheeler* (1829), Mood. & M. 398; *Cooke* v. *Banks* (1826), 2 C. & P. 478.

(*m*) *Doe* d. *Jones* v. *Richards* (1798), Peake, Add. Cas. 180; *Talbot* v. *Lewis* (1834), 5 Tyr. 1; *Doe* d. *Padwick* v. *Skinner* (1848), 3 Exch. 84.

(*n*) *Nicholls* v. *Parker* (1805), 14 East, 331, n. (boundaries of common—whether in parish and manor of A. or parish and manor of B.); *Thomas* v. *Jenkins* (1837), 6 Ad. & El. 525, and *Brisco* v. *Lomax* (1838), 8 Ad. & El. 198, 213 (boundaries of hamlet and private estate—identical); *Evans* v. *Rees* (1839), 10 Ad. & El. 151 (boundaries between parishes and counties).

(*o*) *Doe* d. *Molesworth* v. *Sleeman* (1846), 9 Q. B. 298, where declarations of a deceased person were admitted as to boundaries; see *Curzon* v. *Lomax* (1803), 5 Esp. 60, where it was said that the right to the soil was evidenced by acts of ownership exercised on it, not by presumptive evidence of property arising from supposed boundaries, the rights to which had never been ascertained by possession.

(*p*) *Barnes* v. *Mawson* (1813), 1 M. & S. 77, *per* Lord ELLENBOROUGH, C.J., at p. 81.

SECT. 1. Nature of Evidence.

Declarations by deceased persons are admissible if made *ante litem motam* (*q*), or against the interest of the declarant (*r*), or in the ordinary course of business and in the discharge of professional duty (*s*), and by a declarant of competent knowledge (*t*). The declarant, if otherwise cognisant of the subject, need not be resident in the locality of the disputed boundary (*a*).

When inadmissible.

285. Evidence of reputation is inadmissible in cases of a private nature (*b*), *e.g.*, as to the boundaries of a waste over which some only of the tenants of a manor claim a right of common appendant (*c*), or as to the boundaries between two private estates, except where the private boundaries coincide with public ones (*d*).

Evidence of reputation as to particular facts as opposed to general rights is not admissible (*e*).

Nature of evidence of reputation.

286. Where evidence of reputation is admissible, it may be oral or documentary, so that deeds, leases and other private documents may be admitted as declaratory of their contents (*f*). It need not necessarily be supported by usage (*g*).

(*q*) See title EVIDENCE.

(*r*) *Crease* v. *Barrett* (1835), 1 Cr. M. & R. 919, where a declaration by a deceased lord of the manor as to the extent of the manor wastes was held admissible, but not as to the extent of his rights over the wastes. See *R.* v. *Bedford (Inhabitants)* (1855), 4 E. & B. 535, 541; and title EVIDENCE.

(*s*) *Price* v. *Torrington (Earl)* (1703), 1 Salk. 285; *Mellor* v. *Walmesley*, [1905] 2 Ch. 164, C. A., where field book entries made by a deceased surveyor for the purpose of a public drainage survey on which he was professionally employed were admitted in evidence.

(*t*) *Rogers* v. *Wood* (1831), 2 B. & Ad. 245. But compare *Crease* v. *Barrett*, *supra*, where an entry by a deceased person as to boundaries, charging himself, was admitted against strangers, even though it appeared that the facts stated in the entry were not known to him of his own knowledge. See also *Pipe* v. *Fulcher* (1858), 28 L. J. (Q. B.) 12, *per* Lord CAMPBELL, C.J., at p. 13; and title EVIDENCE.

(*a*) *Newcastle (Duke)* v. *Broxtowe Hundred* (1832), 4 B. & Ad. 273.

(*b*) See *R.* v. *Bedford (Inhabitants)*, *supra*, at p. 542. The principle is that questions of private boundaries are not matters of public notoriety. But see *Davies* v. *Lewis* (1787), 2 Chit. 535, where, in a question as to private rights, whether or not a place was parcel of a sheepwalk, evidence of reputation was held admissible.

(*c*) *Dunraven (Earl)* v. *Llewellyn* (1850), 15 Q. B. 791. See *Reed* v. *Jackson* (1801), 1 East, 355, 357; *Doe* d. *Didsbury* v. *Thomas* (1811), 14 East, 323; *Clothier* v. *Chapman* (1805), 14 East, 331, n.; *Williams* v. *Morgan* (1850), 15 Q. B. 782.

(*d*) *Thomas* v. *Jenkins* (1837), 6 Ad. & El. 525; *Brisco* v. *Lomax* (1838), 8 Ad. & El. 198, 213. See *R.* v. *Bliss* (1837), 7 Ad. & El. 550, 554 (boundary of a road).

(*e*) *Outram* v. *Morewood* (1793), 5 Term Rep. 121, *per* Lord KENYON, C.J., at p. 123: "Although a general right may be proved by traditionary evidence, yet a particular fact cannot." *E.g.*, that a deceased person planted a tree near a road and stated at the time of planting that his object was to show where the boundary of the road was when he was a boy (*R.* v. *Bliss*, *supra*; see *R.* v. *Berger*, [1894] 1 Q. B. 823), or that a stone was erected as a boundary mark at a particular place (*R.* v. *Bliss*, *supra*), or that perambulations had taken a particular line (*Taylor* v. *Devey* (1837), 7 Ad. & El. 409); see also *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.

(*f*) See p. 146, *post*; and title EVIDENCE.

(*g*) *Crease* v. *Barrett*, *supra*.

SECT. 2.—*Particular Kinds of Evidence.*

SECT. 2. Particular Kinds of Evidence.

SUB-SECT 1.—*Public Documents and Orders etc.*

Effect of statements in public documents.

287. Statements in public or official documents are as a general rule admissible as evidence of the facts recorded (*h*).

Domesday Book.

288. Domesday Book is a record of a public inquisition or survey, and therefore admissible as evidence of boundaries (*i*).

Crown survey.

289. A Crown survey, if made under proper authority, as, for example, pursuant to an Act of Parliament, and produced from the records of the court or other proper custody, is also admissible as a public document in questions of boundary (*k*), even where the commission under which it was made is lost, provided that evidence is forthcoming *aliunde* that the survey was made under due authority (*l*).

But surveys which are not made under proper authority (*m*) are treated merely as private memorials and are inadmissible in evidence (*n*). This rule applies to surveys made on behalf of the Crown when it is beneficially interested (*o*). Thus, a survey directed

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(*h*) For a definition of "public documents," see *Sturla* v. *Freccia* (1880), 5 App. Cas. 623, at p. 643, explained in *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A. See also title EVIDENCE.

(*i*) See title EVIDENCE. Domesday Book was compiled shortly after the Norman conquest by Royal Commissioners. It contains a general survey of all the counties in England except the four northern, and specifies the name and local position of every place, its possessor at the time of King Edward the Confessor, and at the time of the survey, together with particulars, quantities and descriptions of the land. Its value as evidence is obviously limited by the difficulty usually experienced of applying the ancient descriptions to modern circumstances. In *Alcock* v. *Cooke* (1829), 5 Bing. 340, and *Beaufort* (*Duke*) v. *John Aird & Co.* (1904), 20 T. L. R. 602, extracts from Domesday Book were given in evidence.

(*k*) *Evans* v. *Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241, C. A., where the survey was made in discharge of a public duty imposed by statute. See *Doe* d. *William IV.* v. *Roberts* (1844), 13 M. & W. 520 (ancient survey or extent of Crown lands); *New Romney Corporation* v. *New Romney Commissioners of Sewers*, [1892] 1 Q. B. 840 (map made under the authority of a Royal Commission).

(*l*) *Rowe* v. *Brenton* (1828), 8 B. & C. 737, 747. See *Smith* v. *Brownlow* (*Earl*) (1870), L. R. 9 Eq. 241, 252.

(*m*) *Evans* v. *Taylor* (1838), 7 Ad. & El. 617, where a survey of the boundaries of a manor purporting to be made under stat. 4 Edw. 1, stat. 1, which gives no power to define boundaries of manors, was held not to be admissible as evidence of boundary, either as a public document or on the ground of reputation; *Mercer* v. *Denne*, *supra*, where a map in the possession of the Admiralty, not being an Admiralty chart, was held not to be admissible.

(*n*) Vin. Abr. tit. Evidence, A. b 15, s. 12; *Daniel* v. *Wilkin* (1852), 7 Exch. 429. See *Beaufort* (*Duke*) v. *Smith* (1849), 4 Exch. 450, where a survey, made by the authority of Oliver Cromwell, was held inadmissible either as a public document or as evidence of reputation; *contrà*, *Freeman* v. *Read* (1863), 4 B. & S. 174, where a parliamentary survey made in the time of the Commonwealth was held to be good evidence of reputation.

(*o*) *Phillips* v. *Hudson* (1867), 2 Ch. App. 243 (survey made by Augmentation Office for the purposes of the Crown as a private owner). Compare *Evans* v. *Merthyr Tydfil Urban Council*, *supra*, where a surveyor's report made under the Act for the Better Management of the Land Revenue of the Crown (34 Geo. 3, c. 75), s. 8, was held to be a public document and admissible in evidence.

SECT. 2. Particular Kinds of Evidence.

to be taken by the King in the seventeenth century with a view to ascertaining what repairs were necessary to save his castles on the coast from the ravages of the sea, is not admissible as a public document to show the boundaries of the land (*p*).

Ordnance maps.

290. The Acts (*q*) under which ordnance surveys have been made in England contain no provisions for settling boundaries. An ordnance map, to which no reference is made in the title deeds (*r*), is not admissible either as a public document or as evidence of reputation to show the boundary of a parish or vill (*s*), or between the lands of adjoining owners (*t*), though it may be received to show the position of the *medium filum* of a river (*u*) or of some physical object at the time it was taken (*a*), such as a track across land (*b*).

Atlases and maps.

291. Standard atlases and maps may be used to prove facts of public knowledge (*c*).

Tithe commutation maps.

292. Tithe commutation maps are admissible as evidence of the boundaries or waste of a manor (*d*), but not of boundaries between private estates (*e*).

Plans etc. made by Board of Agriculture and Fisheries.

293. On an enfranchisement of copyholds made under the Copyhold Act, 1894 (*f*), any plan made or approved by the Board of Agriculture and Fisheries and any definition of boundaries is conclusive as between the lord of the manor and the tenant (*g*), but it could not, it seems, be conclusive as to the boundaries before the date of determination (*h*).

Although a map attached by the Board of Agriculture and Fisheries (formerly the Land Commissioners (*i*)) to an award under

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(*p*) *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.

(*q*) Ordnance Survey Act, 1841 (4 & 5 Vict. c. 30); Geological Survey Act, 1845 (8 & 9 Vict. c. 63). As to the value of ordnance maps as evidence of boundaries in the case of land registered under the Land Transfer Acts, 1875 and 1897, see p. 115, *ante*.

(*r*) See *Wakeman* v. *West* (1836), 7 C. & P. 479.

(*s*) *Bidder* v. *Bridges* (1886), 34 W. R. 514.

(*t*) *Tisdall* v. *Parnell* (1863), 14 I. C. L. R. 1, 27, 28; *Coleman* v. *Kirkaldy*, [1882] W. N. 103. See *Swift* v. *M'Tiernan* (1848), 11 I. Eq. R. 602; *Mercer* v. *Denne*, *supra* (ancient map prepared by Board of Ordnance).

(*u*) *Great Torrington Commons Conservators* v. *Moore Stevens*, [1904] 1 Ch. 347, at p. 353.

(*a*) *Caton* v. *Hamilton* (1889), 53 J. P. 504.

(*b*) *A.-G.* v. *Antrobus*, [1905] 2 Ch. 188, at p. 203.

(*c*) In *R.* v. *Orton*, cited in Stephen's Dig. Evidence, 6th ed. p. 48, maps of Australia were given in evidence to show the situation of places where the defendant said he had lived, and in *Birrell* v. *Dryer* (1884), 9 App. Cas. 345, the court accepted an Admiralty chart as evidence; see *ibid.*, *per* Lord BLACKBURN, at p. 352.

(*d*) *Smith* v. *Lister* (1895), 64 L. J. (Q. B.) 154, at p. 159.

(*e*) 6 & 7 Will. 4, c. 71, s. 64; *Wilberforce* v. *Hearfield* (1877), 5 Ch. D. 709. Compare *Hammond* v. *Bradstreet* (1856), 10 Exch. 390, Ex. Ch., where the point was discussed.

(*f*) Copyhold Act, 1894 (57 & 58 Vict. c. 46). See further p. 112, *ante*, and title COPYHOLDS.

(*g*) *Ibid.*, s. 52 (4).

(*h*) *R.* v. *St. Mary* (*Inhabitants*) (1821), 4 B. & Ald. 462. Compare *R.* v. *Milton* (1843), 1 Car. & Kir. 58.

(*i*) See p. 113, *ante*; and title AGRICULTURE, Vol. I., p. 297.

an Inclosure Act is evidence whether a road is a highway or not, it is not evidence of the boundaries of the highway where the strip of land bordering the highway is not dealt with in the award (*k*), and where a tenant for life under a will of land adjoining the highway accepts, against his interest, an award of the Board under an Inclosure Act which treats the pieces of land adjoining a highway as belonging to the waste and not to the adjoining owners, that is strong evidence against his successors in title that the pieces were in fact part of the waste (*l*).

Private maps etc.

294. Maps and surveys which are not admissible as public documents are sometimes received in evidence as admissions of persons in privity with those against whom they are tendered, or as evidence of reputation (*m*).

Ecclesiastical terriers.

295. Ecclesiastical terriers, or schedules of the temporal possessions of parish churches, made from time to time pursuant to the 87th canon, are receivable in evidence, if they come from the proper custody, namely, the bishop's or archdeacon's registry or the chest of the parish church (*n*).

A terrier of glebe lands is evidence against, but not for, the parson, unless signed by the parson and by churchwardens not nominated by the parson. Its value as evidence is increased if it is signed also by some substantial parishioners (*o*). But a terrier of a parish which is not signed by any parish official or person bearing a public character in a parish, is not evidence (*p*). Entries in parochial books are sometimes received as evidence of boundaries (*q*).

Verdict of jury.

296. A verdict of a jury in a former action relating to a boundary is sometimes admissible as evidence of reputation in a subsequent action between different parties (*r*).

Arbitrator's award.

But an award of an arbitrator is not admissible as evidence of reputation (*s*), though in a subsequent suit between the same parties

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(*k*) *R.* v. *Berger*, [1894] 1 Q. B. 823.

(*l*) *Gery* v. *Redman* (1875), 1 Q. B. D. 161.

(*m*) *Doe* d. *Hughes* v. *Lakin* (1836), 7 C. & P. 481; *Freeman* v. *Read* (1863), 4 B. & S. 174. See p. 147, *post*.

(*n*) See *Coombs* v. *Coether and Wheeler* (1829), Mood. & M. 398; *Croughton* v. *Blake* (1843), 12 M. & W. 205, at p. 208, where it was said that the custody need not be the *most* proper custody; *Earl* v. *Lewis* (1801), 4 Esp. 1; and title EVIDENCE. As to ecclesiastical terriers generally, see title ECCLESIASTICAL LAW.

(*o*) Buller, N. P. 248; *Atkins* v. *Hatton* (1793), 2 Anst. 386. Compare *Carr* v. *Mostyn* (1850), 5 Exch. 69, where returns made by parsons in answer to inquisitions made by the bishop regarding the boundaries etc. of a parochial chapelry were admitted as evidence.

(*p*) *Earl* v. *Lewis*, *supra*. See *Cooke* v. *Banks* (1826), 2 C. & P. 478.

(*q*) *A.-G.* v. *Stephens* (1856), 6 De G. M. & G. 111.

(*r*) *Evans* v. *Rees* (1839), 10 Ad. & El. 151; *Reed* v. *Jackson* (1801), 1 East, 355, at p. 357; *Talbot* v. *Lewis* (1834), 6 C. & P. 603; *Brisco* v. *Lomax* (1838), 8 Ad. & El. 198, at p. 210, where LITTLEDALE, J., said that a verdict was not a reputation, but was as good evidence as reputation; *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135. See generally, as to the value of verdicts, *Lee* v. *Johnstone* (1869), L. R. 1 Sc. & Div. 426.

(*s*) *Evans* v. *Rees*, *supra*.

SECT. 2. Particular Kinds of Evidence.

or those claiming through them such an award is admissible, not as hearsay, but as evidence properly so called (*t*).

So, too, ancient orders of sessions containing statements respecting boundaries (*a*), presentments of manorial courts setting out boundaries (*b*), but not decrees purporting to be made by courts not known to the law (*c*), are admissible as evidence of reputation.

Orders of sessions etc.

Certificate of proceedings before Tithe Commissioners etc.

297. Copies of proceedings before the Tithe Commissioners, if certified under their seal (*d*), and authenticated orders, licences, or other instruments issued by the Board of Agriculture and Fisheries (*e*), are evidence of the matters therein stated.

Assessments.

298. Extracts from land tax or poor rate assessments are evidence of seisin and as such admissible in questions of boundary (*f*).

SUB-SECT. 2.—*Private Documents.*

Ancient documents.

299. Ancient documents coming from the proper custody and purporting upon the face of them to show exercise of ownership, such as leases (*g*), licences in the nature of leases (*h*), or documents showing that a person in possession is vindicating that possession against someone else (*i*), are admissible as evidence in questions of boundary. In the case of a lease the payment of rent is an

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(*t*) *Breton* v. *Knight* (1837), cited in Roscoe's Evidence at Nisi Prius, 18th ed. p. 220.

(*a*) *Newcastle* (*Duke*) v. *Broxtowe Hundred* (1832), 4 B. & Ad. 273.

(*b*) *Evans* v. *Rees* (1839), 10 Ad. & El. 151.

(*c*) *Rogers* v. *Wood* (1831), 2 B. & Ad. 245.

(*d*) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 2. See *Giffard* v. *Williams* (1869), 5 Ch. App. 546.

(*e*) Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30); Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31).

(*f*) *Doe* d. *Smith* v. *Cartwright* (1824), 1 C. & P. 218; *Plaxton* v. *Dare* (1829), 10 B. & C. 17 (old rates made by parish officers on the occupiers of the land in question); *Doe* d. *Stansbury* v. *Arkwright* (1833), 2 Ad. & El. 182, n.; *Doe* d. *Strode* v. *Seaton* (1834), 2 Ad. & El. 171; *Anstee* v. *Nelms* (1856), 1 H. & N. 225. See *Swift* v. *M'Tiernan* (1848), 11 I. Eq. R. 602.

(*g*) *Malcolmson* v. *O'Dea* (1863), 10 H. L. Cas. 593, 614; *Bristow* v. *Cormican* (1878), 3 App. Cas. 641, 653 (boundaries of a private fishery); *Beaufort* (*Duke*) v. *John Aird & Co.* (1904), 20 T. L. R. 602. As evidence of reputation in matters of public boundaries, ancient patents and inquisitions (*Donegall* (*Marquis*) v. *Templemore* (1858), 9 I. C. L. R. 374, and *Re Belfast Dock Act* (1867), 1 I. R. Eq. 128 (boundaries of navigable rivers)), leases and books of accounts (*Plaxton* v. *Dare* (1829), 10 B. & C. 17, where in a question of a parish boundary the books of accounts contained evidence of the payment of parish rates) are admissible. See further, as to evidence of public boundaries, title LOCAL GOVERNMENT.

(*h*) *Rogers* v. *Allen* (1808), 1 Camp. 309; *Malcolmson* v. *O'Dea*, *supra*, at p. 614.

(*i*) *Blandy-Jenkins* v. *Dunraven* (*Earl*), [1899] 2 Ch. 121, 125, C. A. As to the value of acts of ownership in support of ancient documents, see also *Hastings Corporation* v. *Ivall* (1874), L. R. 19 Eq. 558; *Bristow* v. *Cormican*, *supra*; *Lord Advocate* v. *Blantyre* (*Lord*) (1879), 4 App. Cas. 770, 791, where the title to the foreshore was evidenced partly by grant and partly from acts of ownership; *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135, where possession of a fishery was evidenced by the production of, *inter alia*, a report of certain ancient proceedings in court in a possessory action.

additional fact equally admissible (*k*), but proof of such payment is not essential to the lease being admitted (*l*).

Private maps and surveys.

300. The general rule as regards private maps and surveys is that they are not receivable in evidence in the strict sense of the word either for or against the parties making them (*m*).

But as between two adjoining proprietors a private map is admissible in a dispute as to boundaries, if at the time the map was made the two adjoining properties belonged to the person from whom both parties derive their respective titles (*n*). So also in particular circumstances maps may be treated as declarations against proprietary interest and receivable in evidence like other such declarations (*o*).

A map annexed to a deed is part of the contract, and as a rule must be used as evidence of the parcels (*p*). Where the connection is clear, the map need not be actually annexed to the deed to which it refers (*q*).

Effect of maps on parcels.

An inaccurate map does not affect or vitiate clear descriptions of parcels (*r*), but under certain circumstances a map or survey may override a description of parcels (*s*).

Maps as evidence of reputation.

Where evidence of reputation is admissible, private maps made by deceased persons having means of knowledge are admissible as such evidence, provided that they are found in the proper custody, and proof is furnished of the death of the maker of the map (*t*).

Inscriptions on boundary walls.

301. Where there is a boundary wall, and the wall has a stone in it bearing an inscription to the effect that the wall belongs to the adjoining owner, this effectually excludes any question of the acquisition of the wall by adverse possession; and no question of the Statute of Limitations, or of adverse possession, or of cesser of possession can properly arise (*u*).

(*k*) *Bristow* v. *Cormican* (1878), 3 App. Cas. 641, at p. 653.

(*l*) *Malcolmson* v. *O'Dea* (1863), 10 H. L. Cas 593, at p. 614.

(*m*) *Anon.* (1717), 1 Stra. 95; *Wilkinson* v. *Allott* (1777), 3 Bro. Parl. Cas. 684 (boundaries of glebe lands); *Pollard* v. *Scott* (1791), Peake, 18 (map taken by parish overseers no evidence as to boundary of a highway, plan made by lord of manor not usable as against tenants of manor); *Wakeman* v. *West* (1836), 7 C. & P. 479; *Phillips* v. *Hudson* (1867), 2 Ch. App. 243, at p. 247, where it was held that the tenant of a manor cannot use against the lord a plan made by the lord.

(*n*) *Doe* d. *Hughes* v. *Lakin* (1836), 7 C. & P. 481.

(*o*) *Bridgman* (*Sir George*) v. *Jennings* (1699), 1 Ld. Raym. 734, where one seised of two manors, during his seisin, caused a survey to be made of one manor which was afterwards alienated, and a dispute as to boundaries arose between the lords of the respective manors, and the survey was admitted as evidence.

(*p*) Starkie on Evidence, 473; *Wakeman* v. *West*, *supra*, at p. 480; *Lyle* v. *Richards* (1866), L. R. 1 H. L. 222.

(*q*) *Yates* v. *Harris* (1702), 1 Stra. 95, n. (old map found with muniments of title which agreed with the boundaries as adjusted on an old purchase).

(*r*) *Mellor* v. *Walmesley*, [1905] 2 Ch. 164, C. A.

(*s*) *Barnard* v. *De Charleroy* (1899), 81 L. T. 497, P. C.

(*t*) *Meath* (*Bishop*) v. *Winchester* (*Marquess*) (1836), 3 Bing. (N. C.) 183, at p. 200; *R.* v. *Milton* (*Inhabitants*) (1843), 1 Car. & Kir. 58. See also *Pipe* v. *Fulcher* (1858), 1 E. & E. 111; *Pollard* v. *Scott*, *supra*, cases where private maps were held inadmissible. As to when evidence of reputation is admissible, see p. 141, *ante*.

(*u*) *Phillipson* v. *Gibbon* (1871), 6 Ch. App. 428.

SECT. 2. Particular Kinds of Evidence.

Preliminary agreement for sale.

302. A preliminary agreement for the sale of property followed by a conveyance is not sufficient to fix boundaries, nor, as between the purchaser and the vendor, except in an action for rectification, is the agreement even evidence for the purpose of showing what were the boundaries of the property subsequently conveyed by deed, for the agreement is merged in the deed (*w*).

Particulars of sale.

Particulars of sale at an auction at which property was sold may, where the conveyance is ambiguous, be admitted as evidence of boundaries (*x*).

Histories.

303. A county history giving the boundaries of a county, though admittedly coterminous in part with the boundaries of a manor, is not admissible as evidence of the manor boundaries (*y*). A book of general history may, it seems, be given in evidence to ascertain ancient facts of a public nature (*a*), but not particular customs or private rights (*b*).

SECT. 3.—*Perambulations and other Acts of Ownership.*

Perambulations.

304. Perambulations and other acts of ownership are receivable in evidence in boundary questions (*c*). A perambulation of a manor by the lord is evidence of an assertion of ownership by him although made in the absence of anyone on behalf of the plaintiff (*d*).

What acts of ownership are sufficient.

305. To prove a right to the soil, evidence of acts of ownership, such as fishing a pond, felling a tree, or preventing persons from taking soil, prevails against presumptive evidence of property arising from supposed boundaries the rights to which have never been ascertained by possession (*e*). But such acts of ownership as clipping, trimming, and pollarding a fence or cleansing a ditch, though admissible in evidence, are not conclusive as to the title

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(*w*) *Williams* v. *Morgan* (1850), 15 Q. B. 782. As to the admissibility of such an agreement or of parol or oral evidence to correct or vary the terms of a deed in an action for rectification, see titles DEEDS AND OTHER INSTRUMENTS; EVIDENCE; MISTAKE.

(*x*) *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554.

(*y*) *Evans* v. *Getting* (1834), 6 C. & P. 586; *White and Jackson* v. *Beard* (1839), 2 Curt. 480, 487, 492.

(*a*) *Read* v. *Lincoln* (*Bishop*), [1892] A. C. 644. See also *White and Jackson* v. *Beard*, *supra*, at p. 492 (boundaries of a parish).

(*b*) Buller, Nisi Prius, 7th ed., p. 234.

(*c*) Perambulation was in former times one of the ways of ascertaining and preserving not only public boundaries, such as those of parishes, towns, counties, and forests, but also *quasi*-private boundaries, *e.g.*, of seigniories, lordships, and manors. See Vin. Abr. Perambulation; and, as to parish boundary perambulations, see *Weeks* v. *Sparke* (1813), 1 M. & S. 679, 687, 689; *Taylor* v. *Devey* (1837), 7 Ad. & El. 409; and title LOCAL GOVERNMENT. *Quære* whether the perambulation of a private estate was ever made.

(*d*) *Woolway* v. *Rowe* (1834), 1 Ad. & El. 114.

(*e*) *Curzon* v. *Lomax* (1803), 5 Esp. 60. See *Jones* v. *Williams* (1837), 2 M. & W. 326, where the question was whether the middle or one side of a stream was the boundary between two estates, and evidence of acts of ownership was admitted to prove the latter proposition; *University College, Oxford* v. *Oxford Corporation* (1904), 20 T. L. R. 637. See generally, as to acts of ownership, title EVIDENCE.

to the fence or ditch where the presumption of law is to the contrary (*f*).

Though acts done upon one part of land within a boundary may be evidence of the ownership of the whole land within such boundary (*g*), yet, as regards lands within a disputed boundary, acts of ownership by either party outside the boundary are no evidence of title to the lands within (*h*).

Repairing fences.

The mere fact that an adjoining owner has for many years, *e.g.*, fifty, done slight repairs for the purpose of maintaining a fence between his land and that of his neighbour, is no evidence of any legal obligation to repair, for such repairs may have been made solely for his own benefit, and in pursuance of his obligation to keep his own cattle from trespassing on his neighbour's property. But the fact not only that one owner and his predecessors in title have always repaired the fence, but also that whatever repairs may have become necessary have always been done upon notice from the adjoining owner requiring them to be done, is evidence from which a prescriptive obligation to fence against the cattle of the adjoining owner may be inferred (*i*).

The ownership of a several fishery in a river navigable or non-navigable, public or private, raises a presumption that the freehold is in the grantee of the fishery (*k*).

SECT. 4.—*Boundaries of Copyholds.*

Length of enjoyment.

306. The generality and vagueness of descriptions of copyhold land on the rolls of manors are well known to the court, and therefore a vendor is not required to furnish evidence connecting the descriptions with the property agreed to be sold, but specific performance will be decreed on proof that the property has actually been enjoyed and has passed under the descriptions for forty years (*l*).

Entries on court rolls.

Entries on court rolls are evidence of boundaries as between the tenants, though such evidence is not always usable by the lord in proof of the boundaries of his manor (*m*).

(*f*) *Henniker* v. *Howard* (1904), 90 L. T. 157; *Craven* (*Earl*) v. *Pridmore* (1902), 18 T. L. R. 282; see p. 125, *ante*.

(*g*) *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401, at p. 417. The erection and maintenance of piles on a portion of a foreshore is an act of ownership only as regards the particular portion of the foreshore upon which the piles stand (*Beaufort* (*Duke*) v. *John Aird & Co.* (1904), 20 T. L. R. 602, at p. 603).

(*h*) *Clark* v. *Elphinstone* (1880), 6 App. Cas. 164 (latent ambiguity in description of boundary). Compare *Doe* d. *Barrett* v. *Kemp* (1831), 7 Bing. 332.

(*i*) *Hilton* v. *Ankesson* (1872), 27 L. T. 519; *Boyle* v. *Tamlyn* (1827), 6 B. & C. 329; *Lawrence* v. *Jenkins* (1873), L. R. 8 Q. B. 274.

(*k*) *Holford* v. *Bailey* (1849), 13 Q. B. 426, at p. 444; *A.-G.* v. *Emerson*, [1891] A. C. 649, at p. 654; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401; *Beaufort* (*Duke*) v. *John Aird & Co.*, *supra*. See title FISHERIES.

(*l*) *Long* v. *Collier* (1828), 4 Russ. 267. See also, as to manor boundaries, *Brisco* v. *Lomax* (1838), 8 Ad. & El. 198; *Evans* v. *Rees* (1839), 10 Ad. & El. 151; and title COPYHOLDS. For the powers of the Board of Agriculture and Fisheries to determine boundaries of copyholds, see p. 112, *ante*.

(*m*) *Irwin* v. *Simpson* (1758), 7 Bro. Parl. Cas. 306; *Standen* v. *Christmas* (1847), 10 Q. B. 135.

SECT. 5. Discovery.

When discovery of title-deeds granted.

SECT. 5.—*Discovery.*

307. Where a question of boundaries is involved, the plaintiff is entitled to discovery of all deeds and documents in the possession of the defendant which contain the evidence of the title of both (*n*), or which in any way tend to make out the plaintiff's case (*o*). Production can only be withheld where the deeds are exclusively relevant to the defendant's case (*p*). A defendant, however, cannot claim protection on this ground where he himself has caused the confusion of boundaries (*q*). In particular, a tenant holding lands of his own with lands demised to him must, in case of a confusion of boundaries, produce his own title-deeds to his lessor (*r*), for it is the tenant's duty to distinguish the boundaries of the land demised (*s*).

(*n*) *Burrell* v. *Nicholson* (1833), 1 My. & K. 680, *per* Lord BROUGHAM, at p. 681.
(*o*) *A.-G.* v. *Emerson* (1882), 10 Q. B. D. 191, C. A. Compare *Bolton* v. *Liverpool Corporation* (1831), 3 Sim. 467, *per* SHADWELL, V.-C., at p. 489.
(*p*) See *Smith* v. *Beaufort* (*Duke*) (1842), 1 Ph. 209; *Lyell* v. *Kennedy* (1883), 8 App. Cas. 217; and compare *Hungerford* v. *Goreing* (1687), 2 Vern. 38.
(*q*) *Bute* (*Marquis*) v. *Glamorganshire Canal Co.* (1845), 9 Jur. 1063.
(*r*) *Southwell* (*Chapter*) v. *Thompson* (1837), 6 L. J. (CH.) 196.
(*s*) *Brown* v. *Wales* (1872), 42 L. J. (CH.) 45.

BRAWLING.

See CRIMINAL LAW AND PROCEDURE; ECCLESIASTICAL LAW.

BREACH OF PROMISE OF MARRIAGE.

See HUSBAND AND WIFE.

BREACH OF THE PEACE.

See CRIMINAL LAW AND PROCEDURE; MAGISTRATES.

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See FACTORIES AND WORKSHOPS; FOOD AND DRUGS.

BRIBERY.

See CRIMINAL LAW AND PROCEDURE.

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See HIGHWAYS, STREETS AND BRIDGES.

BRITISH DOMINIONS.

See DEPENDENCIES AND COLONIES.

BRITISH SUBJECTS.

See ALIENS; CONSTITUTIONAL LAW.

BROKERS.

See AGENCY; INSURANCE; SALE OF GOODS; STOCK EXCHANGE.

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BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS.

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London Building Acts - - - - ,, METROPOLIS.

Part I.—Application of Terms.

SECT. 1.—*Building and Engineering Contracts etc.*

Application of terms.

308. The term "building and engineering contracts" is to be understood as applicable to these headings as a convenient description and not as a definition having any strictly legal meaning. Such contracts may be defined as those in which one party, called the builder or contractor (*a*), undertakes to build or construct works on, under or over land. This land is usually in the possession of another person, called the building owner or employer (*a*).

(*a*) See p. 159, *post.*

Shipbuilding contracts relate to the construction of ships, which generally takes place at the yard or works of the shipbuilder.

Agreements for the granting of leases of land in consideration of the erection of buildings and works thereon are not within the scope of this article (*b*).

Another class of contracts connected with building operations are contracts for the sale or lease of land, under which restrictive covenants as to building are imposed on the purchasers or lessees of separate plots of an estate which is being laid out for building. The purpose of these covenants is to preserve the character and amenities of the estate for the common benefit of the several purchasers and lessees, as well as that of the vendor or lessor (*c*).

Building agreements.

Building schemes.

SECT. 2.—*Parties to the Contract.*

SUB-SECT. 1.—*Building Owners and Employers.*

309. The terms "building owner" and "employer" are applied in this title to persons who have employed another person to construct, or execute work upon, a building or buildings (such as houses, shops, warehouses, churches, theatres etc.) on the building owner's or employer's land for his benefit, either as occupier or lessor.

Definition.

SUB-SECT. 2.—*Builders and Contractors.*

310. The term "builder" (*d*) has received judicial interpretation on account of its being employed in the repealed Bankruptcy Act, 1869 (*e*), and previous Acts (*f*). The effect of these interpretations is that a builder is a person who builds either on his own or another's land for profit (*g*). In the London Building Act, 1894 (*h*), "builder" is defined as meaning the person who is employed to build or to execute work on a building or structure, or, where no person is so employed, the owner of the building or structure.

Builder.

The term "contractor" (*i*) is in popular usage applied to persons who are either builders in a large way of business, or who undertake to perform work which is not comprised within the term "building"

Contractor.

(*b*) Building agreements will be found dealt with exhaustively under the title LANDLORD AND TENANT.

(*c*) See titles REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

(*d*) "The master artisan, who receives his instructions from the architect, and employs the masons, carpenters etc. by whom the manual work is performed" (New Eng. Dict., Vol. I., p. 1162). "In the practice of civil architecture the builder comes between the architect who designs the work and the artisans who execute it" (Engl. Encyc.). "A person who carries on the various trades requisite in the erection of a building" (Dictionary of Architecture).

(*e*) 32 & 33 Vict. c. 71, s. 4, Sched. I.

(*f*) As to these Acts, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 5, 324, 325.

(*g*) *Ex parte Neirinckx* (1835), 2 Mont. & A. 384. See also *Ex parte Edwards* (1840), 1 Mont. D. & De G. 3; *Stuart* v. *Sloper* (1849), 3 Exch. 700; *Ex parte Stewart* (1849), 3 De G. & Sm. 557; *Re Fowler* (1851), Fonbl. 201.

(*h*) 57 & 58 Vict. c. ccxiii., s. 5 (33).

(*i*) "One who contracts or undertakes to supply certain articles, or to perform any work or service (especially for Government or other public body) at a certain price or rate; in the building and related trades, one who is prepared to undertake work by contract" (New Eng. Dict., Vol. II., p. 915, *sub voce* "Contractor").

SECT. 2. Parties to the Contract.

in its narrowest sense, as well as to those who undertake to execute engineering works.

Sub-contractor.

The term "sub-contractor" is applied to a person to whom the whole or a portion of the works, which the builder or contractor has undertaken to construct, have been sublet by him.

Specialist.

The term "specialist" is often applied to sub-contractors who are employed to supply some particular kind of work or materials.

SECT. 3.—*Persons connected with the Contract.*

SUB-SECT. 1.—*Architects.*

Architect.

311. An architect (*k*) is a person who holds himself out as ready to design, plan, or supervise the erection of buildings and works of various kinds, representing that he possesses the requisite artistic and technical knowledge.

Architects profess in varying degrees to have the knowledge necessary to estimate the probable cost of works to be done and the value of works executed, but this knowledge is becoming more and more the province of quantity surveyors (*l*). With architects, as with other professional men, work in the country is less specialised than in London (*m*).

Qualification.

There is no legal obligation on persons practising as architects to pass any qualifying examination or to obtain a diploma, nor is their right to recover fees dependent on such conditions. There are, however, institutions and associations which require their members to have gone through prescribed courses of instruction, and to have satisfied examiners appointed in that behalf. The Royal Institute of British Architects is the most important of these associations, and has made rules for its members in respect of fees, charges etc. (*n*).

No licence required.

An architect does not require a licence to practise, nor has he to pay any tax or duty on that account, except where he acts as a valuer (*o*).

Naval architect.

Naval architects are persons who profess to have similar qualifications with regard to the construction of ships as other architects profess to have with regard to buildings.

SUB-SECT. 2.—*Engineers.*

Civil engineer.

312. The term "engineer" (*p*), as employed in connection with contracts for the construction of works, is equivalent to civil engineer.

(*k*) "A skilled professor of the art of building, whose business it is to prepare the plans of edifices, and exercise a general superintendence over the course of their erection" (New Eng. Dict., Vol. I., p. 434). "A person skilled in the art of building; one who understands architecture, or whose profession it is to form plans and designs of buildings and superintend the execution of them" (Cent. Dict., Vol. I., p. 297). See also Dictionary of Architecture, *sub voce* "Architect," and references there cited. See also O. Masselin, "Responsabilité des Architectes" (1879), s. 37.

(*l*) See p. 161, *post*.

(*m*) As to the obligation of the architect to possess competent professional skill, see p. 291, *post*.

(*n*) See the Calendar of the Royal Institute of British Architects for the current year.

(*o*) See p. 163, *post*, and title VALUERS AND APPRAISERS.

(*p*) "One whose profession is the designing and constructing of works of

Engineers are divided into many classes, corresponding with the special branches of applied science in which they have specialised.

Qualifications.

As in the case of architects, no educational qualification or diploma is necessary for the exercise of the profession of an engineer, but a member of the profession holds himself out as having professional skill in some particular class or classes of work (such as the construction of bridges, docks, harbours, canals, roads, railways, drainage works etc.), which he undertakes to superintend, or for which he prepares plans, specifications etc.

Appliances etc. for execution of works.

In the case of many engineering contracts the temporary works or appliances which are necessary for the construction of the permanent works are so important that they are designed by the engineer and made part of the contract (*q*), while in the case of building contracts the scaffolding and other temporary appliances are nearly always left to the discretion of the builder.

Persons who contract to execute engineering works in many cases describe themselves as engineers, but in this title they are described as contractors, while the term "engineer" is restricted to the engineer employed to design or supervise such works.

Resident engineer.

313. As the engineer who is responsible to his employer for the proper planning and construction of the works is not always able to give constant and undivided attention to the details of the work, it is a common practice for a resident engineer to be appointed. The position and functions of a resident engineer under different contracts vary considerably. He may be a mere servant or agent of the employer, like a clerk of the works in a building contract, or his position may be analogous to that of the engineer (*r*).

SUB-SECT. 3.—*Quantity Surveyors.*

Bills of quantities.

314. Plans, drawings, and specifications of building and engineering works are generally so complicated in their nature as to necessitate, if tenders are required, the making of calculations to ascertain the amount of each kind of work required under the contract, *e.g.*, excavation, brickwork, masonry etc. The results of these calculations are called bills of quantities, and the persons employed to make these calculations are called quantity surveyors (*a*).

Quantity surveyor.

The term "quantity surveyor" has been judicially construed as meaning a person "whose business consists in taking out in detail the measurements and quantities, from plans prepared by an architect, for the purpose of enabling builders to calculate the amounts for which they would execute the plans" (*b*). This definition only applies in relation to building contracts, but with the obvious

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public utility, such as bridges, roads, canals, railways, harbours, drainage works, gas and water works etc." (New. Eng. Dict., Vol. I., p. 177). See also Dictionary of Architecture, *sub voce* "Civil Engineering"; and Cresy, Encyclopædia of Civil Engineering.

(*q*) *Thorn* v. *London Corporation* (1876), 1 App. Cas. 120.

(*r*) See *Re De Morgan, Snell & Co. and Rio de Janeiro Flour Mills* (1892), Hudson on Building Contracts, 3rd ed., Vol. II., p. 198.

(*a*) See p. 163, *post*.

(*b*) *Taylor* v. *Hall* (1870), 4 L. R. C. L. 467, *per* MORRIS, J., at p. 476.

SECT. 3. Persons connected with the Contract.

interchange of engineer for architect and contractor for builder, it becomes applicable to engineering contracts.

In many cases quantity surveyors carry on the separate and distinct business of preparing bills of quantities, but sometimes the architect in charge of the particular works performs the duties of a quantity surveyor himself.

Other duties falling within the scope of a quantity surveyor's employment are the taking out of quantities to reduce work when it is found that no tender can be obtained to do the work, except at a price exceeding that which the building owner or employer is willing to expend, the measurement and valuation of work for progress certificates, and the taking out of quantities for and the pricing of deviations from the contract (*c*).

SUB-SECT. 4.—*Surveyors.*

Land surveyor.

315. The word "surveyor" is a vague designation, and includes a quantity surveyor, but a land surveyor is a person who professes to be skilled in the surveying and valuing of land and buildings and various kinds of work incident and ancillary thereto (*d*).

Most local authorities have the power of appointing surveyors, who perform various duties under the Public Health and other Acts. In these circumstances the surveyor to some extent is in the position of an architect or engineer according to the nature of the duties in question.

SUB-SECT. 5.—*Valuers.*

Valuer or appraiser.

316. A valuer or appraiser (*e*) is one who professes to have a knowledge of the theory and practice of valuing matters connected with some particular trade or business.

Appraiser.

An appraiser is defined by statute (*f*) as a person who values or appraises "any estate or property real or personal, or any interest in possession or reversion, remainder, or contingency in any estate or property real or personal, or any goods, merchandise, or effects of whatsoever kind or description the same may be, for or in expectation of any hire, gain, fee, reward, or valuable consideration to be therefor paid him."

Licence.

317. Any person acting as valuer and appraiser is required to be licensed (*g*), and a penalty of £50 is imposed on any person appraising or valuing without a licence (*h*). All appraisements and valuations, including those of "dilapidations or repairs wanted, or materials and labour used or to be used in any building or of any

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(*c*) As to the duties, liabilities, and remuneration of quantity surveyors, see pp. 310 *et seq.*, *post*.

(*d*) See Dictionary of Architecture, *sub voces* "Survey," "Surveyor." As to quantity surveyor, see p. 161, *ante*.

(*e*) See title VALUERS AND APPRAISERS, where valuers and appraisers are dealt with fully.

(*f*) Appraisers' Licences Act, 1806 (46 Geo. 3, c. 43), s. 4, extended to Ireland by Stamp Duties Act (Ireland), 1842 (5 & 6 Vict. c. 82), s. 19.

(*g*) Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 1; Revenue (No. 2) Act, 1864 (27 & 28 Vict. c. 56), s. 6.

(*h*) Inland Revenue Act, 1890 (53 & 54 Vict. c. 21), s. 21 (1).

artificer's work," must be written out upon stamped paper within fourteen days of being made, and the employer is forbidden to pay for the valuation if this requirement is not complied with, under a penalty of £20 (*i*).

These provisions as to licences and duties apply not only to persons who regularly exercise the business or occupation of a valuer or appraiser, but also to persons, such as architects, who make an appraisement in even one single instance (*k*). On the other hand, "appraisements or valuations made for, and for the information of, one party only, and not being in any manner obligatory as between the parties," *e.g.*, estimates of the probable cost of the work, are not liable to stamp duty, and are also apparently not subject to the obligation of a licence (*l*) being necessary for the person making them (*m*).

SUB-SECT. 6.—*Clerks of the Works.*

Clerk of the works.

318. A clerk of the works is a person employed to superintend the construction of buildings and other works in order to ensure that the builder supplies proper labour and materials (*n*). He is subordinate to the architect, and his powers should be negative—that is to say, he should only have power to disapprove of materials and work, and not to bind the building owner by approval of them. The architect is not entitled to rely implicitly on the efficiency of the clerk of the works, but must himself exercise reasonable supervision (*o*).

SUB-SECT. 7.—*Builders' Merchants.*

Builder's merchant.

319. The terms "builder's merchant" and "merchant" are used to denote a person whose business it is to supply a builder with the materials and plant by means of which he executes the work intrusted to him. It is not unusual in building contracts to designate the particular merchants from whom special materials are to be obtained (*p*).

SECT. 4.—*Bills of Quantities.*

Form and nature of bills of quantities.

320. "Bills of quantities" is the name given to a detailed statement of the different items of work, labour and materials which it is estimated will be required for the proposed work. The bills of quantities are usually split up into several bills, such as the carpenters' bill, the masons' bill etc., and are provided with a blank

(*i*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 24, Sched. See *Leeds* v. *Burrows* (1810), 12 East, 1; *Perkins* v. *Potts* (1814), 2 Chit. 399.

(*k*) *Palk* v. *Force* (1848), 12 Q. B. 666; *Northampton Gaslight Co.* v. *Parnell* (1855), 15 C. B. 630.

(*l*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I. See also *Atkinson* v. *Fell* (1816), 5 M. & S. 240; *Jackson* v. *Stopherd* (1834), 2 Cr. & M. 361.

(*m*) For the difference between an award under arbitration and a valuation or appraisement, see p. 283, *post*; and title ARBITRATION, Vol. I., p. 441.

(*n*) See Dictionary of Architecture, *sub voce* "Clerk of the Works."

Saunders v. *Broadstairs Local Board* (1890), Hudson on Building Contracts, 3rd ed., Vol. II., p. 159; see also *Lee* v. *Bateman* (*Lord*) (1893), *Times* (31 October, 1893). See p. 299, *post*.

(*p*) See p. 279, *post*.

SECT. 4. Bills of Quantities.

money column for the builder to fill up, and by the addition of the sums filled in the builder can arrive at the amount of his tender.

The bills of quantities are usually prepared by a quantity surveyor (*q*), but sometimes the architect himself undertakes the work.

Building owner not liable for inaccuracy in general.

321. If the building owner actually guarantees the accuracy of the bills of quantities, he is responsible to the builder for the consequences of any inaccuracy therein; but in the ordinary course of business the building owner or his architect merely forwards the bills of quantities to the builder or contractor for the purpose of a tender. In these circumstances, should the quantities be inaccurate, the employer will be under no liability to a contractor who has tendered, though the inaccuracy in the bills of quantities may have induced the contractor to tender at an inadequate price to construct a complete work for a lump sum (*r*). And it makes no difference whether the bills of quantities are prepared by the architect or by an independent quantity surveyor (*s*).

If, however, the contractor has made mistakes in his arithmetical computations, which must have been obvious to the employer (*t*), or there are mutual mistakes as to the meaning of the contract, the contractor may be able to obtain relief in equity.

When building owner liable.

322. On the other hand, if the builder can show that the quantity surveyor was the building owner's agent to make a representation as to the correctness of the quantities, and that he was guilty of fraudulently making the quantities less than in fact they should be, and that the building owner knew this and sanctioned it, so that the tender of the builder was obtained by fraud, the builder would be entitled to have the contract set aside (*u*).

SECT. 5.—*Incidents of Building, Engineering, and Shipbuilding Contracts.*

Materials affixed to freehold.

323. By reason of the principle of law shortly expressed in the maxim *Quicquid plantatur solo, solo cedit* (*w*), the materials supplied by the builder or contractor, as soon as they are affixed to the land belonging to the building owner or employer, become annexed to

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(*q*) See p. 161, *ante*; pp. 309 *et seq.*, *post*.

(*r*) *Sherren* v. *Harrison* (1860), Hudson on Building Contracts, 3rd ed., Vol. II., p. 6; *Scrivener* v. *Pask* (1866), L. R. 1 C. P. 715; *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597; *Pearson* (S.) *& Son, Ltd.* v. *Dublin Corporation*, [1907] A. C. 351. See, however, *Patman* v. *Pilditch* (1904), reported in *The Builder* (16 July, 1904), where a lump sum contract provided that a building was to be erected according to the plans, invitation to tender, specification, and bills of quantities signed by the contractors, and it was held, *per* CHANNELL, J., that the amount of work was defined by the bills of quantities, and that the contractors were entitled to charge extra for excess.

(*s*) *Young* v. *Blake* (1887), Hudson on Building Contracts, 3rd ed., Vol. II., p. 106.

(*t*) *Neill* v. *Midland Rail. Co.* (1869), 17 W. R. 871; and compare *Garrard* v. *Frankel* (1862), 30 Beav. 445.

(*u*) *Scrivener* v. *Pask* (1866), 18 C. B. (N. S.) 785, *per* BYLES, J., at p. 793.

(*w*) Wentworth, Office of Executors, 14th ed., p. 145; *Omne quod* (*solo*) *inædificatur solo cedit* (Fleta, lib. 3, cap. 2, s. 12).

and form part of the freehold (*x*). The builder has no lien on the work he has done for his employer, and can only obtain payment of his price by bringing an action (*y*); thus, the rights of the parties are different from those in an ordinary contract for the manufacture of "future goods," where, for instance, a person is employed on his own premises to construct a chattel, *e.g.*, a ship, from his own materials (*a*) for another.

Materials not accepted by becoming owner's property.

The affixing of the work and materials to the freehold, and the consequent change of property in them, does not in itself constitute an acceptance of the work and materials by the building owner (*b*).

Materials of unfinished ship.

324. Shipbuilding contracts in many cases are analogous in their incidents to building and engineering contracts by reason of a provision, which in most cases they contain, to the effect that the property in the incomplete ship shall vest in the employer at some fixed period, *e.g.*, on the payment of the first instalment of the price (*c*). The materials worked into the ship then become the property of the employer, on the principle of accession (*d*), which applies equally whether the property into which the materials are worked be fixed or movable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship (*e*).

325. Among the peculiarities of building and engineering contracts owing to the nature of their subject-matter are the following:—

Employment of professional persons.

The building owner or employer (unless he is an architect or engineer) finds it difficult to describe the work which he requires to be carried out. Consequently a necessity arises for the employment of professional persons to explain the requirements of the building owner, by preparing plans, drawings, and specifications etc. which will enable the builder or contractor to put a price upon the work to be contracted for.

Technical details.

Difficulties also arise from the building owner not understanding the technical details of plans, specifications etc. which have been prepared, so as to be able to see beforehand whether the work described in them corresponds exactly with what he actually requires to be done.

Modification of original scheme.

Circumstances may, and often do, arise during the construction of the works which require in some respect a modification of the original scheme. This consideration necessitates the insertion in the contract of conditions providing for alterations, additions, and

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(*x*) *Johnson* v. *Crew* (1836), 5 Upper Canada Q. B. (o. s.) 200, *per* MACAULAY, J., at p. 204.

(*y*) See p. 264, *post*.

(*a*) See title SALE OF GOODS.

(*b*) As to what constitutes acceptance, see p. 203, *post*.

(*c*) For forms of contract containing such provision, see Encyclopædia of Forms, Vol. II., pp. 602, 614.

(*d*) For which see title PERSONAL PROPERTY.

(*e*) *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651, *per* BLACKBURN, J., at p. 659.

SECT. 5. Incidents of Building etc. Contracts.

omissions in the works, and variations of particular stipulations, without abrogating the contract itself.

Professional supervision.

The works require professional supervision during the course of construction for the purpose of ensuring that the builder or contractor is faithfully performing all the stipulations of his contract as to quality both of materials and workmanship.

Bills of quantities.

When plans and specifications have been prepared by an architect or engineer, the builder or contractor often will not give an estimate until bills of quantities have been prepared (*f*).

Determination of differences.

Building and engineering contracts sometimes contain terms giving to the architect or engineer (who has to superintend the works as the agent of the building owner or employer) powers of determining either by certificate or arbitration the rights of the parties (*g*).

Part II.—Formation and Construction of the Contract.

SECT. 1.—*Tenders.*

SUB-SECT. 1.—*Mode of obtaining Tenders.*

Different methods of contracting.

326. As has already been stated (*h*), plans and specifications of the intended works have to be prepared, and usually quantities taken out, before builders or contractors can or will offer to undertake the construction of the work. Various courses are open to the building owner or employer; *e.g.*, either to endeavour to enter into a contract with a builder or contractor for the construction of the work for a lump sum, or to employ a contractor without any stipulation as to price, in which case there is an obligation to pay him a fair and reasonable price, or to agree to pay for the work at a price to be fixed by the valuation of a third party or in accordance with a schedule of prices.

Tenders.

If the course is adopted of endeavouring to find a builder to contract for the works, the employer has to obtain tenders or offers from builders or contractors, that is to say, estimates of the cost at which they are willing to undertake the works. Sometimes a single contractor is asked to tender; sometimes several contractors, selected either by the employer himself or by his architect or engineer, are invited to tender (*i*); and sometimes, again, tenders are advertised for (*k*), in which case it is open to any person to send in a tender.

SUB-SECT. 2.—*Invitation to tender.*

Effect of invitation to tender.

327. An invitation to tender is a mere attempt to ascertain whether an offer can be obtained within such a margin as the

(*f*) See p. 163, *ante*.
(*g*) See p. 281, *post*.
(*h*) See p. 161, *ante*.
(*i*) For form of invitation to be used in such a case, see Encyclopædia of Forms, Vol. II., p. 574.
(*k*) For forms of advertisement, see Encyclopædia of Forms, Vol. II., p. 575.

building owner or employer is willing to adopt, or, in other words, is an offer to negotiate, an offer to receive offers, an offer to chaffer (*l*).

It is usual where tenders are invited to publish the fact that the building owner or employer does not bind himself to accept the lowest or any tender, but such a reservation is unnecessary, and is inserted *ex abundanti cautelâ* (*m*).

Withdrawal by employer.

The employer may at any moment revoke the invitation to tender, and cannot be made responsible for any expenses incurred by persons in connection with the preparing of tenders (*n*).

Withdrawal by contractor.

A person making a tender (*o*) is entitled to withdraw it at any time before acceptance (*p*), but if he does not do so, it remains in force until it is accepted or lapses by effluxion of time (*q*).

SUB-SECT. 3.—*Acceptance of a Tender.*

What amounts to acceptance of tender.

328. The unconditional acceptance of a tender by the employer binds both parties, and a contract is thereby formed, the terms of which are ascertainable from the invitation to tender, the tender, the acceptance, and any other relevant documents (*r*).

Further document to be prepared.

The fact that a formal contract is agreed to be entered into makes no difference, if the parties at the time of the acceptance had a contracting mind, and merely contemplated the setting down of the terms on which they were agreed in a formal instrument (*s*). If, however, the acceptance is not unconditional, and the particular stipulations of the contract are left open to be fixed in a document to be subsequently prepared, there is no contract binding on either party (*t*).

It makes no difference if the person tendering should describe his offer as an "estimate," as it is still equally an offer. Further,

(*l*) For a full discussion of the law relating to tenders, see title CONTRACT.

(*m*) See *Spencer* v. *Harding* (1870), L. R. 5 C. P. 561.

(*n*) The principle in this case is the same as where goods are advertised to be sold by auction and subsequently withdrawn, in which circumstances an intending purchaser has no ground of action to recover his expenses of attending the sale (*Harris* v. *Nickerson* (1873), L. R. 8 Q. B. 286; see title AUCTION AND AUCTIONEERS, Vol. I., pp. 509, 511). But see *Pauling* v. *Pontifex* (1852), 1 W. R. 64, where it was held that the conduct of the parties was such that, coupled with a custom of the trade, it implied an acceptance of the lowest tender.

(*o*) For forms of tender, see Encyclopædia of Forms, Vol. II., pp. 576, 577.

(*p*) See title CONTRACT, and *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs* (1890), 44 Ch. D. 616.

(*q*) See *Murray* v. *Rennie* (1897), 24 R. (Ct. of Sess.) 965. The acceptance must be within a reasonable time. "That reasonable time can never extend after the time at which the contract was to commence" (*Metropolitan Asylums Board (Managers)* v. *Kingham & Sons* (1890), 6 T. L. R. 217, *per* FRY, L.J., at p. 218).

(*r*) *Wimshurst* v. *Deeley* (1845), 2 C. B. 253; *Thorn* v. *Commissioners of Her Majesty's Works and Public Buildings* (1863), 32 Beav. 490; *Great Northern Rail. Co.* v. *Witham* (1873), L. R. 9 C. P. 16; *Tancred, Arrol & Co.* v. *Steel Co. of Scotland* (1890), 15 App. Cas. 125; *A.-G.* v. *Stewards & Co.* (1901), 18 T. L. R. 130.

(*s*) *Navan Union* v. *M'Loughlin* (1855), 4 I. C. L. R. 451; *Lewis* v. *Brass* (1877), 3 Q. B. D. 667; *Seaton Brick and Tile Co.* v. *Mitchell* (1900), 2 F. (Ct. of Sess.) 550; and see title CONTRACT.

(*t*) *Kingston-upon-Hull (Governor, Guardians etc.)* v. *Petch* (1854), 10 Exch. 610; *Wood* v. *Silcock* (1884), 50 L. T. 251; see title CONTRACT for a full treatment of this question.

SECT. 1. Tenders.

there is no custom that a letter so headed should not be treated as an offer, and if such a custom existed it would be contrary to law (*u*).

According to the custom of the trade, when the old materials of a building about to be removed are offered for sale without reserve as to the quantity, the whole of the materials are understood by vendor and purchaser to be included in the sale (*a*).

Seal of corporation.

In the case of a corporation or public body required to contract under seal (*b*), the acceptance of a tender must be sealed, but this sealing may be done by affixing the seal of the public body to the resolution authorising the acceptance (*c*).

SUB-SECT. 4.—*Acceptance obtained by Secret Commission.*

Effect of secret commission on acceptance.

329. Where the architect or other agent of the building owner without the knowledge of the building owner receives or agrees to receive a commission from the builder to induce him to influence the building owner to accept the tender, the architect and builder are guilty of a fraud, in consequence of which the building owner is entitled either to avoid the contract (*d*), or, if the contract is affirmed, to recover the amount of the commission from the agent who has received it, and also to recover damages from the builder who has been guilty of corrupting the architect or agent (*e*).

The civil remedy against the architect who has been bribed is in the nature of a common law action for money had and received to the use of the employer, who is not entitled to follow the money through the account of the architect as trust money (*f*).

Criminal liability.

The corruption of an agent is a misdemeanour on the part of both the briber and the bribed, and the offender is liable to imprisonment for a term not exceeding two years with or without hard labour and a fine not exceeding £500, or, on summary conviction, to imprisonment for a term not exceeding four months and a fine not exceeding £50 (*g*).

If the employer is a public body, both the builder who has offered the commission and the member, or servant, or agent of the authority who has accepted it are under a special criminal liability (*h*).

(*u*) *Croshaw* v. *Pritchard* (1899), 16 T. L. R. 45.

(*a*) *Thorn* v. *Commissioners of Her Majesty's Works and Public Buildings* (1863), 32 Beav. 490, *per* ROMILLY, M.R., at p. 496.

(*b*) *Dartford Union Guardians* v. *Trickett* (1888), 59 L. T. 754; and see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174 (1); and title CORPORATIONS. This sub-section is obligatory, and not merely directory (*Young* v. *Leamington Spa Corporation* (1883), 8 App. Cas. 517).

(*c*) As to the sealing of contracts by a local authority, see titles LOCAL GOVERNMENT; METROPOLIS.

(*d*) As to secret commissions generally, see title AGENCY, Vol. I., pp. 189, 216.

(*e*) *Panama and South Pacific Telegraph Co.* v. *India-rubber, Gutta-percha, and Telegraph Works Co.* (1878), 10 Ch. App. 515; *Salford Corporation* v. *Lever*, [1891] 1 Q. B. 168; *Grant* v. *Gold Exploration and Development Syndicate, Ltd.*, [1900] 1 Q. B. 233.

(*f*) *Lister & Co.* v. *Stubbs* (1890), 45 Ch. D. 1; *Powell* v. *Evan Jones & Co.*, [1905] 1 K. B. 11.

(*g*) Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34). See further on this Act, title CRIMINAL LAW AND PROCEDURE.

(*h*) Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69), ss. 1, 2. See further on this Act, titles CRIMINAL LAW AND PROCEDURE; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

SUB-SECT. 5.—*Acceptance where the Tender has been induced by Misrepresentations.*

Fraudulent representation by employer or agent.

330. If the building owner or employer has made fraudulent representations as to the facts which have deceived the person tendering and caused him to make a disadvantageous tender, the builder or contractor who has had his tender accepted, on discovering the fraud, may rescind the contract and, if necessary, bring an action for the purpose (*i*). But if he continues to act upon the contract after he has discovered the fraud, he will be held to have abandoned his right to have it rescinded (*j*). In such circumstances in an action for work and labour done he cannot recover more than the contract price (*k*).

But, although the right to have the contract rescinded may have been lost, the builder may still have a right of action of tort for deceit against the building owner in addition to his right to recover the price (*l*).

It makes no difference whether the building owner or employer has made the representations himself, or whether they were made with his knowledge or privity by an agent (*m*).

Statements not amounting to representation.

331. Neither the building owner or employer, nor the person who has taken out the quantities, impliedly warrants the correctness of the bills of quantities. If supplied to the builder in the ordinary course they do not amount to anything more than a representation of a belief (*n*) by the sender that they are accurate (*o*).

So also if statements as to existing facts are made as being the best information in the possession of the employer, or the contractor is expressly directed to satisfy himself as to the correctness of the statements—*e.g.*, as to levels, strata etc.—the person making the statements is not responsible, except where there is an intention to deceive the contractor (*p*).

SUB-SECT. 6.—*Unauthorised Acceptance by Agent.*

Unauthorised acceptance.

332. If an agent who is not authorised in that behalf accepts a tender, the employer is not bound by this acceptance (*q*); but if he should ratify the unauthorised acceptance, both parties are bound from the date of the acceptance so ratified (*r*).

(*i*) See title CONTRACT.

(*j*) *Ormes* v. *Beadel* (1860), 2 De G. F. & J. 333.

(*k*) *Selway* v. *Fogg* (1839), 5 M. & W. 83.

(*l*) See *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation*, [1907] A. C. 351.

(*m*) *Kimberley* v. *Dick* (1871), L. R. 13 Eq. 1.

(*n*) See p. 164, *ante*. "It [a bill of quantities] is an estimate, an estimate which a reasonable person, such as a builder, would probably act upon as being an honest representation made by a skilled person, but beyond that it does not go" (*Re Ford & Co. and Benrose & Sons* (1902), Hudson on Building Contracts, 3rd ed., Vol. II., p. 354, *per* COLLINS, M.R., at p. 363).

(*o*) *Priestly* v. *Stone* (1888), 4 T. L. R. 730. See further, as to this subject, p. 164, *ante*; pp. 298, 312, *post*.

(*p*) *Bottoms* v. *York Corporation* (1892), Hudson on Building Contracts, 3rd ed., Vol. II., p. 220; *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation*, *supra*.

(*q*) See title AGENCY, Vol. I., p. 207.

(*r*) *Ibid.*, p. 173.

SECT. 1. Tenders.

SUB-SECT. 7.—*Stamping of an Acceptance.*

Stamping.

333. One of the documents which constitute the contract must be stamped (*s*). If not under seal an agreement requires a sixpenny stamp; if under seal ten shillings (*a*).

SUB-SECT. 8.—*Agreements not to Tender.*

Agreements not to tender.

334. An agreement between two or more persons not to tender for a contract is valid and enforceable (*b*), and there is nothing illegal in the owners of commodities agreeing that they will sell as between themselves at a certain price, leaving one of them to make any other profit that he can (*c*). Even if such a contract should be in restraint of trade and not enforceable by law, it would not be "unlawful" within the more accurate meaning of the word, namely, as contrary to law, so as to give a right to bring an action for damages on the ground of conspiracy (*d*).

SECT. 2.—*Formation of the Contract.*

SUB-SECT. 1.—*In General.*

Ascertainment of terms.

335. As has already been stated (*e*), when a tender has been unconditionally accepted a completed contract is formed, the terms of which can be ascertained from the invitation to tender, the tender, and the acceptance thereof, and any other relevant documents (*f*), and either party can successfully object to the introduction of any new term (*g*).

Where the contract need not be and is not in writing, the question whether or not a contract has actually been entered into will be determined by a consideration of all the facts upon which the contract is said to be based (*h*).

Consideration.

336. Consideration is necessary, except in the case of a contract by deed, to support the contract; thus, a promise by a building owner or employer to pay extra for work already included in the builder's or contractor's contract is made without consideration (*i*). If the

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(*s*) *Coker* v. *Young* (1860), 2 F. & F. 98.

(*a*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.; and see further, title REVENUE.

(*b*) *Galton* v. *Emuss* (1844), 13 L. J. (CH.) 388; *Re Carew* (1858), 26 Beav. 187; *Heffer* v. *Martyn* (1867), 36 L. J. (CH.) 372; *Jones* v. *North* (1875), L. R. 19 Eq. 426; *Chattock* v. *Muller* (1878), 8 Ch. D. 177.

(*c*) *Jones* v. *North*, *supra*, *per* BACON, V.-C., at p. 430.

(*d*) See *Mogul Steamship Co.* v. *McGregor*, *Gow & Co.*, [1892] A. C. 25, and titles CONTRACT; TRADE AND TRADE UNIONS.

(*e*) See p. 168, *ante*.

(*f*) *Wimshurst* v. *Deeley* (1845), 2 C. B. 253; *Thorn* v. *Commissioners of Her Majesty's Works and Public Buildings* (1863), 32 Beav. 490; *Great Northern Rail. Co.* v. *Witham* (1873), L. R. 9 C. P. 16; *Tancred* v. *Steel Co. of Scotland* (1890), 15 App. Cas. 125; *A.-G.* v. *Stewards & Co.* (1901), 18 T. L. R. 130.

(*g*) *Lewis* v. *Brass* (1877), 3 Q. B. D. 667.

(*h*) ——— v. *Yoxall* (1844), 1 Car. & Kir. 315. See also *Smith* v. *Neale* (1857), 2 C. B. (N. S.) 67; *Russell* v. *Trickett* (1865), 13 L. T. 280.

(*i*) *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597, *per* JAMES, L.J., at p. 608; and compare *Harris* v. *Watson* (1791), 1 Peake, 72; *Stilk* v. *Myrick* (1809), 2 Camp. 317. See title CONTRACT.

consideration for the contract is illegal the contract is not enforceable (*k*).

SECT. 2. Formation of the Contract.

SUB-SECT. 2.—*Necessity of Writing.*

How far writing necessary.

337. Building and engineering contracts, though they are almost invariably in writing, only require to be in writing when they come within the provisions of the Statute of Frauds (*l*) or those of the Sale of Goods Act, 1893 (*m*), or when they are made with a corporation in respect of matters as to which such corporation can only contract in writing or under seal (*n*).

Contract for work and materials.

338. Contracts to construct buildings, or engineering works, are contracts for work and labour, and do not require to be in writing as contracts for the sale of goods.

The distinction between a contract for the sale of a chattel and one for work and labour depends upon whether or not the expenditure of work and materials results in the production of a chattel the property in which passes by an actual sale (*o*).

It has never been held that building and engineering contracts as such are required to be in writing as involving an interest in land (*p*), except contracts to pull down existing works where the contractor agrees to purchase the old materials (*q*). These latter were formerly held to be contracts affecting an interest in land (*r*); but since 1894 they are contracts for the sale of goods (*s*).

Contract containing guarantee.

339. The Statute of Frauds requires promises to answer for the debt of another to be in writing (*a*). The usual case where an obligation of this nature arises in respect of a building contract is where there is an actual guarantee (*b*).

(*k*) *Windhill Local Board* v. *Vint* (1890), 45 Ch. D. 351; *Scott* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A.

(*l*) 29 Car. 2, c. 3, s. 4. See title CONTRACT. For a full discussion of written contracts and the rules relating to their form and construction, see title DEEDS AND OTHER INSTRUMENTS. All contracts as to interests in land must be in writing, but ordinary building and engineering contracts do not come within this provision, although building agreements, which contemplate the grant of a lease to the builder, do. See title REAL PROPERTY AND CHATTELS REAL.

(*m*) 56 & 57 Vict. c. 71, s. 4. See further, title SALE OF GOODS.

(*n*) As to this, see p. 172, *post*.

(*o*) See titles CONTRACT; SALE OF GOODS; WORK AND LABOUR; and see specially *Lee* v. *Griffin* (1861), 1 B. & S. 272, *per* BLACKBURN, J., at p. 277; *Clark* v. *Bulmer* (1843), 11 M. & W. 243; *Clay* v. *Yates* (1856), 1 H. & N. 73; *Dixon* v. *London Small Arms Co.* (1876), 1 App. Cas. 632.

(*p*) See *McManus* v. *Cooke* (1887), 35 Ch. D. 681.

(*q*) As, for instance, when the temporary Vauxhall Bridge was discontinued, the contractor agreed to remove it, and pay to the London County Council £50 for the privilege of retaining the materials.

(*r*) *Lavery* v. *Pursell* (1888), 39 Ch. D. 508.

(*s*) This is in consequence of the definition of "goods" in s. 62 (1) of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which includes "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." The effect is the same whether *Lavery* v. *Pursell*, *supra*, is superseded by this statutory provision or not. The contract must be in writing either by reason of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), alone, or by reason of both that Act and the Statute of Frauds.

(*a*) 29 Car. 2, c. 3, s. 4; *Lakeman* v. *Mountstephen* (1874), L. R. 7 H. L. 17; and see title GUARANTEE.

(*b*) As to guarantees, see p. 279, *post*.

SECT. 2. Formation of the Contract.

Contracts for the employment of architects, engineers and surveyors, and building and engineering contracts, are also required to be in writing, if they are not to be performed within the space of one year from the making thereof (*c*).

Contract not to be performed within year.

In cases where the Statute of Frauds applies, and the contract does not comply with the statutory provisions, if the builder has executed his part of the contract he may be able to obtain relief, on the ground of part performance; for though the court will not decree specific performance of a building contract, yet when the builder has performed his part of the contract it will order payment of the price (*d*).

340. Except in the case of covenants in leases depending on the creation of the interest in land contemplated by the lease, a party may sue though he has not executed the contract (*e*), even though that party be a corporation (*f*); and by suing a party affirms the contract and becomes bound by it (*g*).

SUB SECT. 3.—*Contracts with Local Authorities and Corporations.*

Urban authorities etc.

341. In the case of urban authorities acting under the Public Health Acts, contracts whereof the value or amount exceeds £50 are required to be in writing and to be under seal (*h*). The contracts of other local authorities, boards of guardians, and non-trading corporations are required to be under seal and consequently in writing, except in the case of executed contracts and contracts of an unimportant character (*i*).

Trading corporations.

Contracts with trading corporations are required to be in accordance with the provisions of the special Act or charter (if any) regulating the corporation. In the absence of any such provisions, executory contracts, which are entered into in the ordinary course of the business for which the corporation was incorporated, are not required to be under seal (*j*).

Joint stock companies.

Contracts with companies registered under the Companies Acts, 1862—1907 (*k*), are required, subject to any reservations contained in the memorandum and articles of association, to be under seal, or in writing, under the same circumstances as if they had been made between private persons, and, if not required to be under seal, may

(*c*) Statute of Frauds (29 Car. 2, c. 3), s. 4. See title CONTRACT.

(*d*) See p. 248, *post*.

(*e*) *Foster and Wilson* v. *Mapes* (1590), Cro. Eliz. 212; *Morgan* v. *Pike* (1854), 14 C. B. 473, *per* JERVIS, C.J., at p. 484: "The cases establish that a covenantee in an ordinary indenture, who is a party to it, may sue the covenantor who executed it, although he himself never did."

(*f*) *Northampton Gaslight Co.* v. *Parnell* (1855), 24 L. J. (C. P.) 60.

(*g*) *Baker* v. *Yorkshire Fire and Life Assurance Co.*, [1892] 1 Q. B. 144.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174 (1).

(*i*) See titles CONTRACT; CORPORATIONS; LOCAL GOVERNMENT; METROPOLIS.

(*j*) *South of Ireland Colliery Co.* v. *Waddle* (1869), L. R. 4 C. P. 617. See generally, titles CONTRACT; CORPORATIONS.

(*k*) 25 & 26 Vict. c. 89; 27 & 28 Vict. c. 19; 30 & 31 Vict. c. 131; 33 & 34 Vict. c. 104; 40 & 41 Vict. c. 26; 42 & 43 Vict. c. 76; 43 Vict. c. 19; 46 & 47 Vict. c. 30; 49 Vict. c. 23; 53 & 54 Vict. cc. 62—64; 56 & 57 Vict. c. 58; 61 & 62 Vict. c. 26; 63 & 64 Vict. c. 48; 7 Edw. 7, c. 50.

be signed or made by parol, as the case may be, by any person acting under the express or implied authority of the company (*l*).

SECT. 2. Formation of the Contract.

SECT. 3.—*Construction of the Contract.*

SUB-SECT. 1.—*In General.*

Evidence on construction.

342. Where the contract is in writing its interpretation is a question for the court, and where the contract is by parol, for the jury (*m*). When, however, words in a written contract are employed in a sense peculiar to a particular trade or business, or when the meaning depends on the custom of a particular locality, such particular meaning can be established by parol evidence, and the interpretation of terms so used is a question for the jury (*n*). If the contract is in writing, all documents referred to in the writing must be construed with it (*o*).

Subsequent acts of the parties may be considered in arriving at their intention, but not their subsequent statements; and when the contract has been reduced to writing, previous negotiations and extrinsic declarations must not be taken into consideration (*p*). Parol evidence may, however, be adduced to show the existence of custom which would annex incidents to a contract, if the custom be reasonable, but not so as to contradict the contract (*q*). The reasonableness of the custom is a question for the court (*r*), but evidence may be adduced to show that it is not a reasonable one (*s*).

Blanks.

343. Where a contract contains a blank the court will not admit parol evidence to show how it should be filled up, at all events if the effect would be to impose an onerous condition on either party (*t*).

Erasures.

Erasures and alterations made previous to the signature of a document are to be given effect to (*u*). Erasures or alterations made by one party after signature do not affect the contract, and the parties still remain bound by the contract in the form in which they made it (*w*).

Clerical errors.

As to clerical errors, the court has power to correct them by

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(*l*) Companies Act, 1867 (30 & 31 Vict. c. 131), s. 37. See title COMPANIES for detailed discussion of the subject.

(*m*) See title CONTRACT.

(*n*) *Symonds* v. *Lloyd* (1859), 6 C. B. (N. S.) 691; *Myers* v. *Sarl* (1860), 30 L. J. (Q. B.) 9; *Bank of New Zealand* v. *Simpson*, [1900] A. C. 182; and generally see for the rules of construction, title CONTRACT.

(*o*) *R.* v. *Peto* (1826), 1 Y. & J. 37, at p. 54; *Cunliffe* v. *Hampton Wick Local Board* (1892), Hudson on Building Contracts, 3rd ed., Vol. II., p. 274.

(*p*) *Lewis* v. *Nicholson* (1852), 18 Q. B. 503; *Inglis* v. *Buttery* (1878), 3 App. Cas. 552; *Burrell & Son* v. *Russell* (1900), 2 F. (H. L.) 80.

(*q*) *Robinson* v. *Thompson* (1890), 89 L. T. Jo. 137; *North* v. *Bassett*, [1892] 1 Q. B. 333; and see titles CONTRACT; CUSTOMS AND USAGES.

(*r*) *Gwyther* v. *Gaze* (1875), Hudson on Building Contracts, 3rd ed., Vol. II., p. 21; *Ebdy* v. *M'Gowan* (1870), Hudson on Building Contracts, 3rd ed., Vol. II., p. 18; *Thorn* v. *London Corporation* (1876), 1 App. Cas. 120; *Croshaw* v. *Pritchard* (1899), 16 T. L. R. 45. See title CUSTOMS AND USAGES.

(*s*) *Bottomley* v. *Forbes* (1838), 5 Bing. (N. C.) 121.

(*t*) *Kemp* v. *Rose* (1858), 1 Giff. 258.

(*u*) *Inglis* v. *Buttery*, *supra*.

(*w*) *Pattinson* v. *Luckley* (1875), L. R. 10 Exch. 330.

SECT. 3 Construction of the Contract.

comparison with the context. If an undoubted mistake is clearly pointed out on the face of an instrument, both courts of law and equity, without at all going into parol evidence upon it, will correct it, and similarly an omitted word can be supplied (*x*).

Partnership contracts.

344. When either party is a member of a firm of partners, the partnership will be liable under the contract if the contracting partner was not acting outside the scope of his authority (*y*).

SUB-SECT. 2.—*Implied Stipulations.*

How far conditions may be implied.

345. A stipulation not actually expressed in a written contract can only be implied in cases where the court is satisfied that both parties intended that the stipulation should be part of the contract (*a*), and the more so if the contract is (as is usual in the case of building and engineering contracts) drawn in a technical manner and with an obvious attention to details. In any case no stipulation can be implied which is at variance with the express terms of the contract (*b*). Nor will onerous covenants be implied (*c*).

But, on the other hand, stipulations which clearly must have been in the contemplation of the parties, or which necessarily arise out of the contractual relation between the parties, will be implied (*d*), *e.g.*, stipulations on the part of the employer to allow the builder to do the work (*e*), to give possession of the site (*f*), and to supply plans (*g*), and on the part of the builder to proceed diligently and to execute the work in a workmanlike manner (*h*).

SUB-SECT. 3.—*Words and Phrases occurring in Building Contracts.*

Explanation of words and phrases.

346. Certain words and phrases occurring in building contracts have been construed judicially for the purposes of the particular

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(*x*) See title DEEDS AND OTHER INSTRUMENTS.

(*y*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 5–8. See also *Beale* v. *Mouls* (1847), 10 Q. B. 976; *McClean* v. *Kennard* (1874), 9 Ch. App. 336; *Moore* v. *Davis* (1879), 11 Ch. D. 261; and title PARTNERSHIP.

and
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v. *Rosser*, [1906] 2 K. B. 728; *Bede Steamship Co.* v. *River Wear Commissioners*, [1907] 1 K. B. 310, C. A.; *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.*, [1907] A. C. 476, P. C.; and generally, title CONTRACT. The question how far contracts can be implied between a building owner on the one part and a sub-contractor or specialist on the other is dealt with at p. 275, *post*.

(*b*) *Jones* v. *St. John's College, Oxford* (1870), L. R. 6 Q. B. 115, *per* LUSH, J., at p. 126; *Jackson* v. *Eastbourne Local Board* (1886), Hudson on Building Contracts, 3rd ed., Vol. II., p. 67.

(*c*) *Kemp* v. *Rose* (1858), 1 Giff. 258.

(*d*) *Barr* v. *Stirling and Dunfermline Rail. Co.* (1855), 17 Dunl. (Ct. of Sess.) 582; *Knight* v. *Gravesend and Milton Waterworks Co.* (1857), 2 H. & N. 6.

(*e*) *Churchward* v. *R.* (1865), L. R. 1 Q. B. 173, *per* COCKBURN, C.J., at p. 195.

(*f*) *Freeman & Son* v. *Hensler* (1900), 64 J. P. 460.

(*g*) *McAlpine* v. *Lanarkshire and Ayrshire Rail. Co.* (1889), 17 R. (Ct. of Sess.) 113.

(*h*) Compare *Jones* v. *Just* (1868), L. R. 3 Q. B. 197; *Hall* v. *Burke* (1886), 3 T. L. R. 165.

contracts in which they occur. These are set out below, but it must be observed that the meanings given to them are not necessarily applicable in all cases, but that the interpretation of each contract must depend upon the construction of its particular terms.

"Abut," "abutting."—In physical contact with (*i*). "Abut."

"Adjacent."—The degree of proximity denoted by this term is a question of circumstances (*k*). "Adjacent."

"Adjoining" does not necessarily imply absolute contiguity (*l*). "Adjoining."

"Approval" means, it would seem, in general approval with full knowledge, or at all events approval with the opportunity of full knowledge. "Approval."

"Approved plan."—A plan approved by a local authority means one lawfully approved, and not one which, though approved by the authority, is illegal (*m*). "Approved plan."

"As far as possible" means as far as possible consistently with reasonable trade requirements (*n*). "As far as possible."

"Brick-built" means brick-built in the ordinary sense, and does not include a house built partly of brick and partly of timber, with some parts of the exterior composed of lath and plaster, and without party-walls (*o*). "Brick-built."

"Building" (*p*) in its popular sense is a structure with walls and roof (*q*). "Building."

The following constructions have been judicially held to be included in the term "building" as contained in various statutes, bye-laws and deeds :—an addition to an existing building (*r*); a bay or

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(*i*) See *Roberts* v. *Karr* (1809), 1 Taunt. 495; *Lightbound* v. *Higher Bebington Local Board* (1885), 16 Q. B. D. 577.

(*k*) *Wellington Corporation* v. *Lower Hutt Corporation*, [1904] A. C. 773.

(*l*) A piece of land separated from a churchyard by a public highway 20 feet broad is adjoining to an existing churchyard within the meaning of the Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), s. 1 (*Re Bateman (Baroness) and Parker*, [1899] 1 Ch. 599). See also *Lightbound* v. *Higher Bebington Local Board*, *supra*.

(*m*) *Yabbicom* v. *King*, [1899] 1 Q. B. 444; *Re McIntosh and Pontypridd Improvement Co.* (1891), 61 L. J. (Q. B.) 164.

(*n*) Where furnaces were to be constructed so as to consume "as far as possible" the smoke arising from them, it was held that "as far as possible" meant "as far as possible consistently with carrying on the trade in an ordinary manner and with a careful use and management of a properly constructed furnace" (*Cooper* v. *Woolley* (1867), L. R. 2 Exch. 88, *per* KELLY, C.B., at p. 91).

(*o*) *Powell* v. *Doubble* (1832), Sugden, Vendor and Purchaser, 14th ed., p. 29.

(*p*) "A structure of the nature of a house built where it is to stand" (New Eng. Dict., Vol. I., p. 1162); "anything erected by art, and fixed upon or in the soil, composed of different pieces connected together, and designed for permanent use in the position in which it is so fixed" (Cent. Dict., Vol. I., p. 712).

(*q*) "One may say of this or that structure: 'this or that is not a building'; but no general definition can be given, and our lexicographers do not attempt it. Without, therefore, presuming to do what others have failed to do, I may venture to suggest, that, by 'a building' is usually understood a structure of considerable size, and intended to be permanent, or at least to endure for a considerable time" (*Stevens* v. *Gourley* (1859), 7 C. B. (N. S.) 99, *per* BYLES, J., at p. 112). See also *Leicester Corporation* v. *Brown* (1892), 9 T. L. R. 8.

(*r*) *R.* v. *Gregory* (1833), 5 B. & Ad. 555.

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bow window (*s*); a church (*t*); a place with four walls, a roof and a door used for keeping manure (*a*); a trellis 12 feet high (*b*); a high wall (*c*); a structure of wood 16 feet by 13 feet not let into the ground, but merely laid upon timbers upon the surface, and intended to be permanently used as a shop (*d*).

The following constructions have been held not to be so included:—a conservatory erected at the side of and leaning against a house (*e*); a hoarding (*f*); hustings for an election (*g*); a timber stack (*h*); a boundary wall (*i*); a screen to prevent newly-erected houses acquiring a right of light (*k*).

"Building purposes."

"Building purposes, lands used for," under s. 128 of the Lands Clauses Consolidation Act, 1845 (*l*), are lands actually laid out for that purpose (*m*).

"Completion."

"Completion," as regards third parties, means completion in fact, and not completion to the satisfaction of the architect or otherwise ascertained in some manner prescribed by the contract (*n*).

"Day-work."

"Day-work" means work which under the terms of the contract is to be paid for by time and materials, and not by measurement (*o*).

"Dwelling-house."

"Dwelling-house" (*p*).—The term "dwelling" implies a building used or capable of being used as a residence by one or more families, and provided with all necessary parts and appliances, such as floors, windows, staircases etc. (*q*).

"External."

"External parts."—Where a house is pulled down leaving a wall

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(*s*) *Coles* v. *Sims* (1854), 5 De G. M. & G. 1; *Western* v. *Macdermott* (1866), 2 Ch. App. 72; *Manners* (*Lord*) v. *Johnson* (1875), 1 Ch. D. 673; *Jackson* v. *Winnifrith* (1882), 47 L.T. 243; *Chitty* v. *Bray* (1883), 48 L. T. 860.

(*t*) *Folkestone Corporation* v. *Woodward* (1872), L. R. 15 Eq. 159; *Anderson* v. *Richards* (1906), 70 J. P. 231.

(*a*) *Morish* v. *Harris* (1865), L. R. 1 C. P. 155.

(*b*) *Wood* v. *Cooper*, [1894] 3 Ch. 671.

(*c*) *Child* v. *Douglas* (1854), 5 De G. M. & G. 739; *Morish* v. *Harris*, *supra*; *Bowes* v. *Law* (1870), L. R. 9 Eq. 636.

(*d*) *Stevens* v. *Gourley* (1859), 7 C. B. (N. S.) 99.

(*e*) *Hibbert* v. *Acton Local Board* (1889), 5 T. L. R. 274.

(*f*) *Slaughter* v. *Sunderland Corporation* (1891), 60 L. J. (M. C.) 91; *Foster* v. *Fraser*, [1893] 3 Ch. 158. A hoarding, however, has been held to be "a building or erection" (*Pocock* v. *Gilham* (1883), 1 Cab. & El. 104).

(*g*) *Allen* v. *Ayre* (1823), 1 L. J. (O. S.) (K. B.) 204.

(*h*) *Harris* v. *De Pinna* (1886), 33 Ch. D. 238.

(*i*) *Ellis* v. *Plumstead Board of Works* (1893), 68 L. T. 291.

(*k*) *Paddington Corporation* v. *A.-G.*, [1906] A. C. 1.

(*l*) 8 & 9 Vict. c. 18.

(*m*) *Coventry* v. *London, Brighton, and South Coast Rail. Co.* (1867), L. R. 5 Eq. 104; and see *Charlton* v. *Gibson* (1844), 1 Car. & Kir. 541.

(*n*) *Lewis* v. *Hoare* (1881), 44 L. T. 66.

(*o*) See Dictionary of Architecture, *sub voce* "Day-work."

(*p*) See also "House," *infra*. In and for the purposes of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), the term "dwelling-house" includes any part of a house where that part is separately occupied as a dwelling (Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 5).

(*q*) *Williams* v. *Fitzmaurice* (1858), 3 H. & N. 844. A shed may be parcel of a dwelling-house for some purposes. See *Ashworth* v. *Heyworth* (1869), L. R. 4 Q. B. 316; *McHole* v. *Davies* (1875), 1 Q. B. D. 59, 61.

of an adjoining house thereby exposed, the exposed wall forms an external part of the house which is left standing (*r*).

"Front main wall."—The meaning of this term depends on all the circumstances of the case; the building must be looked at as a whole, and no particular portion must be selected to determine it (*s*). "Front main wall."

"House."—This term is similar in meaning to the term "dwelling house" (*a*). "House."

In the interpretation of various instruments and statutes the term "house" has been held to include the following (*b*): a collection of buildings used for one purpose (*c*); a building containing several residential flats (*d*); each of two tenements, the one on the ground floor and the other on the first floor of the same building, there being no intercommunication between them, and each having a separate front door (*e*).

On the other hand, a building intended for a dwelling-house, but never completed and used as a store for straw and agricultural implements, is not a house (*f*).

"Maintain," "Maintenance." — "Maintain" has a double meaning: namely, to maintain in exactly the same state as it was found, or by making improvements without any alteration of purpose (*g*). "Maintain."

"Minerals" comprise all substances lying on the strata of the land which are commonly worked for profit and have a value independent of the surface (*h*). "Minerals."

(*r*) *Green* v. *Eales* (1841), 2 Q. B. 225. As to party-walls, see titles BOUNDARIES, FENCES AND PARTY-WALLS, pp. 134 *et seq.*, *ante*; METROPOLIS.

(*s*) *A.-G.* v. *Edwards*, [1891] 1 Ch. 194; *Leyton Local Board* v. *Causton* (1893), 9 T. L. R. 180, decided under the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), s. 3.

(*a*) A permanent building in which the tenant or the owner and his family dwell or live (*Chapman* v. *Royal Bank of Scotland* (1881), 7 Q. B. D. 136).

(*b*) These definitions may be important in view of a builder contracting to build something described as "a house," and the architect requiring variations of the work the effect of which the builder alleges to make the structure no longer "a house," but something different.

(*c*) *Richards* v. *Swansea Improvement and Tramways Co.* (1878), 9 Ch. D. 425, under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), s. 92.

(*d*) *Kimber* v. *Admans*, [1900] 1 Ch. 412, under a covenant not to erect more than a certain number of houses.

(*e*) *Ilford Park Estates* v. *Jacobs*, [1903] 2 Ch. 522, under a covenant not to erect more than one house on a site.

(*f*) *Elmore* v. *St. Briavells* (*Inhabitants*) (1828), 8 B. & C. 461, under the repealed statute 9 Geo. 1, c. 22, s. 7.

(*g*) "It is very difficult to define what works of maintenance are. It is a very large term, and useful or reasonable ameliorations are not excluded by it. . . . You may maintain by keeping in the same state, or you may maintain by keeping in the same state and improving the state, always bearing in mind that it must be maintenance as distinguished from alteration of purpose" (*Sevenoaks, Maidstone and Tunbridge Rail. Co.* v. *London, Chatham, and Dover Rail. Co.* (1879), 11 Ch. D. 625, *per* JESSEL, M.R., at pp. 634, 635). In covenants in leases, to "maintain" means to keep in substantially the same condition as at the date of the demise (*Lister* v. *Lane and Nesham*, [1893] 2 Q. B. 212).

(*h*) *Midland Rail. Co.* v. *Checkley* (1867), L. R. 4 Eq. 19; *Midland Rail. Co.* v. *Haunchwood Brick and Tile Co.* (1882), 20 Ch. D. 552; *Tucker* v. *Linger*

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"Necessary" includes what is proper (*i*).

The term "plastering" does not include "gauging," *i.e.*, mixing plaster of Paris (*k*).

"Premises."

"Premises," although popularly applied to buildings etc., in legal language means the subject or thing previously expressed (*l*).

"Probationary drawings."

"Probationary drawings" means drawings to be approved by or on behalf of the employer (*m*).

"Rebuild."

"Rebuild" means to rebuild the whole of a house or building, and not merely partially to replace old work by new (*n*).

"Repair."

"Repair."—The term "repair" may mean either patching or renewing, according to circumstances (*o*). Where the thing to be repaired is so worn, decayed, injured, or out of repair that it cannot be patched up, the only possible repair is by way of renewal.

"Several works."

"Several works." — The expression "several works" means "the whole works," and not each separate section thereof, for the purpose of calculating the period of maintenance (*p*).

"Specification."

"Specification."—A detailed description of building, engineering and other works executed or proposed to be executed.

"Strikes."

"Strikes."—The word means a refusal by a whole body of workmen to work for their employers, in consequence of either a refusal by the employers to comply with the workmen's demands relating to pay, hours, employment of particular persons etc., or a refusal by the workmen to accept terms of employment proposed by their employers (*q*).

"Structure."

"Structure."—This term includes anything to which the term "built" can be applied (*r*).

"Weekly accounts."

"Weekly accounts."—Parol evidence may be admitted to show that by the usage of the building trade "weekly accounts" means accounts of day-work (*a*) only, and does not extend to extra work which is capable of being measured (*b*).

(1883), 8 App. Cas. 508; *Glasgow Corporation* v. *Farie* (1888), 13 App. Cas. 657; *Jersey (Earl)* v. *Neath Guardians* (1889), 22 Q. B. D. 555; *Ruabon Brick and Terra Cotta Co.* v. *Great Western Rail. Co.*, [1893] 1 Ch. 427; *Midland Rail. Co. and Kettering, Thrapston, and Huntingdon Rail. Co.* v. *Robinson* (1889), 15 App. Cas. 19; *Re Todd, Birleston & Co. and North Eastern Rail. Co.*, [1903] 1 K. B. 603; *North British Rail. Co.* v. *Turners, Ltd.* (1904), 6 F. (Ct. of Sess.) 900.

(*i*) *Lytton* v. *Great Northern Rail. Co.* (1856), 2 K. & J. 394; *Sanderson* v. [illegible] *and Workington Rail. Co.* (1849), 11 Beav. 497, (1850) 2 H. & Tw. 327, where an agreement for accommodation works provided for "such roads etc. as may be necessary," and it was held that this meant such roads etc. as may be necessary and proper for convenient communication between the severed portions of the land.

(*k*) *Wallis* v. *Robinson* (1862), 2 F. & F. 307.

(*l*) *Beacon Life and Fire Assurance Co.* v. *Gibb* (1862), 1 Moo. P. C. C. (N. S.) 73.

(*m*) *Moffatt* v. *Dickson* (1853), 13 C. B. 543.

(*n*) *London Corporation* v. *Nash* (1747), 3 Atk. 511; *A.-G.* v. *Hatch*, [1893] 3 Ch. 36.

(*o*) *Inglis* v. *Buttery* (1878), 3 App. Cas. 552, at p. 573.

(*p*) *Cunliffe* v. *Hampton Wick Local Board* (1892), 9 T. L. R. 378.

(*q*) *King* v. *Parker* (1876), 34 L. T. 887, *per* KELLY, C.B., at p. 889. See title TRADE AND TRADE UNIONS.

(*r*) See *Lavy* v. *London County Council*, [1895] 2 Q. B. 577.

(*a*) See p. 176, *ante*.

(*b*) *Myers* v. *Sarl* (1860), 30 L. J. (Q. B.) 9.

SECT. 4.—*Novation.*

SECT. 4. Novation.

347. Where, by consent, a new party is substituted for either of the original parties to a contract, there is what is called a novation (*c*). Novation.

SECT. 5.—*Implied Contract to pay Quantum Meruit.*

348. It may happen that the contract has been abandoned, or that the circumstances contemplated by it have become so changed that the conditions have become inapplicable. For instance, the work may have been agreed to be done pursuant to a plan and no plan agreed upon, or the work may have been agreed to be done to the approval of a third person and no person appointed to approve, or the work may be so delayed by the employer that much greater expenditure of money or labour is requisite. In such a case, if the builder or contractor has been encouraged to go on with the work, a new contract by the building owner or employer to pay a *quantum meruit* may be implied from such of the facts as are applicable (*d*). Circumstances in which a new contract may be implied.

Payments on account may, in certain circumstances, be evidence of a new contract to pay, but where the employer is a corporation only enabled to contract under seal such is not the case (*e*). Payments on account.

Where, after the abandonment of a contract to perform work in a specified manner, a new contract in general terms has been entered into to complete the work, such of the stipulations of the original contract as would necessarily apply may be impliedly included in the new contract, but not any special terms as to forfeiture or liquidated damages (*f*).

SECT. 6.—*Variation of Contracts.*

349. Where a contract is required by statute to be under seal it can only be varied by an instrument under seal (*g*). In cases where the contract is not required to be under seal a subsequent agreement not under seal by which the time or mode of performance or any other stipulation in the contract is dispensed with or varied may be set up as a defence in an action for non-performance of the work in the time or manner covenanted for in the deed (*h*). Manner of variation.

(*c*) See p. 274, *post*; and title CONTRACT.

(*d*) *Burn* v. *Miller* (1813), 4 Taunt. 745; *Bush* v. *Whitehaven Town and Harbour Trustees* (1888), 52 J. P. 392.

(*e*) *Lamprell* v. *Billericay Union* (1849), 3 Exch. 283.

(*f*) *Barr* v. *Dunfermline Rail. Co.* (1855), 17 Dunl. (Ct. of Sess.) 582; *Kemp* v. *Rose* (1858), 1 Giff. 258; *Hunt* v. *South Eastern Rail. Co.* (1875), 45 L. J. (C. P.) 87.

(*g*) *Homersham* v. *Wolverhampton Waterworks Co.* (1851), 6 Exch. 137; *Routledge* v. *Farnham Local Board* (1861), 2 F. & F. 406; *Young* v. *Leamington Spa Corporation* (1883), 8 App. Cas. 517; *Williams* v. *Barmouth Urban District Council* (1897), 77 L. T. 383.

(*h*) *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537; *Thames Ironworks and Shipbuilding Co.* v. *Royal Mail Steam Packet Co.* (1862), 13 C. B. (N. S.) 358.

SECT. 6. **Variation of Contracts.**

If the contract is one that is required by the Statute of Frauds to be in writing, and is in fact in writing, a contract to vary it must also be in writing (*i*), although a rescission does not require to be in writing (*k*).

Where the contract is not required by statute to be in writing, but has been actually reduced to writing, the parties may, at any time, waive, dissolve or annul it or in any manner add to, subtract from, or vary or qualify its terms by a parol agreement (*l*).

Alterations not provided for in contract.

350. Building and engineering contracts usually contain provisions giving power to the employer or his architect or engineer in some specified manner to vary the works specified in the contract. In the absence of such a provision, the contractor would be entitled to refuse to comply with any request of the employer or the architect to carry out the work in a different manner from that specified (*m*). If, however, he does comply with such an order, it must depend upon the amount and character of the variation whether the original contract is rescinded or not. So long and so far as the work specified in the original contract can be traced in the substituted work, the contract, with its terms relating to payment, approval etc., will remain binding, while if the alterations are so sweeping that the original work can be no longer traced, the original contract will be held to be abrogated, at any rate as to price, and the work to have been done under a new contract to construct the substituted work in consideration of payment at a reasonable rate (*n*).

Usual variations.

The manners most frequently occurring in which building and engineering contracts are varied are, besides the ordering of additions to or variations in the work (*o*), the dispensing with or varying of stipulations as to the time for completion (*p*), and as to the payment of liquidated damages by the contractor for delay (*q*).

SECT. 7.—*Rescission and Rectification of Contracts.*

By mutual agreement.

351. It is within the powers of the parties to a building contract, as in any other case, to rescind the contract by mutual agreement (*r*).

(*i*) See *Sanderson* v. *Graves* (1875), L. R. 10 Exch. 234; and title CONTRACT. See also *Hoadly* v. *Maclaine* (1834), 4 Moo. & S. 340; *Moore* v. *Campbell* (1854), 10 Exch. 323; *Noble* v. *Ward* (1867), L. R. 2 Exch. 135.

(*k*) *Goman* v. *Salisbury* (1684), 1 Vern. 240; and see title CONTRACT.

(*l*) *Goss* v. *Nugent* (*Lord*) (1833), 5 B. & Ad. 58, *per* DENMAN, C.J., at p. 65. See title CONTRACT.

(*m*) See title CONTRACT.

(*n*) *Pepper* v. *Burland* (1792), Peake, 139; *Robson* v. *Godfrey* (1816), 1 Stark 275.

(*o*) For variation of building contracts in respect of the ordering of extras, additions, and omissions, see pp. 228 *et seq.*, *post*.

(*p*) See pp. 189 *et seq.*, *post*.

(*q*) See pp. 242 *et seq.*, *post*.

(*r*) *James* v. *Cotton* (1831), 7 Bing. 266.

SECT. 7. Rescission and Rectification of Contracts.

352. Where the instrument in which a contract is expressed does not embody the intentions of the parties making the contract because of a mistake made by one of them, the party who has signed the document under the mistake in question is generally entitled to have the contract cancelled (*s*), subject to an option given to the other party to accept cancellation or submit to rectification (*t*). Where, however, both parties are under a mistake common to them both, the court will rectify the instrument so as to make it express the real contract which the parties intended to make. The principle upon which the courts act is that they do not rectify contracts, but they do rectify instruments purporting to have been made in pursuance of the terms of contracts, where the instruments do not express the terms actually agreed upon by the parties (*a*).

On ground of mistake.

A contract may be rectified on the ground of mutual mistake, even when one of the parties is a local authority only empowered to contract under seal (*b*).

If, however, one party was cognisant of the mistake at the time the instrument was executed, and seeks to take advantage of the misapprehension under which he knew the other party lay, the court has power to rectify the document (*c*).

Where the parties differ as to the construction of the document, neither party is precluded from abandoning his view of the construction and adopting that of the other party, and the fact that he has at one time set up an erroneous construction of the contract does not prevent there being a contract (*d*).

Difference of opinion as to construction.

353. The class of cases in which mistakes most commonly occur are where clerical errors or errors of computation have been made in a schedule of prices (*e*). In some cases one or more items in the schedule may be quoted at a very high or a very low price, and this may give rise to an attempt to rectify the instrument, but in such a case it would obviously be contended that the high price was fixed intentionally for the purpose of compensating the contractor for items priced at a low figure, or the low price to induce the employer to agree to high prices for other parts of the works. In such a case also the person claiming rectification must have done nothing from which an intention to affirm the contract in

Usual mistakes.

(*s*) *Paget* v. *Marshall* (1884), 28 Ch. D. 255, *per* BACON, V.-C., at p. 263: "The other class of cases is one of what is called unilateral mistake, and there, if the court is satisfied that the true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into." See further, titles CONTRACT; MISTAKE.

(*t*) *Ibid.*, at pp. 266, 267; *Harris* v. *Pepperell* (1867), L. R. 5 Eq. 1.

(*a*) *Mackenzie* v. *Coulson* (1869), L. R. 8 Eq. 368, *per* JAMES, V.-C., at p. 375; and see title CONTRACT.

(*b*) *McCartney* v. *Brighton Corporation* (1904), *Times* (May 20, 1904).

(*c*) *Neill* v. *Midland Rail. Co.* (1869), 17 W. R. 871.

(*d*) See title CONTRACT; and *Wilkie* v. *Hamilton Lodging House Co.* (1902), 4 F. (Ct. of Sess.) 951.

(*e*) *Neill* v. *Midland Rail. Co.*, *supra*, where the contractor put down 5,000 yards of concrete at 5*s.* a yard as amounting to £55 instead of £1,250.

SECT. 7. Rescission and Rectification of Contracts.

its existing form may be implied, as, for instance, by directing the engineer to order as little as possible of the high-priced work (*f*).

Part III.—Completion.

SECT. 1.—*Contracts Entire and not Entire.*

SUB-SECT. 1.—*Definition.*

When contract entire.

354. An entire contract means one where the entire fulfilment of the promise by either party is a condition precedent to the right to call for the fulfilment of any part of the promise by the other (*g*).

In an entire building or engineering contract, the builder or contractor must have completed the works, and, if so required by the stipulations of the contract, such completion must have been certified by the architect or engineer, before a right to payment arises or to final payment in case of payment by instalments (*h*).

An entire contract is indivisible, and cannot be apportioned. It is of great importance to both the employer and contractor to ascertain whether the contract is entire or not, as the rights of the employer in respect of insisting on the whole work being done and those of the contractor in respect of payment are dependent thereon.

of entire contracts.

355. There are four varieties of such entire contracts: (1) a contract to construct the whole building or works in consideration of the payment of a fixed sum of money: contracts of this class are often called "lump sum contracts" (*i*); (2) a contract to construct the whole building or works in consideration of a specified price made up of separate payments for each separate part of the building or works (*k*); (3) a contract to construct the whole building or works without mention of any price (*l*); (4) a contract to construct the whole building or works for a price to be

(*f*) See *Page* v. *Taunton Urban District Council* (1904), Hudson on Building Contracts, 3rd ed., Vol. I., p. 205; *Ewing and Lawson* v. *Hanbury & Co.* (1900), 16 T. L. R. 140, where the contract specified a price of £18 a hundredweight for certain materials, which was a very high price, and the employers sought unsuccessfully to have the contract rectified by making the price £18 a ton.

(*g*) See generally, for a discussion of contracts entire and not entire, title CONTRACT.

(*h*) *Cutter* v. *Powell* (1795), 2 Smith, L. C., 11th ed., p. 1; and see title CONTRACT.

(*i*) *Ellis* v. *Hamlen* (1810), 3 Taunt. 52. See p. 184, *post*.

(*k*) *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651; and see *Newfoundland Government* v. *Newfoundland Rail. Co.* (1888), 13 App. Cas. 199. See p. 185, *post*.

(*l*) See *Cogge* v. *Bernard* (1703), 1 Smith, L. C., 11th ed., p. 173, at p. 174. See p. 185, *post*

subsequently ascertained on some fixed basis, *e.g.*, by a schedule of prices (*m*).

When contract not entire.

356. Building and engineering contracts, where there is no obligation on the contractor to construct the whole of a particular work, are not entire. Repairing contracts are also, in many cases, not entire (*n*), but where there is an express stipulation that completion shall be a condition precedent to payment, they are so.

Effect of payment by instalments.

357. In most building and engineering contracts, provision is made for the payment of instalments during the progress of the work. It depends on the construction of the particular contract whether or not the effect of such a provision is to prevent the contract being entire (*o*).

SUB-SECT. 2.—*Effect of Non-completion of Entire Contract.*

Contractor unable to sue.

358. If the contract is entire and the builder or contractor throws up the work, or without any fault on the part of the employer is unable to go on with the work, he has no right of action against the employer either under the contract or on a *quantum meruit* for work and materials supplied (*p*). Where, however, he has done work outside the contract, he can recover for such work, although he has not completed the work contracted for (*q*).

Damages for non-completion.

Not only will the contractor not be able to recover payment for the incomplete work, but he will also be liable in damages to the employer for the breach of his contract to complete the work (*r*).

Employer's default, or new contract.

The contractor, however, will be entitled to payment, and will not be liable to the employer in damages, if he can show either that the non-completion of the work was due to some act or default of the employer (*s*), or that the parties have in fact entered into some new contract under which the contractor is entitled to be paid for the work actually constructed (*t*).

SUB-SECT. 3.—*Entire Contracts for a Lump Sum ascertained.*

Non-completion of lump sum contract.

359. If a builder or contractor undertakes to construct a particular work for a fixed sum of money, *e.g.*, to build a house according to

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(*m*) *Whitaker* v. *Dunn* (1887), 3 T. L. R. 602; *Jamieson* v. *M'Innes* (1887), 15 R. (Ct. of Sess.) 17; *Wilkie* v. *Hamilton Lodging House Co.* (1902), 4 F. (Ct. of Sess.) 951. See p. 185, *post*.

(*n*) *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651, *per* BLACKBURN, J., at p. 660.

(*o*) See p. 225, *post*.

(*p*) *Ellis* v. *Hamlen* (1810), 3 Taunt. 52; *Rees* v. *Lines* (1837), 8 C. & P. 126; *Pontifex* v. *Wilkinson* (1845), 2 C. B. 349; *Sumpter* v. *Hedges*, [1898] 1 Q. B. 763, C. A.; *Re Nuttall and Lynton and Barnstaple Rail. Co.* (1899), 82 L. T. 17.

(*q*) See title WORK AND LABOUR.

(*r*) *Bottoms* v. *York Corporation* (1892), Hudson on Building Contracts, 3rd ed., Vol. II., p. 220.

(*s*) *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310; *Mackay* v. *Dick* (1881), 6 App. Cas. 251; *Arterial Drainage Co.* v. *Rathangan River Drainage Board* (1881), 6 L. R. Ir. 513.

(*t*) *Burn* v. *Miller* (1813), 4 Taunt. 745; *Hunt* v. *South Eastern Rail. Co.* (1875), 45 L. J. (C. P.) 87.

SECT. 1.

Contracts Entire and not Entire.

plans etc. for £2,000, he cannot recover any payment whatever until the work is completely constructed, unless the contract contains some express stipulation for payment by instalments (*a*), for where there is a contract to do work for a lump sum nothing can be recovered until the work is completed (*b*). Even in the case of contracts to do repairs to an existing work, in which case the implication is against the contract being entire, an agreement to repair and make perfect a given structure will make the contract an entire one (*c*).

SUB-SECT. 4.—*Separate Prices for Separate Parts of a Whole Work.*

Non-completion where parts of work separately priced.

360. If a builder or contractor undertakes to erect the whole of a specified building or work in accordance with a specification which is divided into different parts to each of which a price is affixed, the contract is entire, and no right to payment arises on the completion of any one of the different parts, but only on the completion of the whole (*d*).

On the other hand, where, in a contract for the construction of a work, the consideration is expressed to be a certain payment for each particular part as and when completed, the contract is a severable one, and payment of each instalment accrues on the completion of each particular part (*e*). The effect is the same as if each part has been made the subject of a separate contract, each of these contracts being entire in itself.

SUB-SECT. 5.—*Contracts to construct Works without Mention of Price.*

Contract constituted by employment.

361. A mere promise by a builder to construct a whole building without any mention of price requires to be supported by some consideration (*f*) in order to become binding on him as a contract. The employment, however, of the builder to do the work is a sufficient consideration, as it implies an agreement to pay a reasonable remuneration for the work and labour done and materials supplied (*g*).

Accrual of payment.

In contracts of this nature there may be an implied condition that payments shall accrue due from time to time as the work progresses (*h*), as a contract not to demand any payment until completion cannot be implied, in the absence of something to show such an intention, from a general employment of a person

(*a*) *Cutter* v. *Powell* (1795), 2 Smith, L. C., 11th ed., p. 1; *Ellis* v. *Hamlen* (1810), 3 Taunt. 52; *Munro* v. *Butt* (1858), 8 E. & B. 738; *Sinclair* v. *Bowles* (1829), 9 B. & C. 92; *Rees* v. *Lines* (1837), 8 C. & P. 126; *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651; *Lewis* v. *Hoare* (1881), 44 L. T. 66; *London Steam Stone Saw Mills* v. *Lorden* (1900), Hudson on Building Contracts, 3rd ed., Vol. II., p. 332.

(*b*) *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673, *per* A. L. SMITH, L.J., at p. 674; *Forman & Co. Proprietary* v. *The Ship "Liddesdale,"* [1900] A. C. 190.

(*c*) *Appleby* v. *Myers*, *supra*.

(*d*) *Sinclair* v. *Bowles*, *supra*.

(*e*) *Newfoundland Government* v. *Newfoundland Rail. Co.* (1888), 13 App. Cas. 199.

(*f*) *Elsee* v. *Gatward* (1793), 5 T. R. 143.

(*g*) *Cogge* v. *Bernard* (1703), 1 Smith, L. C., 11th ed., p. 173; *Whittle* v. *Frankland* (1862), 2 B. & S. 49.

(*h*) *Roberts* v. *Havelock* (1832), 3 B. & Ad. 404.

to perform a particular work. Whether the implication is that payment is to be deferred until completion of the whole work or is to be made from time to time as the work progresses depends on the nature and construction of each particular contract (*i*).

Contract for repairs.

362. In contracts to employ a person to do work on materials the property of the employer, such as to execute repairs to a house or a ship, the implication is that the contract is not entire (*k*), and the contractor, if he does not complete the work, can sue for the value of the labour and materials supplied by him (*l*). Such a contract, however, can be made entire by express words (*m*), and even in the absence of express words, if it is clear that the intention of the parties was that the contract was to be entire, the contract will be construed accordingly (*n*).

SUB-SECT. 6.—*Entire Contracts for a Sum to be ascertained.*

What contracts included.

363. A contract to perform the whole of particular works for a price which has to be ascertained in a stipulated manner may be an entire contract (*o*). Where a price is fixed for the whole work, and additions and deductions are to be measured and valued, such a contract is a lump sum contract (*p*).

Manner of ascertaining price.

The manner of ascertaining the price may be by way of a schedule of prices, or by valuation, or by arbitration. In the case of a schedule of prices, the fact of a separate price being annexed to each item in the schedule of prices does not render the contract divisible or entitle the contractor to payment on the completion of each item of work (*q*).

Where no provision for ascertaining price.

It is a common occurrence in connection with entire contracts when a price is to be ascertained in accordance with a schedule of prices, that some class of work described in the specification or shown on the drawings has been omitted from the schedule of prices. This does not relieve the contractor from the obligation of completing the whole, including the class of work for which a price has been omitted. If there is no provision in the contract for ascertaining the price of unpriced work (as, for instance, by valuation by the engineer), the contractor will be entitled to be paid for it at a reasonable rate (*r*).

SUB-SECT. 7.—*Contracts to do more than one Part of a Whole.*

Contract for separate works.

364. Sometimes a contractor undertakes to construct more than one distinct work, as separate reservoirs, or more than one part of

(*i*) *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651.
(*k*) *Ibid.* at p. 660.
(*l*) *Menetone* v. *Athawes* (1764), 3 Burr. 1592; *Roberts* v. *Havelock* (1832), 3 B. & Ad. 404; *The Tergeste*, [1903] P. 26.
(*m*) *Appleby* v. *Myers*, *supra*.
(*n*) *Wilkinson* v. *Clements* (1872), 8 Ch. App. 96.
(*o*) *Appleby* v. *Myers*, *supra*; *Whitaker* v. *Dunn* (1887), 3 T. L. R. 602.
(*p*) *London Steam Stone Saw Mills* v. *Lorden* (1900), Hudson on Building Contracts, 3rd ed., Vol. II., p. 332.
(*q*) *Appleby* v. *Myers*, *supra*.
(*r*) *Re Walton-on-the-Naze Urban District Council and Moran* (1905), Hudson on Building Contracts, 3rd ed., Vol. II., p. 400.

SECT. 1. **Contracts Entire and not Entire.**

a connected work, as sections of a railway, by a contract which provides for payment for each work or part of a work on the completion thereof, while there is also a promise by the contractor to complete the whole of the works or work. Under such a contract, although the employer must pay for each part on its completion, he would have a cross-claim in damages against the contractor in case of non-completion of the other parts (*s*).

Where a contractor is employed to do certain parts of a work, his obligation is limited to doing the whole of those parts (*t*).

SUB-SECT. 8.—*Performance of an Entire Contract.*

Contractor must do all necessary work.

365. A contract to complete a whole work as such involves an obligation to do everything that is necessary for the completion of the whole work as described (*a*). The omission of anything indispensably necessary will make the work incomplete so as to render the price not payable, and the builder or contractor liable in damages for non-completion. It makes no difference that such indispensably necessary works are not described in the specification (*b*), or are not shown on the drawings, or are impracticable (*c*), or are calculated wrongly, or their costs or extent underestimated in the specification (*d*), or are omitted or underestimated in the quantities (*e*), and this whether the quantities have been made part of the contract (*f*) or not (*g*).

Where a contract provides that work is to be done to the satisfaction of the architect or engineer, any work within the contract, which he requires to be done as a condition to his approval, is indispensably necessary work if his decision is final (*h*).

The fact that the quantities are made part of a contract to construct a complete work does not cut down the obligation of the builder to furnish a complete work, but if the contract is merely to do so much work as is described in the quantities, the obligation of the contractor is to do that quantity and no more (*i*).

Preparatory work.

366. In the case of an entire contract, preparatory work, such as clearing away existing works, excavating for foundations, bringing

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(*s*) *Newfoundland Government* v. *Newfoundland Rail. Co.* (1888), 13 App. Cas. 199.

(*t*) *Kemp* v. *Rose* (1858), 1 Giff. 258.

(*a*) *Williams* v. *Fitzmaurice* (1858), 3 H. & N. 844; *Gillespie* v. *Howden* (1885), 22 Sc. L. R. 527; *Stegmann* v. *O'Connor* (1899), 81 L. T. 627.

(*b*) *Williams* v. *Fitzmaurice, supra*; *Re Shell Transport and Trading Co. and Consolidated Petroleum Co.* (1904), 20 T. L. R. 517.

(*c*) *Hydraulic Engineering Co.* v. *Spencer & Sons* (1886), 2 T. L. R. 554.

(*d*) *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597.

(*e*) *Scrivener* v. *Pask* (1866), L. R. 1 C. P. 715; *Re Ford & Co. and Bemrose & Sons* (1902), 18 T. L. R. 443.

(*f*) *Coker* v. *Young* (1860), 2 F. & F. 98.

(*g*) *Kimberley* v. *Dick* (1871), L. R. 13 Eq. 1.

(*h*) *Dobson* v. *Hudson* (1857), 1 C. B. (N. S.) 652, *per* CRESSWELL, J., at p. 659: "I find no provision in the contract for the expense of alterations resulting from the opinion or the caprice of the . . . surveyor. The plaintiffs undertook to do the work to the satisfaction of the surveyor." As to the architect requiring work not within the contract, see p. 231, *post*.

(*i*) *Kemp* v. *Rose*, *s*

materials from a distance etc., is included in the contract work (*k*). If any unforeseen difficulties should arise, such as the site turning out to be rock where soil was expected, the preparatory work still has to be done by the contractor as part of the contract work (*l*).

Use of better materials than those contracted for.

367. If a contractor without authority from his employer constructs the works of better materials than those stipulated for in the contract, the employer might refuse to accept the work, in which case the contractor would not be able to recover at all, as he would not have performed his contract. Even if the employer should accept the work, the contractor could only recover the contract price without any increase in price for the superior material used (*m*).

Foundations and materials dug out.

368. The builder, in the absence of express stipulation to the contrary, has a general right to dig the foundation of the building and to convert to his own use the materials dug out, provided that they are ordinary materials and not such things as antiquities etc. (*n*). This right, however, is limited to the necessary foundations of the building contemplated by the contract, and does not extend so as to allow him to dig all over the site to get these materials (*o*).

Where the contract expressly reserves the minerals, every substance that can be dug up for the purpose of profit is included (*p*). It would seem that the builder, in such a case, cannot even dig materials from the site for use in the construction of the building unless they are part of the foundations.

Effect of substantial compliance with contract.

369. An allegation that the building owner has received something as good as what he bargained for will not enable a builder to recover the contract price, in the case of an entire contract, in which completion is a condition precedent to the right to payment, except in the case of acceptance by the employer, waiver, or evidence of a new contract to pay for the work actually performed (*q*).

It would seem, however, that the rule in the case of building contracts is similar to that in the case of specific performance, which is, that such non-essential and trivial defects on the side of

(*k*) *Weatherston* v. *Robertson* (1852), 1 Stu. M. & P. 333.

(*l*) *East and West India Dock Co.* v. *Kirk and Randall* (1887), 12 App. Cas. 738; *Bottoms* v. *York Corporation* (1892), Hudson on Building Contracts, 3rd ed., Vol. II., p. 220.

(*m*) *Forman & Co. Proprietary* v. *The Ship* "*Liddesdale*," [1900] A. C. 190; *Wilmot* v. *Smith* (1828), 3 C. & P. 453.

(*n*) *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch. D. 562, where a prehistoric boat, found in digging out foundations, was held to be the property of the owner of the soil. It is usual, especially in contracts with local authorities, to provide for the preservation and delivery to the building owner of antiquities etc. found on the building site.

(*o*) *Robinson* v. *Milne* (1884), 53 L. J. (CH.) 1070.

(*p*) See p. 177, *ante*.

(*q*) *Munro* v. *Butt* (1858), 8 E. & B. 738; *Whitaker* v. *Dunn* (1887), 3 T. L. R. 602; and compare *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673; *Forman & Co. Proprietary* v. *The Ship* "*Liddesdale*," *supra*.

SECT. 1. **Contracts Entire and not Entire.**

one party as can be compensated for will not excuse the other party to the contract (*r*). In every case it must be a matter of degree: thus the omission of a lock on a door in a large mansion, or the omission to put some zinc on the flat roof of an annexe (*s*), might not amount to non-completion, while omission to put down the floors in a house (*t*) certainly would do so (*u*).

The question of completion, being one of fact, is for the jury, and if the jury find that the contract has in fact been performed, the contractor would be entitled to recover the contract price, subject to deduction for the reasonable cost of making the work perfect (*b*).

Contractor's right to do whole of work.

370. In the case of an entire contract, the employer is under an obligation to allow the contractor to do the whole of the work (*c*). The contractor, it would seem, is entitled (subject to any special circumstances or stipulations in the contract) to uninterrupted possession of the site for the purpose of carrying out the works in the contract. He can therefore object to a fresh contractor being brought upon the site while he is carrying out the contract works. The employer cannot, it would seem, take advantage of a stipulation authorising him to omit work in order to get parts of the contract work executed by another contractor while the contract is proceeding. It has been decided in America that such a clause does not contemplate or authorise the omitting of work given to another contractor (*d*).

Fitness of work for intended purpose.

371. The question whether or not completion includes making the work answer the purpose for which it is constructed depends on whether the work is agreed to be constructed to answer a particular purpose, or whether it is agreed merely to be constructed in accordance with a specification and plans. In the first case the contractor warrants that he will make something fit for the purpose (*e*), and if the work is useless, so as to amount to a total failure of consideration, there is no completion on the part of the contractor, and no obligation on the employer to pay (*f*). In the first case it is no excuse for the contractor doing useless work that it was not possible to do it otherwise, unless he told his employer, or the employer knew of the impossibility. The contractor's obligation is not performed unless the work done is useful and skilfully

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(*r*) See title SPECIFIC PERFORMANCE.

(*s*) *Lowther* v. *Heaver* (1889), 41 Ch. D. 248, 262.

(*t*) *Williams* v. *Fitzmaurice* (1858), 3 H. & N. 844.

(*u*) "Small deviations from the plan would not affect it much; but if there is any obstinate or corrupt deviation, that would materially" (*Craven* v. *Tickell* (1789), 1 Ves. 60, *per* Lord THURLOW, L.C., at p. 61).

(*b*) *Cutler* v. *Close* (1832), 5 C. & P. 337.

(*c*) *Tancred, Arrol & Co.* v. *Steel Co. of Scotland* (1890), 15 App. Cas. 125.

(*d*) *Gallagher* v. *Hirsh* (1899), N. Y. 45 App. Div. 467.

(*e*) *Hall* v. *Burke* (1886), 3 T. L. R. 165; and compare *Preist* v. *Last*, [1903] 2 K. B. 148, C. A.

(*f*) *Farnsworth* v. *Garrard* (1807), 1 Camp. 38; *Denew* v. *Daverell* (1813), 3 Camp. 451; *Hill* v. *Featherstonhaugh* (1831), 7 Bing. 569; *Grounsell* v. *Lamb* (1836), 1 M. & W. 352. See also *Cousens* v. *Paddon* (1835), 5 Tyr. 535; *Basten* v. *Butter* (1806), 7 East, 479; *Hall* v. *Burke*, *supra*.

executed (*g*). In the second case, however, the contractor's obligation is only to follow the plans and specification, and to use proper materials and workmanship (*h*), and he is not responsible if the work turns out useless to the employer, unless it has been done badly or not in accordance with the plans and specification (*i*).

SECT. 1. Contracts Entire and not Entire.

SUB-SECT. 9.—*Implied Condition as to Workmanship.*

372. A contract to perform any work, in the absence of any stipulation as to the manner in which it is to be carried out, implies a condition that the work shall be done in a good and workmanlike manner (*j*), and the workmen employed on the work must be possessed of the ordinary amount of skill possessed by those exercising the particular trade (*k*). The contractor, however, cannot be held responsible for the quality of materials or work chosen or directed by the employer or his architect, as in that case the employer chooses to supersede the contractor's judgment by using his own (*l*).

Manner in which work is to be done.

SECT. 2.—*Time for Completion.*

SUB-SECT. 1.—*Where no Time is specified.*

373. In a contract to perform a work, where no particular time is specified within which the work is to be completed, an agreement to complete within a reasonable time will be implied, and a reasonable time for completion will be allowed (*m*).

Completion within reasonable time.

The question as to what is a reasonable time is one of fact (*n*), to be determined by the jury under the direction of the court. All the circumstances of the case should be taken into consideration, such as the nature of the work to be done, the time necessary to do the work, the orders which the contractor has in hand (*o*), the proper use of customary appliances (*p*), and the time which a reasonably diligent manufacturer of the same class as the contractor would take (*q*).

Calculation of reasonable time.

Where a reasonable time for completion becomes substituted for a time specified in the contract, in consequence of the specified time being no longer applicable, then in order to ascertain what is a reasonable time the whole circumstances must be taken into consideration, and not merely those existing at the time of the making of the contract.

(*g*) *Duncan* v. *Blundell* (1820), 3 Stark. 6; *Grounsell* v. *Lamb* (1836), 1 M. & W. 352; *Pearce* v. *Tucker* (1862), 3 F. & F. 136.

(*h*) *Ripley* v. *Lordan* (1860), 2 L. T. 154; and compare *Jones* v. *Just* (1868), L. R. 3 Q. B. 197, 202.

(*i*) Compare *Olliviant* v. *Bayley* (1843), 5 Q. B. 288; *Chanter* v. *Hopkins* (1838), 4 M. & W. 399.

(*j*) *Duncan* v. *Blundell, supra*; *Pearce* v. *Tucker, supra.*

(*k*) See *Harmer* v. *Cornelius* (1858), 5 C. B. (N. S.) 236; and see title BAILMENT, Vol. I., p. 559.

(*l*) *Duncan* v. *Blundell, supra, per* BAYLEY, J., at p. 7.

(*m*) *Startup* v. *Macdonald* (1843), 6 Man. & G. 593, *per* ROLFE, B., at p. 611. See title CONTRACT.

(*n*) *Fisher* v. *Ford* (1840), 4 Jur. 1034; *Startup* v. *Macdonald, supra.*

(*o*) *Attwood* v. *Emery* (1856), 26 L. J. (C. P.) 73.

(*p*) *Lyle Shipping Co.* v. *Cardiff Corporation*, [1900] 2 Q. B. 638.

(*q*) *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D. 670.

SECT. 2. Time for Completion.

If in consequence of an unavoidable accident the performance of a contract, for the completion of which no time is fixed, is delayed, the implication of law is that the contractor shall use reasonable diligence (*r*).

SUB-SECT. 2.—*Where a Particular Time is specified.*

Failure to complete by stipulated time.

374. If a particular time for completion is specified in the contract, the mere fact of non-completion within that time will not, in ordinary circumstances, be such a breach as to release the employer from the contract, but it will entitle him to damages (*s*). If the builder or contractor is unduly delaying the work, and the contract time has ceased to be binding, the employer may give him notice to complete by a fixed reasonable time (*t*), and on default of the contractor he would be justified in refusing to allow the contractor to proceed any further.

If—which, however, is unusual in building contracts—time has been effectually made of the essence of the contract, and completion to time expressly made a condition precedent to payment, the employer will be released by non-completion to time (*u*).

SUB-SECT. 3.—*When Time is of the Essence of the Contract.*

When time not of the essence of the contract.

375. The old rule of law that time is always of the essence of a contract is now superseded by the rules of equity in that behalf (*w*). In building contracts time is not of the essence of the contract in the absence of express words making it so, as the subject of the contract is not such as to make the completion to time essential (*x*). And the mere insertion of words making time of the essence of the contract will be ineffective if they are inconsistent with other terms of the contract (*a*).

Time cannot be of the essence of the contract where there is a provision for the payment of a penalty or liquidated damages for delay (*b*), nor where there is a bonus for expedition, and generally where the parties contemplate a possible postponement of completion (*c*).

When time of the essence of the contract.

376. Where the contract expressly makes time of the essence of the contract, or gives a power to determine the contract in case of non-completion within the stipulated time, then, in the absence of any inconsistent provisions, time will be of the essence of the contract (*d*),

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(*r*) *Ford* v. *Cotesworth* (1868), L. R. 4 Q. B. 127, *per* BLACKBURN, J., at p. 133.

(*s*) *Lucas* v. *Godwin* (1837), 3 Bing. (N. C.) 737; but see *Tidey* v. *Mollett* (1864), 16 C. B. (N. S.) 298.

(*t*) See p. 191, *post*.

(*u*) *Lucas* v. *Godwin*, *supra*, at p. 744.

(*w*) Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (7); and see title CONTRACT.

(*x*) *Lucas* v. *Godwin*, *supra*, at p. 744.

(*a*) *Lowther* v. *Heaver* (1889), 41 Ch. D. 248, *per* LINDLEY, L.J., at p. 268.

(*b*) *Lamprell* v. *Billericay Union* (1849), 3 Exch. 283, 308.

(*c*) See title CONTRACT.

(*d*) *Walker* v *London and North Western Rail. Co.* (1876), 1 C. P. D. 518.

and the contractor can recover nothing if he does not complete to time (*e*).

SECT. 2. Time for Completion.

377. In cases where time has not been made of the essence of the contract, or where, although time originally was of the essence of the contract, the time so fixed for completion has ceased to be applicable by reason of waiver or otherwise, the employer has still a right by notice to fix a reasonable time for the completion of the work, and, in case the contractor does not complete by that time, to dismiss the contractor (*f*), just as a vendor would be entitled to rescind the contract in case of a contract for sale of land (*g*).

Employer's right to demand completion within reasonable time.

The contractor has up to the last moment (12 o'clock at night) of the day fixed for completion to finish his contract (*h*).

SECT. 3.—*Contracts to reinstate Buildings which have been destroyed.*

378. Many insurance policies give the insurers an option to reinstate the insured buildings when destroyed or injured by fire. If the insurers once exercise this option, and elect to reinstate, they are bound by their election, and cannot afterwards claim to be only liable on their covenant to pay the insurance money (*i*). The exercise of this election puts the insurers in the position of a contractor who has undertaken to complete an entire work, namely, to restore the destroyed or injured buildings as far as possible to their condition before the fire (*k*).

Option to reinstate.

The Fires Prevention (Metropolis) Act, 1774 (*l*), gives the same option to insurance companies, and also enables the person interested to require them to reinstate. The operation of this statute is not confined to places within the limits of the former bills of mortality (*m*).

(*e*) *Munro* v. *Butt* (1858), 8 E. & B. 738.

(*f*) See *Taylor* v. *Brown* (1839), 9 L. J. (CH.) 14, *per* LORD LANGDALE, M.R., at p. 16: "Where the time is not of the essence of the contract, where the contract is to be performed within a time which is not defined, and there be any unnecessary delay by one party, the other has a right to limit the time."

(*g*) *Lowther* v. *Heaver* (1889), 41 Ch. D. 248, *per* LINDLEY, L.J., at p. 268; and see title SALE OF LAND.

(*h*) *Startup* v. *Macdonald* (1843), 6 Man. & G. 593; and see title TIME.

(*i*) *Brown* v. *Royal Insurance Co.* (1859), 1 E. & E. 853; *Scottish Amicable Association* v. *Northern Assurance Co.* (1883), 11 R. (Ct. of Sess.) 287. See also *Fuller* v. *Patrick* (1849), 13 Jur. (o. s.) 561, and title INSURANCE.

(*k*) *Brown* v. *Royal Insurance Co., supra; Times Fire Assurance Co.* v. *Hawke* (1859), 28 L. J. (EX.) 317.

(*l*) 14 Geo. 3, c. 78, s. 83.

(*m*) *Re Quicke*, [1908] 1 Ch. 887, *per* Swinfen Eady, J., at p. 893, apparently following *Re Barker, Ex parte Gorely* (1864), 34 L. J. (BCY.) 1, which case was, however, doubted in *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888), 13 App. Cas. 699, *per* Lord WATSON, at p. 716. See also *Simpson* v. *Scottish Union Fire and Life Insurance Co.* (1863), 32 L. J. (CH.) 329; *Andrews* v. *Patriotic Assurance Co.* (1886), 18 L. R. Ir. 355, 366, holding that it does not apply to Ireland. See title INSURANCE. The area within the bills of mortality was employed as a term to denote what became the metropolitan area after the passing of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120). Marylebone and St. Pancras were, however, excluded. Compare Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 6.

SECT. 3. Contracts to reinstate Buildings etc.

379. The insurers are liable for defective or less valuable work done under their obligation to restore (*n*), even if the restoring of the building to its condition before the fire is impossible (*o*), and the damages which the insured may recover for breach of the covenant to restore are not limited to the amount of the insurance money.

Extent of insurer's liability.

If the new building is burnt down during the process of construction the insurers must still complete their contract to restore, apparently even in cases where they have stipulated that, should reinstatement be prevented, they shall only be liable for so much as would, in the absence of the prevention, have been sufficient to make good the loss. Such a stipulation does not seem to cover prevention owing to an act of God (*p*).

The contract being to reinstate the building, no allowance "new for old" can be made (*q*), as the marine insurance rules do not apply. In assessing damages for the breach of a contract to reinstate, due regard should be had to the fact that the contract is one to rebuild or restore an old building and not to build a new one.

In the case of machinery or other chattels attached to a building which has been destroyed, the insurers cannot insist on reinstating the chattels on the original site if it has passed away from the insured. In the case of chattels the meaning of "reinstate" is to replace *in statu*, not *in situ* (*r*).

Part IV.—Excuses for Non-Completion.

SECT. 1.—*Arising before Performance.*

SUB-SECT. 1.—*Impossibility.*

Effect of impossibility etc.

380. It frequently happens that the performance of the specified works in the manner contemplated by the contract is impossible. The ordinary rules of law as to the effect of impossibility apply to building and engineering contracts (*s*).

Duty of contractor to ascertain that works are

It is the duty of a contractor, in the exercise of common prudence, before making his tender, to inform himself of all particulars concerning the work, and particularly as to the practicability of executing every part of the work contained in the plans, drawings, and specification according to the specified terms and conditions. Ignorance on his part in making his tender will not excuse him from performing his contract. If it be the usage of contractors to

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(*n*) *Alchorne* v. *Favill* (1825), 4 L. J. (O. S.) (CH.) 47.

(*o*) *Ibid.*; *Brown* v. *Royal Insurance Co.* (1859), 1 E. & E. 853.

(*p*) For the meaning and effect of an act of God generally, see title CONTRACT.

(*q*) See, however, *Vance* v. *Foster* (1841), 1 Ir. Circ. Cas. 47. The decision in this case does not seem to have been accepted in England.

(*r*) *Anderson* v. *Commercial Union Assurance Co.* (1885), 2 T. L. R. 191.

(*s*) See *Clifford* (*Lord*) v. *Watts* (1870), L. R. 5 C. P. 577, *per* BRETT, J., at p. 588; *Hills* v. *Sughrue* (1846), 15 M. & W. 253; and title CONTRACT.

rely on the specification without examining it for themselves, or employing a skilled person to do so on their behalf, such an usage cannot legally be supported (*t*). The fact that the contractor has agreed to erect a building or construct works as described in the plans and specification, implies that he understands such plans and specification, and he cannot escape liability by setting up that he exercised ordinary care and skill and yet failed to understand them (*a*).

Position of contractor.

381. Where a builder or contractor has made a contract to erect a building or construct works, and it turns out that it is impossible to do the work and he does not complete it or them, he will not be excused from the consequences of not fulfilling his contract, including a liability to pay damages (*b*). It must be observed that this liability to pay damages for non-performance of an impossibility only attaches where the contract is absolute and unrestricted by any condition expressed or implied (*c*).

Difficulty not amounting to impossibility.

The obligation on the contractor, however, appears to be unlimited not merely where there are only difficulties or increased expense in executing the work not brought about by the employer (*d*); and *à fortiori* the obligation is unlimited, if the difficulties were foreseen by the contractor. If the employer or his agent, *e.g.*, the architect or engineer, knows at the time of entering into the contract that performance is impossible he cannot anticipate performance by the contractor, and therefore it would seem that the minds of the parties are not *ad idem*, and consequently neither party can sue upon the contract (*e*).

In case, however, of serious impediments, not brought about by the employer and arising from causes which were not, and could not be, in the contemplation of either of the parties at the time of the making of the contract, and necessarily altering the character of the work, so as to make the special conditions of the contract inapplicable, it is a question whether the court would be justified in holding that grounds existed which relieved the contractor from his obligation (*f*).

(*t*) *Thorn* v. *London Corporation* (1876), 1 App. Cas. 120, *per* Lord CHELMSFORD, at p. 132.

(*a*) *Bottoms* v. *York Corporation* (1892), Hudson on Building Contracts, 3rd ed., Vol. II., p. 220.

(*b*) "Certainly, if he does in direct terms enter into a contract to perform an impossibility, subject to a penalty, he will not be excused because it is an impossibility; so if he does bind himself to perform an impossibility, if a certain named person shall require him to do so, there is nothing illegal in putting himself under such an obligation as that" (*Jones* v. *St. John's College, Oxford* (1870), L. R. 6 Q. B. 115, *per* HANNEN, J., at p. 127).

(*c*) *Brecknock and Abergavenny Canal Navigation Co.* v. *Pritchard* (1796), 6 Term Rep. 750.

(*d*) See as to damages, p. 241, *post*.

(*e*) See *Cunningham* v. *Dunn* (1878), 3 C. P. D. 443.

(*f*) *Jackson* v. *Eastbourne Local Board* (1886), Hudson on Building Contracts, 3rd ed., Vol. II., p. 67, *per* Lord WATSON, at p. 90; and see *Bush* v. *Whitehaven Town and Harbour Trustees* (1888), 52 J. P. 392. See also *Clifford (Lord)* v. *Watts* (1870), L. R. 5 C. P. 577, where a man contracted to dig 1,000 tons of clay each year on certain lands, and when it turned out that there never

SECT. 1. Arising before Performance.

Destruction of subject-matter.

382. Where the work the subject of an entire contract is destroyed before the completion of the contract, there is a difference in the position of the parties according to whether the destruction affects the contract work only or affects also some other work or thing without the continued existence of which the execution of the contract work is impossible.

In the first case, if the contract to construct is unrestricted by any conditions applicable to the case, the contractor has not performed his obligation, and must either do the work over again, or be liable in damages for breach of contract (*g*).

In the second case, as the parties must have known, when they entered into the contract, that the contract could not be carried out if the other thing ceased to exist, they must have contemplated the continued existence of that thing as being a necessary element of the contract, and therefore the contract is subject to an implied condition that, if the thing should cease to exist from a cause not owing to the fault of either party before the completion of the contract, then both parties should be excused from further performance of the contract (*h*). In such a case the contractor cannot bring an action to recover the contract price, or the value of the work and materials provided by him (*i*), nor can the employer bring an action against the contractor to recover damages for breach of contract (*k*), or to recover instalments already paid to the contractor (*l*).

In the case of contracts which are not entire, if the structure, on which the work is to be executed, is destroyed during the progress of the work, while further performance of the contract on the part of both the employer and the contractor is excused, the contractor is entitled to be paid for the work and labour expended before the destruction (*m*).

Defects in soil.

383. It is no excuse for non-performance of a contract to build a house or to construct works upon a particular site that the soil thereof has either a latent or patent defect, rendering the building or constructing impossible. It is the duty of the contractor before tendering to ascertain that it is practicable to execute the work on the site (*a*). The builder or contractor on discovering such defects in the soil as will render the construction of the contemplated works difficult or impossible is not entitled to throw up or abandon the

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was as much as 1,000 tons of clay on the land, was held not liable in an action for breach of contract.

(*g*) *Brecknock and Abergavenny Canal Navigation Co.* v. *Pritchard* (1796), 6 Term Rep. 750.

(*h*) *Taylor* v. *Caldwell* (1863), 3 B. & S 826, 833; *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651.

(*i*) *Appleby* v. *Myers*, *supra*.

(*k*) *Taylor* v. *Caldwell*, *supra*.

(*l*) *Anglo-Egyptian Co.* v. *Rennie* (1875), L. R. 10 C. P. 271, affirmed at p 571, without expressing any opinion on the present point. Compare *Elliott* v. *Crutchley*, [1906] A. C. 7; *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, [1903] 2 K. B. 756, C. A.

(*m*) *Gillett* v. *Mawman* (1808), 1 Taunt. 137, where, however, the general law was held to be controlled by the usage of the particular trade, that there was to be no payment until the whole was completed and delivered.

(*a*) See *Gibraltar Sanitary Commissioners* v. *Orfila* (1890), 15 App. Cas. 400. See p. 193, *ante*.

contract (*b*). And thus, if part of the work falls down in consequence of any such defect, the builder or contractor will have to reinstate it or lose his right to recover payment, and be liable in damages for not completing his contract (*c*).

Temporary impossibility etc.

384. Where the impossibility is only temporary in its nature, it has been suggested that it might possibly excuse the non-performance to time (*d*).

SUB-SECT. 2.—*Illegality.*

Effect of illegality.

385. A contract to perform an act illegal at the time the contract is entered into, or which subsequently becomes illegal, is either void *ab initio* or becomes void (*e*). Contracts also which are contrary to sound morals or to public policy will not be enforced by the Courts (*f*).

In case the builder has been paid instalments during the construction of a building under a contract which is void as being illegal, the building owner cannot as a general rule recover back such voluntary payments (*g*).

When building contracts illegal.

386. In the case of building contracts illegality chiefly arises through disregard of the statutes, whether public and general or local and personal, and the sub-statutory legislation by way of bye-laws and regulations, affecting the mode of construction in the particular locality, the deposit of plans, and giving of notices etc. (*h*).

(*b*) *Bottoms* v. *York Corporation* (1892), Hudson on Building Contracts, 3rd ed., Vol. II., p. 220.

(*c*) *Jackson* v. *Eastbourne Local Board* (1886), Hudson on Building Contracts, 3rd ed., Vol. II., p. 67; *Bottoms* v. *York Corporation*, *supra*; *McDonald* v. *Workington Corporation* (1893), Hudson on Building Contracts, 3rd ed., Vol. II., p. 240.

(*d*) *Lawrence* v. *Twentiman* (1611), 1 Roll. Abr., tit. Condition, G. 10.

(*e*) See title CONTRACT. "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute" (*Bartlett* v. *Vinor* (1692), Carth. 251, *per* HOLT, C.J., at p. 252.

(*f*) See title CONTRACT, and *Pearce* v. *Brooks* (1866), L R. 1 Exch. 213.

(*g*) See *Kearley* v. *Thomson* (1890), 24 Q. B. D. 742, C. A., *per* FRY, L.J., at pp. 745-6.

(*h*) The most important public and general Acts which impose restrictions etc. on buildings are:—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), for which see title FACTORIES AND WORKSHOPS; Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77); Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), for which see title MINES, MINERALS AND QUARRIES; Public Health Act, 1875 (38 & 39 Vict. c. 55); Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (46 & 47 Vict. c. 37); Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25); Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59); Public Health (Buildings and Streets) Act, 1888 (51 & 52 Vict. c. 52); Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72); Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34); and see titles LOCAL GOVERNMENT; PUBLIC HEALTH ETC. The Acts regulating buildings in London are:—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120); Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102); London Building Act, 1894 (57 & 58 Vict. c. ccxiii.); London Building Acts Amendment Act, 1905 (5 Edw. 7, c. cciz.); and see title METROPOLIS.

SECT. 1. Arising before Performance.

Thus, a contract to build on a disused burial ground (*i*), or to erect a wooden structure contravening the provisions of the Metropolis Management Act, 1855 (*j*), is void (*k*), so also is a contract by a surveyor of highways to perform work or supply materials (*l*) contrary to s. 46 of the Highway Act, 1835 (*m*).

Words in a statute requiring that a thing shall be constructed of particular substances imply a prohibition against constructing with other substances (*n*).

Obtaining local authority's consent.

387. Where the consent of some authority has to be obtained in order to render the building lawful, it would seem to depend on the particular terms of the contract whether there is an implied covenant by the building owner to obtain the consent, or whether the contract is a conditional one depending on that consent being obtained (*o*). In most cases it would seem that the contract is conditional on the obtaining of the consent, and consequently that, if it is not obtained, the contract is avoided and both parties are discharged from performing it. If, however, the building owner expressly or impliedly agrees to obtain the consent, the failure to do so would be a breach of contract on his part entitling the builder to damages.

When illegality amounts to impossibility.

388. In some cases the distinction between physical impossibility, which does not excuse the builder from his contract, and illegality, which does, is very narrow (*p*). If the builder's obligation is to perform some definite work, he must do that work in such a way as to comply with the law, although he may be put to greater expense in doing the work in that way. If, on the other hand, the illegality goes to the root of the contract, and the law forbids the construction of the work at all, the contract is abrogated and both parties are discharged from performance.

SUB-SECT. 3.—*Prevention by the Employer.*

When repudiation amounts to breach.

389. As in the case of other classes of contracts, a building contract can, as a general rule, only be rescinded by mutual consent (*q*), but if either party repudiates or abandons the contract,

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(*i*) *Gibbons* v. *Chambers* (1885), 1 T. L. R. 530; *Re St. Saviour's Rectory (Trustees) and Oyler* (1886), 31 Ch. D. 412; *Re Ponsford and Newport District School Board*, [1894] 1 Ch. 454; and see *Re Ecclesiastical Commissioners and New City of London Brewery Co.*, [1895] 1 Ch. 702. See also title BURIAL AND CREMATION, p. 532, *post*.

(*j*) 18 & 19 Vict. c. 120. See title METROPOLIS.

(*k*) *Stevens* v. *Gourley* (1859), 7 C. B. (N. S.) 99.

(*l*) *Barton* v. *Piggott* (1874), L. R. 10 Q. B. 86.

(*m*) 5 & 6 Will. 4, c. 50. See title HIGHWAYS, STREETS AND BRIDGES.

(*n*) *Stevens* v. *Gourley*, *supra*.

(*o*) *Smith* v. *Harwich Corporation* (1857), 2 C. B. (N. S.) 651; *Re Northumberland Avenue Hotel Co., Fox and Braithwaite's Claim* (1887), 56 L. T. 833; *Bywaters & Sons* v. *Curnick & Co.* (1906), Hudson on Building Contracts, 3rd ed., Vol. I., p. 793. See also *Rashleigh* v. *South Eastern Rail. Co.* (1851), 10 C. B. 612; as to this last case see the observation of WILLES, J., in *M'Intyre* v. *Belcher* (1863), 32 L. J. (C. P.) 254, at p. 255.

(*p*) See this point discussed in *Brown* v. *Royal Insurance Society* (1859), 28 L. J. (Q. B.) 275.

(*q*) See title CONTRACT.

the other party can at once elect to treat such repudiation or abandonment as a rescission of the contract and sue for the breach (*r*).

The act or acts relied on as repudiation must be absolute (*s*), must go to the root of the contract, and must show that the party has an intention to repudiate the whole contract, and not merely an intention to refuse to carry out some stipulation of it. The longer the parties have been carrying out the contract the less likely is it that a refusal or neglect to observe some stipulation will be treated by the court as an intention to repudiate the whole (*t*). If the employer gives notice to the contractor not to do any more work, this will amount to repudiation of the whole contract (*a*). But the notice must be final and not merely amount to a postponement of the work (*b*).

Remedy of contractor.

Specific performance of a building or engineering contract will not be decreed. The remedy of the builder or contractor, if the employer refuses to allow him to proceed or excludes him from the site, will be to recover payment for the work he has done and damages for the loss which he has sustained by not being allowed to complete the work, or to treat the contract as rescinded and sue for the reasonable price of the work done.

Impossibility created by employer.

390. If the employer by his own act renders himself incapable of carrying out the contract he has made, *e.g.*, by selling the land on which the works are to be constructed, the contractor at once ceases to be bound by the contract, and can bring his action without any previous request to the employer to perform his part of the contract (*c*). It is a question of fact for the jury to decide, when a contract has not been performed, which party was in fault in occasioning the contract not to be carried into effect (*d*).

Prevention.

391. Prevention before the commencement of the work may be of various degrees. The contractor may be absolutely prevented from commencing the work, or the prevention may only delay him and prevent him completing by the time fixed by the contract. On the nature and degree of the prevention depends whether the contractor is entitled to treat the contract as having been repudiated by the employer (*e*), or is bound to continue the work and leave open the question how far the default of the employer may have released the contractor from any of his obligations (*f*), or may

(*r*) *Lines* v. *Rees* (1837), 1 Jur. 593. But he is not bound so to treat it; see *Michael* v. *Hart*, [1902] 1 K. B. 482, *per* COLLINS, M.R., at p. 490.

(*s*) *Lines* v. *Rees*, *supra*.

(*t*) See title CONTRACT, and *Cornwall* v. *Henson*, [1900] 2 Ch. 298, 303.

(*a*) *Cort* v. *Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.* (1851), 17 Q. B. 127.

(*b*) See *Bartholomew* v. *Markwick* (1864), 15 C. B. (N. S.) 711; *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; *Société Générale de Paris* v. *Milders* (1883), 49 L. T. 55.

(*c*) See title CONTRACT.

(*d*) *Pontifex* v. *Wilkinson* (1845), 2 C. B. 349.

(*e*) *Holme* v. *Guppy* (1838), 3 M. & W. 387.

(*f*) *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310; *Arterial Drainage Co.* v. *Rathangan River Drainage Board* (1881), 6 L. R. Ir. 513.

SECT. 1. Arising before Performance.

have given him a right of action (*g*) for any injury accruing to him through the prevention. In some circumstances, such as delaying the work so as to turn a summer contract into a more expensive winter contract, the prevention may be such as to abrogate the terms of the contract as to payment, and entitle the contractor to recover on a *quantum meruit* (*h*).

Failure to perform condition precedent.

Where the prevention by the employer is a default to do something which is a condition precedent to the contractor's obligation to do the work (*i*), the contractor may treat the prevention as a repudiation of the contract, but in other cases where the prevention is only partial, the contractor must complete the work and seek his remedy in damages (*k*). Whether the performance of the obligation of either party is a condition precedent to the obligation of the other party is a question of the construction of the contract.

Failure to provide site.

392. In the absence of express conditions as to providing the site for the works, there is an implied contract that the employer shall be in a position to hand over the site to the contractor immediately upon the making of the contract (*l*).

Thus if the employer does not provide the site on which the works are to be constructed at the time fixed by the contract, or at once if no time is so fixed (*m*), the contractor is entitled to throw up the work and bring his action for damages (*n*); or he may, as soon as he obtains possession of the site, commence and continue the work, in which case he waives the right of treating the obligation to provide the site as a condition precedent, but retains any right of action he may have for damages for breach of contract (*o*).

Failure to appoint architect etc.

393. Where the contract is that the work is to be done under the superintendence of the employer's architect or engineer, and no architect or engineer is named in the contract, there is an implied contract by the employer that he will appoint a suitable architect or engineer, and this is a condition precedent to the contractor's obligation to do the work (*p*), but this is not so where there is merely a liberty to superintend (*q*).

Failure to provide plans.

Similarly, there is an express or implied obligation, as the case may be, on the part of the employer to furnish the contractor with the necessary plans and drawings within a reasonable time (*r*).

(*g*) *Lawson* v. *Wallasey Local Board* (1883), 11 Q. B. D. 229; *Freeman & Son* v. *Hensler* (1900), 64 J. P. 260.

(*h*) *Bush* v. *Whitehaven Town and Harbour Trustees* (1888), 52 J. P. 392.

(*i*) *Holme* v. *Guppy* (1838), 3 M. & W. 387.

(*k*) *Boone* v. *Eyre* (1777), 1 Hy. Bl. 273, n.; *Macintosh* v. *Midland Counties Rail. Co.* (1845), 14 M. & W. 548.

(*l*) *Freeman & Son* v. *Hensler*, *supra*.

(*m*) *Ibid.*

(*n*) *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310, 320.

(*o*) *Ibid.*

(*p*) *Coombe* v. *Greene* (1843), 11 M. & W. 480; *Hunt* v. *Bishop* (1853), 8 Exch. 675; *Hunt* v. *Remnant* (1854), 9 Exch. 635.

(*q*) *Jones* v. *Cannock* (1852), 3 H. L. Cas. 700.

(*r*) *Kingdon* v. *Cox* (1848), 17 L. J. (C. P.) 155; *Arterial Drainage Co.* v. *Rathangan River Drainage Board* (1881), 6 L. R. Ir. 513.

It would seem, however, that the contractor ought to apply for the plans if they are not furnished to him (*s*).

SECT. 1. Arising before Performance.

SUB-SECT. 4.—*Waiver.*

394. The original contract for the construction of works may be waived by the parties either expressly or impliedly entering into a new agreement, either in substitution for or in addition to the original contract (*t*). Rules as to waiver.

Building and engineering contracts present no differences from other contracts in respect of how far agreements in writing and under seal can be waived or altered by parol agreements, or by such as are in writing but not under seal (*a*).

Where such a new agreement exists, it is a question for the court to determine to what extent the new agreement waives, alters, or incorporates the original contract (*b*).

There must, however, be evidence of such a new agreement having been come to, and no mere request of the employer, or consent to extend the time, will be evidence of an intention to waive the whole of the original agreement (*c*).

Waiver, as distinguished from a substituted agreement, could hardly occur before the commencement of the work under a building or engineering contract, except possibly by the builder or contractor doing nothing for a long time, and the building owner or employer acquiescing therein. When waiver occurs.

SECT. 2.—*Arising during Performance.*

SUB-SECT. 1.—*Impossibility.*

395. Where after the work has been commenced it is discovered that the work is impossible, the same considerations arise, so far as relate to the validity of the contract, as where the impossibility is discovered before commencement (*d*). Effect of impossibility etc. arising during performance.

The impossibility after commencement may, however, arise in another manner; thus if the contractor has undertaken unconditionally to perform within the contract time any extra work which may be ordered and extras are ordered which are in fact impossible of completion within the contract time, the contractor will be obliged to do the work within the time or pay damages for his default (*e*). Impossibility of compliance with architect's instructions.

Where the subject-matter is destroyed during construction, in the case of an entire contract the contractor cannot recover (*f*), except where the destruction is caused by the default of the employer or his servants (*g*). Subject-matter destroyed.

(*s*) *Stevens* v. *Taylor* (1860), 2 F. & F. 419, 422, n.
(*t*) *Courtnay* v. *Waterford and Central Ireland Rail. Co.* (1878), 4 L. R. Ir. 11.
(*a*) See title CONTRACTS.
(*b*) *Holme* v. *Guppy* (1838), 3 M. & W. 387.
(*c*) *Macintosh* v. *Midland Counties Rail. Co.* (1845), 14 M. & W. 548.
(*d*) See p. 192, *ante*.
(*e*) *Jones* v. *St. John's College, Oxford* (1870), L. R. 6 Q. B. 115.
(*f*) See p. 194, *ante*.
(*g*) *Richardson* v. *Dumfriesshire Road Trustees* (1890), 17 R. (Ct. of Sess.) 805.

SECT. 2. Arising during Performance.

Strikes.

396. Where a time is fixed for completion of the work, and there is no condition as to relief on account of the occurrence of strikes, the contractor will be liable for delay so caused, just as in a similar case demurrage would be payable by consignees to the owner of a ship (*h*).

Where no time is fixed for completion, and there is no exception for strikes, the occurrence of a strike would be a circumstance to be taken into consideration, and might convert what otherwise would be an unreasonable time into a reasonable time (*i*).

If the contract provides for the occurrence of strikes, and a strike lasts so long that the contract, in a commercial sense, is put an end to, or its object is frustrated, as distinguished from mere delay, the strike puts an end to the contract (*k*).

The cause of the strike is immaterial; it is as much a strike when it is caused by the workmen resisting demands of their employers, as if it was caused by the employers resisting demands of the workmen (*l*).

Bad weather.

The occurrence of bad weather or storms is also no excuse for non-performance of the contract, as the variableness of the climate is a circumstance which must have been in the contemplation of the parties when the contract was made (*m*).

SUB-SECT. 2.—*Illegality.*

Effect of working under illegal contract.

397. In the case of a building contract void by reason of the subject-matter being illegal or against sound morals or public policy, if the builder continues with the work after he knows of the illegality or unlawful purpose, he will not be able to recover any payment for the work and materials supplied by him; but if on learning that the building is being constructed for an unlawful purpose he at once ceases work, as it is his duty to do, he can recover a *quantum meruit* for the work etc. done by him before he knew of the illegal purpose (*n*), as in the case of other contracts for illegal objects.

SUB-SECT. 3.—*Prevention by the Employer.*

Repudiation.

398. If during the progress of the works the building owner or employer wrongfully rescinds or repudiates the contract, there is at once a breach, and the builder or contractor is entitled to sue for damages (*o*).

Prevention.

399. As in the case of prevention before the commencement of the work, prevention during the performance of the contract may either be absolute—that is, such as to prevent the builder or

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(*h*) *Budgett & Co.* v. *Binnington & Co.*, [1891] 1 Q. B. 35. See title SHIPPING AND NAVIGATION.
(*i*) *Hick* v. *Raymond and Reid*, [1893] A. C. 22.
(*k*) *King* v. *Parker* (1876), 34 L. T. 887.
(*l*) *Ibid.*
(*m*) *Maryon* v. *Carter* (1830), 4 C. & P. 295.
(*n*) See title CONTRACT.
(*o*) As to the measure of damages, see p. 242, *post*.

SECT. 2. Arising during Performance.

contractor from completing the work after he has commenced it—or partial, so as only to delay him and prevent him from completing by the time fixed by the contract; and the same principles apply in deciding whether the builder or contractor is entitled to treat the contract as abrogated, or whether he must go on and complete the work and seek his remedy by way of damages (*p*).

Forfeiture.

Where the contract contains provisions which entitle the employer to forfeit the contract in case of certain defaults on the part of the contractor (*q*), and the employer exercises this power wrongfully, that is, without the contractor having been in default, such an act of forfeiture amounts to total prevention (*r*), and entitles the builder to elect to put an end to the contract (*s*).

Exclusion from site.

If during the progress of the work the employer excludes the builder from the site, this will amount to total prevention (*t*).

Failure to supply materials.

In cases where the employer has undertaken to supply certain materials to the contractor, the question whether the non-supply of the materials amounts to total prevention or only to such prevention as will give the contractor a right to damages depends upon whether the undertaking to supply them is a condition precedent or not. Non-supply of rails for the construction of a railway has been treated as the breach of a covenant independent of that to complete the railway (*a*).

Fraudulent agreement with architect.

400. If the employer, either in collusion with the architect or engineer or otherwise, fraudulently prevents the contractor from completing the works, *e.g.*, by inducing the architect or engineer not to certify for works which are in conformity with the contract, the remedy of the contractor is apparently to bring an action for breach of contract by wrongfully preventing the architect from certifying rather than to bring an action of deceit (*b*). There may, however, be cases in which the conduct of the building owner and the architect would amount to a conspiracy (*c*), but even in such a case an action founded on prevention would appear to be preferable to one founded on the conspiracy (*d*).

Refusal to pay instalments.

401. A refusal by the employer to pay instalments which are not due is of course not an abandonment or repudiation of the contract on the part of the employer (*e*). But if the employer

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(*p*) See p. 197, *ante*.
(*q*) See p. 249, *post*.
(*r*) See *Davies* v. *Swansea Corporation* (1853), 8 Exch. 808.
(*s*) *Smith* v. *Howden Union Rural Sanitary Authority* (1890), Hudson on Building Contracts, 3rd ed., Vol. II., p. 151; *Felton* v. *Wharrie* (1906), Hudson on Building Contracts, 3rd ed., Vol. II., p. 455.
(*t*) See *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310, *per* CLEASBY and PIGOTT, BB., at p. 320.
(*a*) *Macintosh* v. *Midland Counties Rail. Co.* (1845), 14 M. & W. 548.
(*b*) See *Smith* v. *Howden Union Rural Sanitary Authority*, *supra*.
(*c*) See *Stevenson* v. *Watson* (1879), 4 C. P. D. 148, *per* DENMAN, J., at p. 153.
(*d*) See *Smith* v. *Howden Union Rural Sanitary Authority*, *supra*.
(*e*) *Rees* v. *Lines* (1837), 8 C. & P. 126.

SECT. 2. Arising during Performance.

refuses to pay instalments which are due to the contractor, it becomes a question of the intention of the employer, and according to whether that intention is to repudiate the whole contract, or is merely to postpone payment of money which he owes (*f*), the remedy of the contractor will be to treat the contract as broken, or to bring an action against the employer to recover the unpaid instalment (*g*).

SUB-SECT. 4.—*Prevention by Architect etc.*

Effect of failure of sub-contractors.

402. Where sub-contractors or specialists are by the terms of the contract employed by the contractor, the employer is not liable to the contractor for any delay caused by them, even although these sub-contractors or specialists are selected by the employer or by the architect (*h*). If, however, the specialists are not sub-contractors of the builder but are employed by the building owner direct, then he will be responsible to the contractor for delay caused by them (*i*).

Employer's duty to sub-contractors.

So also, where independent contractors are employed to do separate works, the employer will be liable to each of them for the due performance of preliminary works which he has undertaken to perform or to have performed. For instance, in the case of a contract to put the roof on a contemplated house, delay in putting up the walls or neglect to put them up might cause partial or total prevention of the contract to roof in.

Default of architect.

If the architect or engineer, in the exercise of his *quasi*-judicial functions (*k*), causes delay or even total prevention of the construction of the works, the contractor has no remedy against the employer (*l*); but if the delay or prevention is caused by him in his capacity as agent of the employer, the employer will be liable for his defaults (*m*). If, however, the architect in the exercise of his *quasi*-judicial duties (*n*) acts fraudulently, the employer will, it would seem, be liable if he acts upon any fraudulent decision or certificate, even if ignorant of the fraud (*o*).

SUB-SECT. 5.—*Waiver.*

Substitution of new contract.

403. Where a new contract is substituted after the commencement of the work, the effect is the same as in cases where that occurs before the commencement (*p*).

(*f*) See *Withers* v. *Reynolds* (1831), 2 B. & Ad. 882; *Freeth* v. *Burr* (1874), L. R. 9 C. P. 208, *per* COLERIDGE, C.J., at p. 214.

(*g*) *Terry* v. *Duntze* (1795), 2 Hy. Bl. 389.

(*h*) *Leslie & Co., Ltd.* v. *Metropolitan Asylums District Managers* (1901), 68 J. P. 86; *Mitchell* v. *Guildford Guardians* (1903), 68 J. P. 84.

(*i*) *Leslie & Co., Ltd.* v. *Metropolitan Asylums District Managers*, *supra*.

(*k*) See p. 292, *post*.

(*l*) As to any remedy of the employer against the contractor in these circumstances, see pp. 244, 245, 248, *post*.

(*m*) *Re De Morgan, Snell & Co. and Rio de Janeiro Flour Mills and Granaries, Ltd.* (1892), 8 T. L. R. 292.

(*n*) As to the meaning of *quasi*-judicial duties see p. 292, *post*.

(*o*) *Smith* v. *Howden Union Rural Sanitary Authority* (1890), Hudson on Building Contracts, 3rd ed., Vol. II., p. 151, and cases there cited.

(*p*) *Hunt* v. *South Eastern Rail. Co.* (1875), 45 L. J. (C. P.) 87. See p. 199, *ante*.

SECT. 2. Arising during Performance.

Where the course of dealing between the parties is inconsistent with strict enforcement of the terms of the contract, the effect of such dealings may be to raise the implication that there is a new contract to pay for the work as actually done, or else that the special conditions have been waived by the party who would have benefited by them (*q*).

What amounts to new contract.

Where the work is proceeded with after a breach, it is a question for the jury to determine whether or not there is a new contract to perform the work in consideration of a *quantum meruit* (*r*). If the breach is non-completion to time, allowing the contractor to continue working does not amount to a waiver of the employer's right to damages for delay (*s*), but where the right to insist on completion to time has been waived, neither party is entitled to abandon the contract without giving notice and affording the other party a reasonable time to complete the building or works (*t*).

Cases of waiver.

Cases of alteration of the terms of a written contract most frequently arise from the ordering of extras, and from the employer delaying the completion of the building or works (*u*).

Breaches of contract more often affect particular stipulations in the contract than they afford an excuse for non-completion of the works or rescission of the whole contract. The stipulations which are usually affected are those as to completion to time (*v*), liquidated damages (*a*), claims for defects (*b*), the right of forfeiting the contract or property of the builder or contractor (*c*), and the contract price (*d*).

SECT. 3.—*Acceptance.*

No implied acceptance from possession or user.

404. Since the employer or building owner is in possession of the land on which the works the subject of the contract are to be erected, while the builder has merely a revocable licence to enter and build (*e*), those works, as they come into being, attach themselves to the freehold. No acceptance of the work can be implied from the mere fact of the employer or building owner continuing in possession of his own land and of the work which has become part of the freehold (*f*). Even the use and occupation of that which has been constructed on the land will not imply acceptance of the work (*g*), or a waiver of any defects, nor will it preclude the building

(*q*) *Munro* v. *Butt* (1858), 8 E. & B. 738; *Whitaker* v. *Dunn* (1887), 3 T. L. R. 602.

(*r*) *Burn* v. *Miller* (1813), 4 Taunt. 745; *De Bernardy* v. *Harding and Poole* (1853), 8 Exch. 822.

(*s*) *Sutherland* v. *Montrose Shipbuilding Co.* (1860), 22 Dunl. (Ct. of Sess.) 665.

(*t*) See *Burn* v. *Miller*, *supra*.

(*u*) See pp. 228 *et seq.*, *post*.

(*v*) See p. 189, *ante*.

(*a*) See p. 243, *post*.

(*b*) See p. 237, *post*.

(*c*) See p. 249, *post*.

(*d*) See p. 224, *post*.

(*e*) *Camden* (*Marquis*) v. *Batterbury* (1860), 7 C. B. (N. S.) 804.

(*f*) *Munro* v. *Butt*, *supra*, at p. 752.

(*g*) *Whitaker* v. *Dunn*, *supra*; *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673; *Forman & Co. Proprietary* v. *The Ship "Liddesdale,"* [1900] A. C. 190, at p. 204.

SECT. 3. Acceptance.

owner from contending that the work has not been performed in accordance with the contract. Where the work has not been completely performed, and the owner enters and completes it (*h*), the question whether he has accepted the work and entered into a new contract to pay for the part which has been constructed or whether he is under no obligation to pay at all (*i*) depends on the surrounding circumstances.

When acceptance implied.

405. Where the question is merely one of completion to time, acceptance or waiver of the condition will be implied from slight acts, but this acceptance or waiver will not operate to exclude a claim for damages for delay on the part of the employer (*k*).

Where the question is one of the conformity of the work to the contract, the question depends on whether the employer has done anything coupled with the use and occupation of the work which has prevented the performance of the special contract (such as preventing the architect from giving a certificate where the obtaining of a certificate is a condition precedent to payment), or whether, where the failure in complete performance is very slight, he has used any language or done any act from which acceptance might reasonably be inferred (*l*).

Effect of acceptance.

406. Except where it can be shown that the employer has not only accepted the work with a knowledge of the defects, but has actually waived the condition as to performance in accordance with the contract, the acceptance will not prevent the employer from showing that the work was incompletely performed, or was not in accordance with the contract.

Knowledge of the defects at the time the work was done is not sufficient to imply acquiescence in them so as to preclude the employer from exercising any rights he may have in respect of the incomplete performance of the contract (*m*).

Effect of approval on defects.

Where the work, however, has to be done to the approval of the employer, if he has expressly or impliedly notified his approval, he cannot go back on it and recover for patent defects (*n*), and it is submitted that in such a case payment by the employer might be held to imply approval, so as to prevent him from bringing an action against the contractor for damages on account of defective work.

Where the work has to be done to the approval of a third person, as an architect or engineer, and the expression of that person's opinion is conclusive, then, in the absence of fraud or collusion (*o*), such approval prevents the employer from having any

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(*h*) *Lysaght* v. *Pearson* (1879), *Times* (March 3, 1879).
(*i*) *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673.
(*k*) *Sutherland* v. *Montrose Shipbuilding Co.* (1860), 22 Dunl. (Ct. of Sess.) 665.
(*l*) *Munro* v. *Butt* (1858), 8 E. & B. 738, *per* Lord CAMPBELL, C.J., at p. 753.
(*m*) *Whitaker* v. *Dunn* (1887), 3 T. L. R. 602.
(*n*) *Bateman* (*Lord*) v. *Thompson* (1875), Hudson on Building Contracts, 3rd ed., Vol. II., p. 23.
(*o*) *South Eastern Rail. Co.* v. *Warton* (1861), 6 H. & N. 520.

right of action on account of defects, whether latent or patent (*p*). If the expression of the third person's opinion is not a condition precedent (*q*) or is not final, *e.g.*, where it is subject to arbitration (*r*), the expression of that person's approval does not prevent the employer setting up a claim on account of defects.

Part V.—Supervision and Approval.

SECT. 1.—*Approval by the Employer.*

SUB-SECT. 1.—*In General.*

How far approval a condition precedent.

407. Where a building contract provides that the work shall be done to the approval of the building owner, and there is no express condition making his approval a condition precedent to payment, the maxim that "no man shall be judge in his own cause" (*s*) raises a presumption against any implied contract that such approval is a condition precedent. In the absence of any express condition to the contrary, such approval must not be unreasonably withheld (*t*).

Where the approval is made a condition precedent to payment, if it is limited to some particular attribute of the work, such as its strength or workmanship, it must be exercised in respect of that particular attribute only, and not of some other, such as its efficiency (*a*).

Contracts to do building work differ in this respect from contracts for the sale of goods, or for the construction of chattels not affixed to the freehold, as in the latter case if the goods or the chattels are not approved they can be returned to the seller or manufacturer, while buildings and works become affixed to the freehold, and the building owner or employer has the benefit of them in any event, without any acceptance or approval being inferred (*b*). Thus, the one-sidedness of approval being made a condition precedent to payment is much greater in the case of a building or engineering contract than in other cases.

(*p*) *Goodyear* v. *Weymouth and Melcombe Regis Corporation* (1865), 35 L. J. (C. P.) 12; *Laidlaw* v. *Hastings Pier Co.* (1874), Jenkins and Raymond, Architect's Legal Handbook, 4th ed., p. 238; *Muldoon* v. *Pringle* (1882), 9 R. (Ct. of Sess.) 915; *Bateman* (*Lord*) v. *Thompson* (1875), Hudson on Building Contracts, 3rd ed., Vol. II., p. 23.

(*q*) *Re Hohenzollern Actien Gesellschaft für Locomotivbau and City of London Contract Corporation* (1886), 2 T. L. R. 470.

(*r*) *Robbins* v. *Goddard*, [1905] 1 K. B. 294.

(*s*) Broom's Legal Maxims, 7th ed., p. 92.

(*t*) *Parsons* v. *Sexton* (1847), 4 C. B. 899; *Braunstein* v. *Accidental Death Insurance Co.* (1861), 1 B. & S. 782.

(*a*) *Ripley* v. *Lordan* (1860), 2 L. T. 154.

(*b*) *Munro* v. *Butt* (1858), 8 E. & B. 738; *Reeves* v. *Barlow* (1884), 12 Q. B. D. 436; *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673; *Hart* v. *Porthgain Harbour Co., Ltd.*, [1903] 1 Ch. 690; *Forman & Co. Proprietary* v. *The Ship "Liddesdale,"* [1900] A. C. 190; compare also *Ramsden* v. *Dyson* (1865), L. R. 1 H. L. 129.

SECT. 1. **Approval by the Employer.**

The mere insertion of words making any term in a contract a condition precedent is not in itself conclusive, for it may be so capricious and unreasonable that a court of law will not enforce it, or it may be *suâ naturâ* incapable of being made a condition precedent (*c*), or, again, there may be other conditions in the contract which are inconsistent with the stipulation being a condition precedent, or which control its operation (*d*).

Express words in contract not conclusive.

Approval not to be unreasonably withheld.

408. In the absence of an express stipulation in the contract permitting even unreasonable disapproval, the courts will imply a condition that the employer shall not unreasonably refuse to approve work, but what is unreasonable must in each particular case depend upon the circumstances, as, for instance, what might be unreasonable in a building owner or employer might be reasonable in a contractor, in his dealings with a sub-contractor (*e*), where the contractor is himself bound by stringent stipulations.

When approval may be unreasonably withheld.

An express contract to abide by the decision of the building owner, reasonable or unreasonable, as a condition precedent to payment, would, it seems, be valid (*f*). The courts, however, are not inclined to interpret conditions in a contract, which practically make one party a judge in his own cause, as conditions precedent unless the terms of the contract are unambiguous (*g*); but where the terms of the bargain are clear and unambiguous, and it is quite clear that, however unreasonable and oppressive a stipulation or condition may be, the one party intended to insist upon, and the other to submit to, it, a court of justice cannot do otherwise than give full effect to the terms which have been agreed upon between the parties (*h*).

Honesty essential.

But, even where the approval of the employer is not required to be reasonable, the failure to approve must be an honest expression of the actual opinion of the employer. He cannot escape the obligation of paying for work of which he has the benefit (*i*) by capriciously, fraudulently, or dishonestly denying that he approves of it when in point of fact it meets with his approval.

SUB-SECT. 2.—*Matters of Taste.*

Disapproval must be *bonâ fide*.

409. Where the approval of the employer is in respect of matters of taste or convenience, the powers of the employer to refuse to approve are more extended, for it is difficult to ascertain the employer's standard of taste or convenience. The only limitation is that he must disapprove *bonâ fide*, and not capriciously or dishonestly or for the purpose of obtaining some benefit for himself.

(*c*) *London Guarantee Co.* v. *Fearnley* (1880), 5 App. Cas. 911, 919.
(*d*) *Re Hohenzollern Actien Gesellschaft für Locomotivbau and City of London Contract Corporation* (1886), 2 T. L. R. 470.
(*e*) *Stadhard* v. *Lee* (1863), 3 B. & S. 364.
(*f*) *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72, 117.
(*g*) *Dallman* v. *King* (1837), 4 Bing. (N. C.) 105, 110.
(*h*) *Stadhard* v. *Lee*, *supra*, *per* COCKBURN, C.J., at p. 372.
(*i*) *Andrews* v. *Belfield* (1857), 2 C. B. (N. S.) 779.

SECT. 2.—*Approval by Architect or Engineer.*

SECT. 2. Approval by Architect or Engineer.

Approval of architect a condition precedent.

410. Where the contract provides that work is to be done to the approval or satisfaction of the architect or engineer, such approval or satisfaction, if final, is a condition precedent to payment for such work (*k*). Where the architect is intended by the exercise of his skill to act as a *quasi*-arbitrator between the parties and to give his approval or disapproval accordingly, his exercise of opinion cannot be impugned on the ground of unreasonableness, but only on that of fraud or collusion or of intervention or prevention by the building owner (*l*). It would seem also that if the architect without reason neglects to deal with the question, the employer is not entitled to take advantage of that misconduct (*m*). And, further, this power of approval or disapproval does not extend so far as to make the architect or engineer a judge in his own cause as to breaches of contract caused by his own defaults (*n*).

Expression of approval.

The approval of the architect or engineer must be expressed in the manner required by the particular contract (*o*). When the approval is not required to be given in writing it is a question of fact for the jury whether the approval has been given or not (*b*).

Dual function of architect.

411. The architect or engineer may often act in two capacities in respect of the same matter as regards approval. He may first be acting as the agent of the building owner, and in that capacity disapprove of work or materials, and then as arbitrator or *quasi*-arbitrator have to decide whether the work or materials ought to be approved, and when acting in this *quasi*-judicial capacity he must apply his mind to act fairly and impartially between the parties (*c*).

Extent of contractor's duty to obey architect.

412. The contractor must obey all reasonable directions or instructions given to him by the architect or engineer, and if he has expressly contracted to carry out the works in accordance with such directions and instructions, he must obey them even if they are unreasonable, as there is no warranty or implied contract on the part of the employer that the architect or engineer will only give such directions as are reasonable (*d*).

(*k*) *Milner* v. *Field* (1850), 5 Exch. 829; *Scott* v. *Liverpool Corporation* (1858), 3 De G. & J. 334.

(*l*) *Page* v. *Llandaff and Dinas Powis Rural District Council* (1901), Hudson on Building Contracts, 3rd ed., Vol. II., p. 347. As to the distinction between the position of an architect as an arbitrator and as a *quasi*-arbitrator, see pp. 283, 293, *post*.

(*m*) *Kellett* v. *New Mills Urban District Council* (1900), Hudson on Building Contracts, 3rd ed., Vol. II., p. 329.

(*n*) *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310.

(*o*) *Morgan* v. *Birnie* (1833), 9 Bing. 672. See, as to architect's certificates, p. 208, *post*.

(*b*) See *Kane* v. *Stone Co.* (1884), 39 Ohio State Reports, 1; U. S. Digest (1884), 140.

(*c*) *Page* v. *Llandaff and Dinas Powis Rural District Council*, *supra*.

(*d*) *Jones* v. *St. John's College, Oxford* (1870), L. R. 6 Q. B. 115.

SECT. 2.

Approval by Architect or Engineer.

Materials etc. disapproved.

The obligations of the contractor, with regard to the removal and replacement of materials or work of which the architect does not approve, vary according to the terms of the particular contract. Sometimes the decision of the architect is made final, or it may be made subject to appeal to himself in his character of *quasi*-arbitrator, or even as arbitrator, or subject to appeal to an independent arbitrator (*e*).

Extras.

The instructions of the architect as to additional work or extras may be binding on the contractor or not according to whether they are works contemplated by the contract, and also whether they are ordered in the prescribed manner (*f*).

SECT. 3.—*Approval by Employer and Architect.*

Effect of approval.

413. In some contracts it is made a condition that the work shall be approved by the employer, and also by the architect or engineer. The only difference in such a condition from a condition requiring the approval of the architect or engineer alone would seem to be that if the architect approved, the employer would still have a power of disapproving, but only reasonably. If the architect and the employer have once exercised the power of approval and such approval has been acted on, and defects are subsequently discovered, the employer cannot in ordinary circumstances retract his expression of approval and bring an action against the contractor for bad work or materials (*g*).

Part VI.—Certificates.

SECT. 1.—*In General.*

SUB-SECT. 1.—*Different Classes of Certificates.*

Definition of certificate.

414. As building owners and employers have not usually the technical knowledge necessary to ascertain whether the builder or contractor is observing the stipulations of the contract as to the work and materials to be employed, an architect or engineer, or some other fit person (*h*), is employed to supervise the work, and it is necessary for this architect or engineer to express in some formal way his approval of the work done and materials actually employed. This approval is expressed in certificates; and such certificates may or may not be conditions precedent to payment becoming due to the builder or contractor (*i*).

(*e*) See p. 215, *post*.

(*f*) *Richards* v. *May* (1883), 10 Q. B. D. 400; and see pp. 229 *et seq.*, *post*.

(*g*) *Bateman* (*Lord*) v. *Thompson* (1875), Hudson on Building Contracts, 3rd ed., Vol. II., p. 23, at pp. 30, 31.

(*h*) See *Jones* v. *St. John's College, Oxford* (1870), L. R. 6 Q. B. 115, in which case a clerk of the works was intrusted with this duty.

(*i*) See p. 210, *post*.

SECT. 1. In General.

There are two principal classes of certificates: progress certificates (*k*), by which the architect or engineer certifies that the builder or contractor is entitled under the terms of the contract to an interim payment of so much on account of the contract price, and final certificates (*l*), which are of three kinds: (1) for payment of so much to the builder or contractor on the final balance between the parties; (2) of approval of the work and materials, stating that the work has been completed, and all the obligations of the contractor fulfilled to the satisfaction of the architect or engineer; and (3) both for payment and of approval and completion.

Classes of certificates.

In contracts which provide that the contractor shall maintain the works for a fixed period after completion, and that retention money (*m*) shall be kept in hand for that period, a certificate is often required by the terms of the contract before payment of the retention money.

415. The certifying architect or engineer may make use of the assistance of others in obtaining the information necessary to enable him to certify, but the certificate must be his own, and not that of any other person even where part of his duties may be deputed (*n*).

Duty of architect in respect of certifying.

416. Although as between the parties the certificate, to be binding, must be the result of the exercise of the skill and judgment of the certifier, this does not make the certificate an award nor the certifier an arbitrator; he has been described as a preventer of disputes (*o*), but in fact he appears to be a *quasi*-arbitrator, whose duty is to act impartially (so far as his natural bias in favour of his employer will permit), and to apply his practical knowledge to the facts patent to him and decide accordingly (*p*). He should hear what each party desires to say, and if he gives opportunities to one he should give the same opportunities to the other (*q*). A stipulation that the certifier shall "adjudge" the sum to be paid does not operate so as to make the certificate an award (*r*).

Certificate not an award

A certificate not being an award, an agreement to be bound by a certificate is not a submission to arbitration, and therefore need not be in writing, and the employer may insist on the necessity of a certificate although he has not formally executed the contract (*s*).

(*k*) For forms of progress certificates, see Encyclopædia of Forms, Vol. II., pp. 650, 651.

(*l*) For forms of final certificates, see *ibid.*, pp. 652, 653.

(*m*) That is, the difference between the amount of the interim payments and the whole price. See p. 226, *post*.

(*n*) *A.-G.* v. *Briggs* (1855), 1 Jur. (N. S.) 1084; *Clemence* v. *Clarke* (1879), Hudson on Building Contracts, 3rd ed., Vol. II., p. 41.

(*o*) *Laidlaw* v. *Hastings Pier Co.* (1874), Jenkins and Raymond, Architect's Legal Handbook, 4th ed., p. 238.

(*p*) *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597, 609.

(*q*) *Page* v. *Llandaff and Dinas Powis Rural District Council* (1901), Hudson on Building Contracts, 3rd ed., Vol. II., p. 347, 350.

(*r*) *Northampton Gas Light Co.* v. *Parnell* (1855), 15 C. B. 630.

(*s*) *Ibid.*

SECT. 1. In General.

Certificate not binding between employer and architect.

417. The certificate which by the contract is made final in all matters between the employer and the contractor is only binding as between those parties, and not as between the employer and the architect (*t*).

SUB-SECT. 2.—*Certificates as Conditions precedent to Payment.*

When certificates conditions precedent to payment.

418. All classes of certificates may be made conditions precedent to payment. If in a particular case a certificate is effectually made a condition precedent, there is nothing payable until the certificate has been given, even though the contract work may be actually completed (*u*). Certificates may be made conditions precedent to payment by express words or by implication (*w*). Such a condition, however, will not necessarily be imported by implication into a new contract substituted for one (containing such a stipulation) which has been abandoned (*x*). Whether it is to be so imported is a question for the jury.

The implication that a certificate is a condition precedent to the right to payment can only arise in cases where the architect or engineer has to exercise his judgment and skill in making the certificate, or has to discharge other duties of a *quasi*-judicial character, such as valuing work or materials or approving of them (*a*).

It is for the builder or contractor to obtain a certificate on which his right to payment depends (*b*).

Extent of condition.

419. Where a certificate is made a condition precedent, the extent of the condition depends upon the terms of the particular contract. Thus, payment may be conditional merely on the grant of a certificate, or on the grant of a certificate and its presentation (*c*), or, again, on the grant of a certificate and the lapse of some fixed time.

Valuations.

420. Where building and engineering contracts provide that the architect or engineer shall value work and materials supplied by the contractor, the valuations so made are very similar to certificates

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(*t*) *Rogers* v. *James* (1891), Hudson on Building Contracts, 3rd ed., Vol. II., p. 185.

(*u*) *Lewis* v. *Hoare* (1881), 44 L. T. 66.

(*w*) *Glenn* v. *Leith* (1853), 1 C. L. R. 569; *Westwood* v. *Secretary of State for India in Council* (1863), 7 L. T. 736; *Dunaberg & Witepsk Rail. Co.* v. *Hopkins, Gilkes & Co., Ltd.* (1877), 36 L. T. 733; *Wallace* v. *Brandon and Byshottles Urban District Council* (1903), Hudson on Building Contracts, 3rd ed., Vol. II., p. 392; *Geary, Walker & Co.* v. *Lawrence & Son* (1906), Hudson on Building Contracts, 3rd ed., Vol. II., p. 406. See also *Grafton* v. *Eastern Counties Rail. Co.* (1853), 8 Exch. 699.

(*x*) See *Hunt* v. *South Eastern Rail. Co.* (1875), 45 L. J. (C. P.) 87.

(*a*) *Glenn* v. *Leith, supra*; *Westwood* v. *Secretary of State for India in Council, supra*, where a mere statement that the value of all additions, deductions, alterations, and deviations should be ascertained and added to, or deducted from, the amount of the contract price, as the case might require, was held to be a condition precedent.

(*b*) *Glenn* v. *Leith, supra, per* JERVIS, C.J., at p. 574.

(*c*) *Morgan* v. *Birnie* (1833), 9 Bing. 672; *Scott* v. *Liverpool Corporation* (1858), 3 De G. & J. 334.

so far as regards their being conditions precedent or not, and also as to being conclusive between the parties (*d*).

Certificate prevented by employer.

421. Where a final certificate for payment depends upon a valuation to be made by the certifier, whether it be of the contract work, or extras, if the employer prevents the valuation being made, as for instance by excluding him from the works, the court has power, apparently in addition to any other remedy, to make a mandatory order directing the employer to allow the certifier to enter on the site to value (*e*).

When certificate not condition precedent.

422. Even where the duties to be performed by the person designated to give a certificate are purely ministerial, so that the certificate is not the result of the exercise of his skill and judgment, the certificate may still be a condition precedent to payment, as, for instance, where the certificate is merely evidence of the receipt and delivery of goods (*f*).

Where it appears from the terms of the contract that the certificate is not intended to be conclusive as to the rights of the parties, the certificate will not be a condition precedent. This is the case, for instance, where it is expressly provided that the final certificate shall be conclusive, but without prejudice to the builder's liability for fraud, default, or wilful deviation (*g*), or where either the employer or the contractor has power to question the certificate, and to have its propriety inquired into by some judicial process, such as arbitration, whether before the architect or engineer or some independent tribunal (*h*).

If the conditions in the contract as to satisfying the architect and as to payment are independent covenants, the obtaining of the certificate is not a condition precedent to payment (*i*), although by the terms of the contract the performance of the work in accordance with the specification and plans may have been made such a condition.

Matters to which condition precedent applies.

423. Where a certificate is made a condition precedent to payment it operates as such only where the certificate is limited to the matters to which it is intended by the terms of the contract to apply, for the architect or engineer cannot extend his powers so as to certify as to matters not intrusted to his jurisdiction (*k*).

(*d*) See *Collier* v. *Mason* (1858), 25 Beav. 200; and p. 215, *post*.

(*e*) *Smith* v. *Peters* (1875), L. R. 20 Eq. 511.

(*f*) *Morgan* v. *Larivière* (1875), L. R. 7 H. L. 423, 436.

(*g*) *London School Board* v. *Wall* (1890), Hudson on Building Contracts, 3rd ed., Vol. II., p. 165; *London School Board* v. *Johnson* (1891), Hudson on Building Contracts, 3rd ed., Vol. II., p. 189.

(*h*) *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72; *Re Hohenzollern Actien Gesellschaft für Locomotivbau and City of London Contract Corporation* (1886), 2 T. L. R. 470; *Robins* v. *Goddard*, [1905] 1 K. B. 294.

(*i*) *London Gaslight Co.* v. *Chelsea Vestry* (1860), 2 L. T. 217.

(*k*) *Russell* v. *Sa da Bandeira* (*Viscount*) (1862), 13 C. B. (N. S.) 149; *Jones* v. *St. John's College, Oxford* (1870), L. R. 6 Q. B. 115; *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310; *Lawson* v. *Wallasey Local Board* (1883), 48 L. T. 507. See also *Great Northern Rail. Co.* v. *Harrison* (1852), 10 Exch. 376, where an engineering contract provided for the delivery and acceptance of a

SECT. 1. In General.

Effect on third persons of making certificate a condition precedent.

424. As regards persons who are not parties to the contract, they are not bound by a stipulation making a certificate a condition precedent to payment, as events which between the parties to the contract are only to be deemed to have occurred upon the performance of a condition precedent are, as regards strangers to the contract, to be deemed to have occurred if in fact they have occurred. Thus, where between the parties payment is dependent on a certificate of completion, as regards third persons "completion" is a question of fact for the jury, and the certificate is not a condition precedent (*l*). This only applies, however, to persons who are really strangers to the contract, and not to assignees of either party, whose rights and obligations are identical with those of their assignors.

SECT. 2.—*Progress Certificates.*

Nature of progress certificates.

425. In most building and engineering contracts provision is made for the making of interim payments to the builder or contractor during the progress of the works on the production of a certificate (*m*) to the effect that so much is due to the contractor on account. In the case of contracts not otherwise entire such a provision is not necessary for the protection of the builder, as payment would accrue due from time to time even in its absence; on the other hand, the insertion of such a provision would be desirable in the interest and for the protection of the building owner. These progress certificates are merely of the nature of approximate estimates by the certifier of the value of the work done, and are not conclusive in favour of either party either as an expression of satisfaction with the quality of the work, or as a determination of its quantity or price. Progress certificates are subject to readjustment at the final settlement between the parties (*n*).

According to the circumstances of the case, the giving of progress

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certain number of sleepers, to be delivered as, and when, and in such quantities, and in such manner as the engineer should direct, and it was held that the engineer had only authority to fix the times of delivery, and had no power to determine whether the whole should or should not be supplied.

(*l*) *Lewis* v. *Hoare* (1881), 44 L. T. 66.

(*m*) For forms of such certificates, see Encyclopædia of Forms, Vol. II., pp. 650, 651.

(*n*) "When the payments were from time to time made on the certificates of the architects, the obvious meaning of both parties was, that the sums advanced should be accounted for by the plaintiff (the builder) on the final settlement between him and the defendants (the employers). They were to be treated as sums paid on account of whatever the plaintiff might eventually be entitled to recover from the defendants" (*Lamprell* v. *Billericay Union* (1849), 3 Exch. 283, *per* ROLFE, B., at p. 305). "When the company want to know whether or not they are in a condition to make an advance, they ask the engineer, 'what value have you got in the shape of materials and work, and can we make the advance?' . . . It is not an exact sum made up by calculation of items, and by applying the prices to the quantities of articles supplied under those items—it is really simply nothing but this—it is an account sent in to shew that the company are quite safe in making such payment as they may think proper by way of advance, because there is now upon their ground property of such a value" (*Tharsis Sulphur and Copper Co.* v. *M'Elroy & Sons* (1878), 3 App. Cas. 1040, *per* Lord HATHERLEY, L.C., at pp. 1048, 1049).

certificates may or may not waive a right to liquidated damages for delay (*o*).

SECT. 2. Progress Certificates.

426. Such certificates are conditions precedent to the right to payment, when the contract provides that no interim payments shall be made to the contractor except on the production of a progress certificate, and does not provide for any appeal by the contractor against the withholding or insufficiency of such certificates. When conditions precedent.

In the absence of some such provision as that "no payment shall be held as legally due until the contract is completed, but advances shall nevertheless be made to the amount thereof, under the engineer's certificate" (*a*), a progress certificate creates a debt due (*b*).

427. As regards the quality of the work or materials, a progress certificate is not sufficient to constitute an acceptance of such work or materials. It is only a kind of qualified approval (*c*), which does not prevent the employer from subsequently disputing the quality, nor the architect from subsequently refusing to certify his satisfaction, and a subsequent refusal to certify cannot, on that ground alone, be impugned as being a fraud on the contractor (*d*). How far binding on employer or architect.

428. According to the terms of the contract, materials supplied, whether affixed to the freehold or not, may be taken into consideration by the architect or engineer in arriving at the amount for which he will give a progress certificate (*e*), or work and labour alone may have to be considered (*f*); the parties, however, may, independently of the contract, agree that the value of materials brought on to the site should form part of the sum to be certified (*g*). How amount of certificate to be ascertained.

When the interim payments are to be calculated at so much per cent. of the value of the work done, it is suggested that the "value of the work done" means not the cost to the contractor, but the value of the work done measured by the proportion it bears to the whole of the completed work.

SECT. 3.—*Final Certificates.*

SUB-SECT. 1.—*Nature and Form of a Final Certificate.*

429. Final certificates may be either for payment, or of satisfaction (*h*), or for payment and of satisfaction (*i*). Classes of final certificate.

(*o*) See p. 247, *post*.
(*a*) *Tharsis Sulphur and Copper Co.* v. *M'Elroy & Sons* (1878), 3 App. Cas. 1040.
(*b*) *Pickering* v. *Ilfracombe Rail. Co.* (1868), L. R. 3 C. P. 235.
(*c*) *Tripp* v. *Armitage* (1839), 4 M. & W. 687.
(*d*) *Cooper* v. *Uttoxeter Burial Board* (1865), 11 L. T. 565; *Richardson* v. *Mahon* (1879), 4 L. R. Ir. 486.
(*e*) *Pickering* v. *Ilfracombe Rail. Co.*, *supra*.
(*f*) *Tripp* v. *Armitage*, *supra*.
(*g*) *Pickering* v. *Ilfracombe Rail. Co.*, *supra*, *per* BOVILL, C.J., at p. 247.
(*h*) For a form of such certificate, see Encyclopædia of Forms, Vol. II., p. 652.
(*i*) For a form of such certificate, see *ibid.*, p. 653.

SECT. 8. **Final Certificates.**

Where a certificate of satisfaction and for payment of the sum due is required, a certificate for payment will apparently imply satisfaction (*k*).

Where the contract provides that the obligations of the contractor shall not cease on the completion of the works, but that a specified sum shall be retained by the employer for a fixed period to cover defects, repairs, or maintenance, it is usually provided that there shall be a certificate of satisfactory completion, usually entitling the contractor to some payment, and then after the expiration of the fixed period that there shall be another certificate for payment of the final balance, after deducting any expense incurred by the employer during the period of maintenance. In a case in which there were two clauses in a contract, one of which provided that the builder should not be paid the balance until two months after the architect had expressed his satisfaction, and the other that the builder should not be paid until after the architect had given his final certificate, and the architect expressed his satisfaction a considerable time before giving his final certificate, such expression of satisfaction was held not to have been that contemplated by the contract, but that to be effective the expression of satisfaction must be made in a final certificate (*l*).

Effect of final certificate being condition precedent.

The effect of making a certificate of satisfactory completion a condition precedent to payment is nearly always to defer the time for payment and to extend the period of maintenance, because the architect cannot certify until actual completion, and this in practice is often delayed.

Form of certificate.

430. The form of the final certificate depends on the terms of the contract; for instance, if the architect is merely required to certify, and no written certificate is expressly required, an oral statement of his satisfaction is sufficient (*m*). Apparently, on the analogy of an award, the mere use of the word "certificate," and a direction that the certificate shall be "delivered," does not imply that the certificate must be in writing (*n*).

A mere checking of the amount of work done (*o*), or of the builder's account (*p*), does not amount to a certificate.

If there is a stipulation that the certificate shall be in writing, or in some particular form, such a stipulation would not be performed by a certificate given in any other manner, in the same way as provisions as to the method of ordering extras must be exactly obeyed (*q*).

Where no provision as to ascertainment of balance due.

431. Where the contract does not provide for the final settlement of the amount of the balance to be paid to the builder or

(*k*) *Harman* v. *Scott* (1874), 2 Johnst. N. Z. R. 407.
(*l*) *Coleman* v. *Gittins* (1884), 1 T. L. R. 8.
(*m*) *Coker* v. *Young* (1860), 2 F. & F. 98, *per* HILL, J., at p. 101; *Roberts* v. *Watkins* (1863), 14 C. B. (N. S.) 592; *Elmes* v. *Burgh Market Co.* (1891), Hudson on Building Contracts, 3rd ed., Vol. II., p. 183.
(*n*) *Oates* v. *Bromil* (1705), 1 Salk. 75.
(*o*) *Moryan* v. *Birnie* (1833), 9 Bing. 672.
(*p*) *Goodman* v. *Layborn* (1881), Roscoe, Digest of Building Cases, 4th ed., Appendix, p. 162.

contractor on completion, that amount is left at large, and in case of dispute must be settled by the jury, or by arbitration where the contract contains an arbitration clause. In such a case the architect or engineer has no power to certify the amount of the final balance due to the builder or contractor (*r*).

SUB-SECT. 2.—*Conclusiveness of a Final Certificate.*

432. The final certificate of an architect or engineer will be conclusive and binding on both parties if the following conditions are complied with :— Conditions of conclusiveness.

(1) The subject-matter of the certificate, so far as the same is to be binding, must be within the powers of the certifier (*s*), and the terms of the contract must effectively make his determination binding on both parties (*a*). *Intra vires* and binding by contract.

(2) The contract must not contain provisions enabling an arbitrator to open up, review, or revise the certificate (*b*). Not subject to revision.

(3) It must be the honest expression of the certifier's opinion (*c*). Not fraudulent.

(4) There must have been no improper interference with the certifier on the part of the employer as to the giving of the certificate (*d*). Independent.

(5) It must be given during the existence of the power of the architect or engineer to give a certificate (*e*). Given in time.

(6) If the contract makes the power to certify conditional on some previously existing state of facts, the existence of such a state of facts must be ascertained before the certificate can be acted on (*f*). After condition fulfilled.

(7) The certificate must be given by the person designated by the contract, and if a particular time is fixed by the contract, at that time (*g*). By proper person at proper time.

(8) The certificate must purport to be final (*h*). Purport to be final.

(9) Where the contract provides for arbitration in case disputes Given before dispute.

(*r*) *Pashby* v. *Birmingham Corporation* (1856), 18 C. B. 2.

(*s*) *Lawson* v. *Wallasey Local Board* (1883), 11 Q. B. D. 229; *Brunsdon* v. *Staines Local Board* (1884), 1 Cab. & El. 272.

(*a*) *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310.

(*b*) *Robins* v. *Goddard*, [1905] 1 K. B. 294; *Re Hohenzollern Actien Gesellschaft für Locomotivbau and City of London Contract Corporation* (1886), 2 T. L. R. 470.

(*c*) *South Eastern Rail. Co.* v. *Warton* (1861), 6 H. & N. 520; *Goodyear* v. *Weymouth and Melcombe Regis Corporation* (1865), 35 L. J. (C. P.) 12, *per* ERLE, C.J., at p. 17; *Clemence* v. *Clarke* (1880), Hudson on Building Contracts, 3rd ed., Vol. II., p. 41, *per* LINDLEY, J., at p. 52.

(*d*) *Paye* v. *Llandaff and Dinas Powis Rural District Council* (1901), Hudson on Building Contracts, 3rd ed., Vol. II., p. 347.

(*e*) *Waring* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1849), 7 Hare, 482; *Smith* v. *Gordon* (1880), 30 Upper Canada C. P. 553.

(*f*) See *Northampton Gas Light Co.* v. *Parnell* (1855), 15 C. B. 630, 648, where the engineer, having power to certify what sum was to be paid as liquidated damages for delay, certified a certain sum under this power, and it was held that the employers were still bound to aver and to prove before a jury that there had been a default by the contractor.

(*g*) See p. 221, *post*.

(*h*) See p. 214, *ante*.

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should arise between the parties, and that a certificate of the architect *or* an award of the referee is to be conclusive, the certificate must have been given before any dispute has arisen (*i*).

How far certificate conclusive.

433. A final certificate may be only partially conclusive; for instance, it may be conclusive as to liability but not as to amount (*k*), or *vice*

On the other hand, the certificate will be conclusive and binding on both parties, although it be made carelessly unskilfully or inaccurately, because persons employing, or agreeing to abide by the determination of, an architect or engineer who is incompetent must be bound by his mistakes (*m*).

Work of prescribed quality and also to satisfaction of architect.

Where the contract provides that work and materials shall be of some prescribed quality, and also that they shall be to the satisfaction of the architect, then, unless the covenants are independent, the description of the quality is mere surplusage and the certificate of the architect is conclusive as to the quality (*n*).

Withdrawal.

If a valid final certificate is once given, the architect or engineer cannot, unless so provided in the contract, withdraw it for the purpose of correcting incorrect statements of fact or of value contained in it, though if the certificate is invalid he can make another (*o*).

Again, if the certificate is based on erroneous reports by an agent of the employer, and not on any fraud of the contractor, it is conclusive against the employer (*p*).

Ultra vires certificates.

434. The certificates of architects and engineers are only conclusive as to the matters intrusted to them in that behalf, and if the certificate is *ultra vires* as to matter it is so far not conclusive (*q*). If the certificate is partially within the certifier's powers and partially without them, it may be conclusive so far as it is *intra vires*, and not as to the remainder. Thus, it may be conclusive as to quantity and not as to liability, or *vice versâ* (*a*).

(*i*) *Lloyd Brothers* v. *Milward* (1895), Hudson on Building Contracts, 3rd ed., Vol. II., p. 288.

(*k*) *Pashby* v. *Birmingham Corporation* (1856), 18 C. B. 2.

(*l*) *Northampton Gas Light Co.* v. *Parnell* (1855), 15 C. B. 630.

(*m*) *Goodyear* v. *Weymouth and Melcombe Regis Corporation* (1865), 35 L. J. (C. P.) 12, *per* WILLES, J., at p. 17; *Harvey* v. *Lawrence* (1867), 15 L. T. 571; *Connor and Olney* v. *Belfast Water Commissioners* (1871), 5 I. R. C. L. 55; *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 605; *Laidlaw* v. *Hastings Pier Co.* (1874), Jenkins and Raymond, Architects' Legal Handbook, 4th ed., Appendix, p. 238; *Bateman* (*Lord*) v. *Thompson* (1875), Hudson on Building Contracts, 3rd ed., Vol. II., p. 23; *Dunaberg and Witepsk Rail. Co.* v. *Hopkins, Gilkes & Co., Ltd.* (1877), 36 L. T. 733; *Clemence* v. *Clarke* (1880), Hudson on Building Contracts, 3rd ed., Vol. II., p. 41; *Lapthorne* v. *St. Aubyn* (1885), 1 Cab. & El. 486.

(*n*) *Chapman* v. *Edinburgh Prison Board* (1844), 6 Dunl. (Ct. of Sess.) 1288; *Harvey* v. *Lawrence*, *supra*.

(*o*) See *Cook* v. *Ipswich Local Board* (1871), L. R. 6 Q. B. 451; *Cumberland* v. *Bowes* (1854), 15 C. B. 348; and *Freeman* v. *Jeffries* (1869), L. R. 4 Exch. 189.

(*p*) *Ayr Road Trustees* v. *Adams* (1883), 11 R. (Ct. of Sess.) 326.

(*q*) *Brunsdon* v. *Staines Local Board* (1884), 1 Cab. & El. 272; *Lawson* v. *Wallasey Local Board* (1883), 11 Q. B. D. 229.

(*a*) *Northampton Gas Light Co.* v. *Parnell*, *supra*.

If the power to certify only arises on the happening of a certain event (*e.g.*, in the event of the builder making default), the ascertainment of the event must precede the exercise of the power. Where no method of ascertaining the happening of the event is prescribed in the contract, the question in case of dispute must be left to the jury or to arbitration (*b*). If the architect has power to ascertain whether the event has happened, he must have actually determined that question before his power to certify arises.

Certificate result of architect's independent judgment.

435. The architect or engineer must give his certificate by the exercise of his own judgment, and without being improperly interfered with by the employer, for if the latter improperly interferes (even in the absence of fraud), the final certificate will not be conclusive and binding on the contractor (*c*).

Effect of fraud or collusion.

436. The architect cannot give a valid certificate if he acts fraudulently or in collusion with the employer (*d*).

An allegation of fraud on the part of the architect can only be sustained when he has acted dishonestly. A mere allegation that he has certified for less money than he ought to have done, or that he has rejected work which he ought to have approved, or that the measurements made by him are inaccurate (*e*), will not amount to an allegation of fraud, because the parties have agreed to accept the judgment of the architect as the standard of what is fair and reasonable.

The effect of fraud by the certifier alone without collusion with the employer is, it would seem, to render the certificate voidable; to treat it as void might in some circumstances leave the contractor in even a worse position than he was before (*f*).

Where, however, the employer makes use of the fraudulent certificate, and re-enters or forfeits the contract, that amounts to prevention, and the contractor has his remedy against the employer (*g*).

As to what amounts to collusion, any active interference by the employer with the architect or engineer to induce him to certify for less than he honestly believes to be due to the contractor would certainly be included. There is no case which decides the effect

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(*b*) *Northampton Gas Light Co.* v. *Parnell* (1855), 15 C. B. 630.

(*c*) *Page* v. *Llandaff and Dinas Powis Rural District Council* (1901), Hudson on Building Contracts, 3rd ed., Vol. II., p. 347.

(*d*) *Goodyear* v. *Weymouth and Melcombe Regis Corporation* (1865), 35 L. J. (C. P.) 12, *per* ERLE, C.J., at p. 17; *Clemence* v. *Clarke* (1879), Hudson on Building Contracts, 3rd ed., Vol. II., p. 41, *per* LINDLEY, J., at p. 52; *M'Intosh* v. *Great Western Rail. Co.* (1855), 3 Sm. & G. 146; *Waring* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1849), 7 Hare, 482; *Butterbury* v. *Vyse* (1863), 2 H. & C. 42; *Bliss* v. *Smith* (1865), 34 Beav. 508, *per* ROMILLY, M.R., at p. 510: "Courts of equity interfere . . . where there is collusive dealing and concert between the employer and the person whom he has appointed architect, for the purpose of injuring the contractor or defeating his claim."

(*e*) *Re Meadows and Kenworthy* (1897), Hudson on Building Contracts, 3rd ed., Vol. II., p. 292.

(*f*) See p. 183, *ante*, and *Smith* v. *Howden Union Rural Sanitary Authority* (1890), Hudson on Building Contracts, 3rd ed., Vol. II., p. 151.

(*g*) See pp. 196, 200, *ante*; p. 242, *post*.

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of an employer lying by and retaining a large sum from the contractor where he knows that the architect has fraudulently certified for less than is due, but it has been said that if the conduct of the architect is fraudulent his determination is void (*h*). If the architect refuses to exercise any judgment as to giving a certificate the contractor should call on the employer to appoint another (*i*).

Claims where no certificate.

437. Though a claim by a contractor, in the absence of a certificate which is a condition precedent to payment, would in the absence of fraud or collusion be certain to fail, yet the contractor cannot be restrained by injunction from bringing such an action (*k*).

SUB-SECT. 3.—*Disqualification of the Certifier.*

Architect in giving certificate not arbitrator.

438. Although the architect or engineer in giving a certificate may be acting as a *quasi*-arbitrator, he is not an arbitrator, and is not subject to the same rules, for he is chosen, not because of his ability to sift evidence, but on account of his skill and knowledge of the matters in question. He is the agent in other respects of one of the parties, and has also certain known interests, and is therefore to a certain extent biassed. His duty is to apply his knowledge and skill honestly and as impartially as he can to the giving of the certificate.

What will disqualify.

If, however, he has entered into some contract or arrangement with his employer unknown to the contractor which may have the effect of inducing him unfairly to cut down the cost of the works (*l*), as by promising that the costs shall not exceed a certain sum (*m*), this secret agreement will have the effect of disqualifying him. A mere estimate of the cost of the work, however, would not have the effect of disqualifying the architect as certifier, unless the assurance was of such a peculiar nature as to support the inference that the architect had so committed himself by the expression of opinion as to render himself incapable of adjudicating on the question (*n*). Even a strongly expressed opinion of the certifier will not disqualify him from subsequently giving a decision on the same matter as arbitrator (*o*).

If the stipulation that the architect shall have these powers of certifying has been obtained by fraud or misrepresentation, the stipulation cannot be enforced (*p*).

(*h*) *Goodyear* v. *Weymouth and Melcombe Regis Corporation* (1865), 35 L. J. (C. P.) 12, 17. See also *Smith* v. *Howden Union* (1890), Hudson on Building Contracts, 3rd ed., Vol. II., p. 151; *Kellett* v. *New Mills Urban District Council* (1900), Hudson on Building Contracts, 3rd ed., Vol. II., pp. 329, 331.

(*i*) *Clarke* v. *Watson* (1865), 18 C. B. (N. S.) at p. 285.

(*k*) *De Worms* (*Baron*) v. *Mellier* (1873), L. R. 16 Eq. 554.

(*l*) *Kemp* v. *Rose* (1858), 1 Giff. 258.

(*m*) *Kimberley* v. *Dick* (1871), L. R. 13 Eq. 1.

(*n*) *Trowsdale & Son* v. *Jopp and North British Rail. Co.* (1865), 4 Macph. (Ct. of Sess.) 31, *per* Lord ARDMILLAN, at p. 36.

(*o*) *Cross* v. *Leeds Corporation* (1902), Hudson on Building Contracts, 3rd ed., Vol. II., p. 369.

(*p*) *Trickett* v. *Green* (1865), 35 L. J. (C. P.) 69; *Kimberley* v. *Dick*, *supra*; *London Tramways Co.* v. *Bailey* (1877), 3 Q. B. D. 217; *Wakefield and Barnsley Banking Co.* v. *Normanton Local Board* (1881), 44 L. T. 697.

What will not disqualify.

439. The fact that the certifier is the known agent of one of the parties affords no ground for disqualification (*q*), nor does the fact that he is known to be a shareholder in the company when the employer is a company (*r*). The honest performance of his duties in the course of his employment as such agent, *e.g.*, in superintending the works, affords no ground for disqualification (*a*). Nor will errors in judgment or want of skill disqualify him, for he is not infallible, and the parties having chosen him must abide by their choice (*b*).

Duty to be impartial.

440. It is his duty to hear what both parties have to urge (*c*), and not to give facilities to one party which he does not give to the other (*d*), and generally to act impartially (*e*).

Matters of which parties have notice.

441. The known interests of architects and engineers, which builders and contractors will be presumed to have had in their minds at the time of the contract, are that:—

(1) The certifier is an agent, and in some cases a salaried servant, of the employer, and consequently owes a duty to him for reward.

(2) It is usual for the certifier to have made an estimate for the employer of the cost of the work, and in many cases of the time necessary for completion, which gives him a certain interest in those estimates not being exceeded.

(3) He usually prepares the contract which fixes his duties, and appoints himself to exercise the various functions appertaining to his different capacities as agent, certifier, and perhaps arbitrator.

(4) He is under an obligation to his employer and has an inducement out of regard to his own reputation not to allow unnecessary

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(*q*) *Jackson* v. *Barry Rail. Co.*, [1893] 1 Ch. 238; *Eckersley* v. *Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667; *Ives and Barker* v. *Willans*, [1894] 2 Ch. 478; *Pickthall* v. *Merthyr Tydvil Local Board* (1886), 2 T. L. R. 805.

(*r*) *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72. In one case the Court went so far as to hold that an engineer was not disqualified as certifier by the fact that the company had demised their railway to him at a rent to correspond with a fixed rate of interest upon the expense of the construction of the line (*Hill* v. *South Staffordshire Rail. Co.* (1865), 12 L. T. 63); but in this case the court does not seem to have drawn the distinction between the known and the unknown interests of architects and engineers in building and engineering contracts. See title ARBITRATION, Vol. I., p. 480.

(*a*) *Cross* v. *Leeds Corporation* (1902), Hudson on Building Contracts, 3rd ed., Vol. II., p. 369.

(*b*) *Goodyear* v. *Weymouth and Melcombe Regis Corporation* (1865), 35 L. J. (C. P.) 12, *per* WILLES, J., at p. 17: "It is said by the defendants that the architect was not at liberty to set aside the provision of the contract as to a written order being necessary. There is a simple answer to this; if he has done his duty, he has not done so, if he has, he has decided erroneously, but that is a matter for his own conscience, and the corporation have to blame themselves for appointing him."

(*c*) *Armstrong* v. *South London Tramways Co.* (1890), 7 T. L. R. 123.

(*d*) *Page* v. *Llandaff and Dinas Powis Rural District Council* (1901), Hudson on Building Contracts, 3rd ed., Vol. II., p. 347.

(*e*) *Chambers* v. *Goldthorpe*, [1901] 1 K. B. 624; *Pawley* v. *Turnbull* (1861), 3 Giff. 70; *Batterbury* v. *Fyse* (1863), 2 H. & C. 42; *Ludbrook* v. *Barrett* (1877), 46 L. J. (C. P.) 798, 800.

SECT. 8. Final Certificates.

extras, or excessive charges for extras, and to endeavour to keep down the amount and cost of extras.

(5) He is necessarily in frequent communication, in the exercise of his duties as agent of the employer, both with him and the contractor; though when he enters on his capacity as *quasi*-arbitrator he must be careful not to communicate anything to the one party which he does not communicate to the other, in relation to the subject-matter of his certificate (*f*).

SUB-SECT. 4.—*Dispensing with a Certificate.*

When certificate may be dispensed with.

442. Where the production of a certificate has been made a condition precedent to payment, this condition cannot be dispensed with, except where there is either fraud or collusion (*g*), or the employer interferes to prevent a certificate being given (*h*), or otherwise prevents completion (*i*), or where the certifier is disqualified (*k*), or where the condition has been waived.

When certificate wrongfully withheld.

443. Where the certificate has been fraudulently and collusively withheld, the action of the employer is a breach of contract, and the contractor has a right of action for damages for this breach of the contract (*l*).

If the employer interferes with the certifier, as for instance by telling him that he will not accept his certificate unless certain conditions, not stipulated for in the contract, are fulfilled, that again amounts to a breach of the contract (*m*).

It has been held that if the certifier never addresses himself to determine and certify, and wrongfully and unreasonably refuses or delays to certify, and the employer takes advantage of this refusal to refuse or delay payment, the contractor can recover without a certificate even if fraud is not alleged (*n*).

When performance prevented.

444. Where the employer prevents performance of the contract, this at once disables him from insisting on the condition as to the certificate, and that condition will be treated as dispensed with (*o*). No person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself (*p*).

Where the performance is prevented by the acts or defaults of the

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(*f*) *Page* v. *Llandaff and Dinas Powis Rural District Council* (1901), Hudson on Building Contracts, 3rd ed., Vol. II., p. 347.

(*g*) See p. 217, *ante*.

(*h*) See p. 217, *ante*.

(*i*) See p. 217, *ante*.

(*k*) See p. 218, *ante*.

(*l*) *Waring* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1850), 2 H. & Tw. 239; *Macintosh* v. *Great Western Rail. Co.* (1850), 19 L. J. (CH.) 374; *Milner* v. *Field* (1850), 20 L. J. (EX.) 68.

(*m*) *Brunsden* v. *Beresford* (1883), 1 Cab. & El. 125.

(*n*) *Kellett* v. *New Mills Urban District Council* (1900), Hudson on Building Contracts, 3rd ed., Vol. II., p. 329. But see *Butterill* v. *Ware Guardians* (1886), 2 T. L. R. 621, C. A.; *Clarke* v. *Watson* (1865) 18 C. B. (N. S.) 278.

(*o*) *Hotham* v. *East India Co.* (1787), 1 Term Rep. 638, 645; *Mackay* v. *Dick* (1881), 6 App. Cas. 251.

(*p*) *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310, 331.

architect or engineer, the employer will only be liable for them when they occur in the exercise of his functions as agent of the employer, for the employer is under no liability for his acts or defaults in the exercise of his *quasi*-judicial functions (*q*).

When certificate capriciously refused.

445. If the refusal to certify is caused by a mere unreasonable or capricious exercise of the discretion vested in the architect or engineer, the contractor has neither a cause of action against the employer (*a*) nor grounds for equitable relief (*b*), but if the architect delays the supply of plans necessary for the carrying out of the work, the employer is liable for breach of contract (*c*).

Waiver of certificate.

446. The right to insist on a certificate as a condition precedent being for the benefit of the employer, the employer can waive it. Whether or not such a right has been waived is a question of fact for the jury (*d*). Where, however, the contract must be under seal, it would seem, on the analogy of a condition making written orders for extras a condition precedent to payment (*e*), that the right to insist on a certificate cannot be waived by a mere parol agreement.

If acceptance of the work done can be proved, that may amount to waiver of the right to require a certificate as a condition precedent to payment (*f*). Such proof would be comparatively easy to establish in the case of a contract to build a ship (*g*), but much more difficult in the case of a building or engineering contract (*h*).

SUB-SECT. 5.—*Who is to give the Certificate.*

Certificate to be given by person designated in contract.

447. The certificate must be given in strict accordance with the terms of the contract, and by the person therein designated either by name or description; thus, where a certificate by two or more architects is prescribed, a certificate by one only is not sufficient (*i*).

Where the person to give the certificate is designated by name, and there is no power contained in the contract under which the

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(*q*) *Re De Morgan, Snell & Co. and Rio de Janeiro Flour Mills and Granaries, Ltd.* (1892), 8 T. L. R. 272.

(*a*) *Botterill* v. *Ware Board of Guardians* (1886), 2 T. L. R. 621.

(*b*) *Moser* v. *St. Magnus and St. Margaret (Churchwardens)* (1795), cited in *Worsley* v. *Wood* (1796), 6 Term Rep. 710, at p. 716; *Scott* v. *Liverpool Corporation* (1858), 3 De G. & J. 334.

(*c*) As, for instance, not supplying drawings (*Arterial Drainage Co.* v. *Rathangan River Drainage Board* (1880), 6 L. R. Ir. 513; *M'Alpine* v. *Lanarkshire and Ayrshire Rail. Co.* (1889), 17 R. (Ct. of Sess.) 113; *Thorn* v. *London Corporation* (1876), 1 App. Cas. 120).

(*d*) *De Vile* v. *Arnold* (1822), 10 Price (EX.) 21.

(*e*) *Lamprell* v. *Billericay Union* (1849), 3 Exch. 283.

(*f*) *Taylour* v. *Blythe* (1856), 27 L. T. (o. s.) 101.

(*g*) But not so in the case of a contract to repair a ship. See *Forman & Co. Proprietary* v. *The Ship "Liddesdale,"* [1900] A. C. 190, at p. 204: "The mere fact that the defendant took the ship which was his own property and made the best he could of it cannot give the plaintiffs any additional right. It is not like the case of an acceptance of goods which were not previously the property of the acceptor."

(*h*) See p. 203, *ante*.

(*i*) *Lamprell* v. *Billericay Union*, *supra*, at p. 304.

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employer can dismiss that person and appoint another person to give the certificate, there can be no dispute as to who is to give the certificate, and any dismissal of the designated person by the employer will either be ineffective or amount to breach of contract (*k*).

"Architect for time being."

Where the certifier is described as "the architect for the time being," or "A. B. or other the architect for the time being," it seems that the architect at the time when the necessity for the certificate arises is the proper person to certify, and not the person who was architect when the work the subject-matter of the certificate was performed (*l*).

Effect of dismissal of architect.

448. The effect of the employer dismissing the architect or engineer differs according as the contract provides for the certificate being given by a named person, or by the architect or engineer of the employer for the time being. In the first case, though the employer can dismiss the architect or engineer from his functions as agent, he must still allow him to exercise his functions as certifier, and, apparently, provide for his doing so, while in the second case he has full power to dismiss him both as agent and certifier, but is bound within a reasonable time to appoint another suitable person to exercise these functions.

Part VII.—Price.

SECT. 1.—*Price for a Completed Contract.*

SUB-SECT. 1.—*Lump Sum Contracts.*

Liquidated demand.

449. If the contract is to construct a specified work for a specified sum of money (commonly called a lump sum contract), the contractor's claim for payment is a liquidated demand, and is within the provisions of the Rules of the Supreme Court as to obtaining summary judgment on a specially indorsed writ (*m*).

SUB-SECT. 2.—*Price fixed by a Schedule of Prices.*

Liquidated demand.

450. If the contract is to do work for a price to be ascertained by measuring each particular class of work and pricing it in accordance with a schedule (*n*), *e.g.*, so much per yard for excavation etc., the price can be recovered in an action as a liquidated demand (*o*), if the measurement of the work is a purely ministerial act, and also

(*k*) *Mills* v. *Bayley* (1863), 2 H. & C. 36.
(*l*) *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72.
(*m*) R. S. C., Ord. 3, r. 6; Ord. 14. So where the price is payable by instalments, summary judgment may be obtained in respect of each instalment (*Workman, Clark & Co., Ltd.* v. *Lloyd Brasileño*, [1908] 1 K. B. 968, C. A.).
(*n*) *Jamieson* v. *M'Innes* (1887), 15 R. (Ct. of Sess.) 17; *Wilkie* v. *Hamilton Lodging House Co.* (1902), 4 F. (Ct. of Sess.) 951.
(*o*) *Stephenson* v. *Weir* (1879), 4 L. R. Ir. 369. See also *Meade* v. *Mouillett* (1879), 4 L. R. Ir. 207.

where it is intrusted to the architect or engineer in his *quasi*-judicial capacity as certifier, and the measurement of the work has been certified (*p*).

Similarly, if the contract is to perform a work for a lump sum, and additions and omissions are to be measured and valued in accordance with a schedule of prices, and their value added to or deducted from the stipulated price, the contractor's claim is a liquidated demand (*q*).

Schedule incomplete.

451. In case the schedule of prices is incomplete, and the contractor is under an obligation to perform some particular class of work for which no price is fixed in the schedule, that class of work will have to be paid for at a reasonable rate, unless the contract provides some other manner of ascertaining its value, such as by referring the matter to some independent person as *quasi*-arbitrator (*a*). Such a claim would be in the nature of a *quantum meruit* and would be a liquidated demand (*b*).

SUB-SECT. 3.—*Interest.*

When interest payable.

452. Apart from statute, interest is not payable on ordinary debts unless by special agreement or mercantile usage, and damages are not recoverable for non-payment of such debts (*c*). There is no mercantile usage that interest is payable on a debt due under a building contract.

SUB-SECT. 4.—*Promise to pay more than agreed.*

Consideration for increase of price.

453. As in the case of other contracts, a promise to pay for the work more than the price fixed by the contract will not be binding on the promisor unless it is supported by some consideration (*d*). An undertaking to use greater expedition in the work than that contracted for would be sufficient consideration to make binding a promise for extra payment (*e*).

SUB-SECT. 5.—*Where no Price is fixed.*

No price originally fixed.

454. Where a price for the work to be done has not been fixed by agreement between the parties, the builder or contractor is entitled to recover the fair and reasonable value of the work done and the materials supplied by him, or, in other words, a *quantum meruit*. This right rests on an implied contract by the employer that he will pay for services rendered at his request (*f*).

(*p*) See *Whitaker* v. *Dunn* (1887), 3 T. L. R. 602.

(*q*) See *Meade* v. *Mouillott* (1879), 4 L. R. Ir. 207.

(*a*) *Re Walton-on-the-Naze Urban District Council and Moran* (1905), Hudson on Building Contracts, 3rd ed., Vol. II., p. 400.

(*b*) *Stephenson* v. *Weir* (1879), 4 L. R. Ir. 369.

(*c*) *London, Chatham, and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1892] 1 Ch. 120, *per* LINDLEY, L.J., at p. 140. As to the cases where interest is recoverable, see title MONEY AND MONEY-LENDING.

(*d*) *Harris* v. *Watson* (1791), Peake, 72; *Stilk* v. *Myrick* (1809), 2 Camp. 317; *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597, 608; and see title CONTRACT.

(*e*) See *Williamson* v. *Clements* (1809), 1 Taunt. 523; *McGreevy* v. *Russell* (1887), 56 L. T. 501; and title CONTRACT.

(*f*) 3 Bl. Com. 161; Vin. Abr. 362; and see title WORK AND LABOUR.

I. Price for a Completed Contract.

A reasonable price includes payment for the skill, supervision, and services of the contractor himself, as well as for materials and labour supplied by him (*g*).

Reasonable price.

Where part of the work has been paid for at a particular rate, and the contractor has raised no protest against payment at that rate, this will be evidence that the contractor has agreed to accept payment at that rate, and that that rate is reasonable.

Original price ceasing to apply.

455. Where a price was originally fixed in the contract, but such price has for some reason ceased to be applicable, so that a reasonable price has become substituted for that fixed by the contract, such reasonable price depends on all the circumstances. A contract to pay the market price has been held in a particular contract to mean the market price at the time the contract was made (*h*).

How far original contract still applicable.

When the condition in a contract as to price has ceased to be applicable, the contract may still have to be looked at, as there may be other conditions therein, still binding, which have some effect on the price.

SECT. 2.—*Price where Contract is not completed.*

Effect of non-completion.

456. Where the contract is not completed the non-completion may arise in various ways, *e.g.*, (1) by an agreement between the parties, (2) by default of the employer, or (3) by default of the contractor (*i*).

SECT. 3.—*Bonus and Deductions.*

When bonus payable.

457. A clause is often inserted in building and engineering contracts giving the builder or contractor an addition to the price if he completes the work sooner than the stipulated time (*k*). This addition to the price is usually called a "bonus."

This bonus may be conditioned to be payable in different ways. The contract may provide that if the contractor completes the work before a certain day he shall be entitled to receive a fixed sum, or it may provide that for every day or week by which completion precedes a fixed date a certain sum shall be paid to the contractor.

To entitle the contractor to claim the bonus he must show that he completed by the time fixed. If he is prevented from so doing by the default of the employer he can claim damages for preventing him from earning the bonus. It would seem that the measure of damages is not necessarily the full amount of the bonus, but may depend upon the amount of the expedition used (*l*).

(*g*) *Grafton* v. *Armitage* (1845), 2 C. B. 336.
(*h*) *Malloch* v. *Holyhton* (1849), 12 Dunl. (Ct. of Sess.) 215.
(*i*) See pp. 238 *et seq.*, *post*.
(*k*) *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72, 78; *Macintos* v. *Midland Counties Rail. Co.* (1845), 14 M. & W. 548.
(*l*) *Bywaters & Sons* v. *Curnick & Co.* (1906), Hudson on Building Contracts, 3rd ed., Vol. I., p. 793. See, however, the *obiter dicta* of ALDERSON, B., in *Macintosh* v. *Midland Counties Rail. Co.*, *supra*, at p. 558.

Part VIII.—Payment.

SECT. 1.—*Payments on Account.*

SECT. 1. Payments on Account.

SUB-SECT. 1.—*In General.*

When payments on account due.

458. The large expenditure which builders and contractors have to incur in carrying out the works which they have undertaken to construct renders it usual for the contract to provide for payments on account of the price during the construction of the works. The manner in which these payments on account are regulated varies according to the terms of the contract. Sometimes the several instalments become due on the completion of particular stages of the work, *e.g.*, a sum when the second floor of a house is reached, and so on (*m*); sometimes the interim payments are to be not less than a fixed sum, *e.g.*, not less than £1,000 at the rate of £75 per cent. on the value of the work (and materials) supplied; or, again, at fixed periods, irrespective of amount, *e.g.*, monthly payments at the rate of £75 per cent. of the value of the work (and materials).

Where the contract does not make completion a condition precedent to payment there may be an implied stipulation on the part of the employer to pay from time to time a reasonable sum to the contractor during the progress of the work (*n*).

Conditions of payment.

459. Whichever method is agreed upon as that in accordance with which payment is to be made, nothing becomes due to the contractor until he has done everything to entitle him to receive payment (*o*). Each certificate for an instalment creates a debt due (*p*), and the contractor is entitled to immediate payment thereof subject to the terms of the contract and any right of the employer to any set-off or counterclaim; *e.g.*, for liquidated damages (*q*).

SUB-SECT. 2.—*Recovering back Instalments paid.*

Effect of contractor abandoning the contract.

460. Where, after the payment of money to the contractor on account, he fails to complete owing to his own default or abandons the contract without good cause, the employer may be entitled to recover back the instalments paid on the ground that the consideration has wholly failed; but at all events the employer would have a ground of action for a breach of the contract to complete (*r*), in which the damages recovered might equal or exceed the amount paid on account.

(*m*) *Terry* v. *Duntze* (1795), 2 Hy. Bl. 389.
(*n*) *Roberts* v. *Havelock* (1832), 3 B. & Ad. 404; *The Tergeste*, [1903] P. 26, *per* PHILLIMORE, J., at p. 34.
(*o*) *Needler* v. *Guest* (1647), Aleyn, 9.
(*p*) *Pickering* v. *Ilfracombe Rail. Co.* (1868), L. R. 3 C. P. 235.
(*q*) *Stubbs* v. *Holywell Rail. Co.* (1867), L. R. 2 Exch. 311; *Newfoundland Government* v. *Newfoundland Rail. Co.* (1888), 13 App. Cas. 199.
(*r*) *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651; *Newfoundland Government* v. *Newfoundland Rail. Co.*, *supra*.

SECT. 2.

SECT. 2.—*Payment on Completion.*

Payment on Completion.

When final payment due.

461. When the whole work is completed in accordance with the contract, payment becomes due to the contractor, except where there is a stipulation postponing the time for payment of the whole or part of the balance, *e.g.*, until after the expiration of a period during which the contractor is liable for defects or for repairs (*s*).

Retention money.

As the interim payments to the contractor are usually made at a rate per cent. on the value of the work done and sometimes materials supplied, there remains on each of these values a balance unpaid. These balances constitute what is called retention money, which is retained by the employer as a security for the due completion of the work, and as a fund to be drawn upon either to complete the work, or rectify defects on the failure of the contractor to do so.

SECT. 3.—*Mode of Payment.*

Payment in cash.

462. Where the contract does not make any special provisions as to payment, the contractor is entitled to be paid in cash. In some contracts, however, special provisions are contained, stipulating that payment may be made either in whole or in part in bills of exchange, debentures, shares, land, or Lloyd's bonds.

Bills.

463. If the contractor takes bills, which are dishonoured, the contractor, unless he has accepted the bills in complete satisfaction of his debt, may either treat them as a nullity and sue on the contract, or he may sue on the dishonoured bills (*t*). The holders in due course of such bills do not acquire any charge over or lien on the subject-matter of the contract, even when it is, as in the case of a ship, not being constructed on the land of the employer (*a*).

Debentures or shares.

464. If the payment is to be by way of debentures or shares, either party can insist on the prescribed mode of payment, though the price of the debentures or shares may have risen or fallen since the contract was made (*b*). An agreement to take payment from a company in fully paid-up shares of the company must be registered with the Registrar of Joint Stock Companies (*c*), but non-registration does not make the contractor liable as a contributory (*d*). The effect, however, of payment in fully paid shares seems to be that they are to be treated as paid up to the extent they have in fact been paid for in money or money's worth. If a builder agrees to take shares in a company in consideration of being employed as a contractor to execute works for the company, this is a conditional contract, and if

(*s*) See also p. 214, *ante*, as to certificates.
(*t*) See title CONTRACT.
(*a*) *Re Lindsay, Ex parte Lambton* (1875), 10 Ch. App. 405.
(*b*) *De Waal* v. *Adler* (1886), 12 App. Cas. 141. See also *Re De Morgan Snell & Co. and Rio de Janeiro Flour Mills* (1892), 8 T. L. R. 108, 292.
(*c*) Companies Act, 1900 (63 & 64 Vict. c. 48), s. 7 (1) (b); and see title COMPANIES.
(*d*) By the repeal of s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131).

he is not given the contract, he need not take the shares, and is entitled to be struck off the list of contributories (*e*).

SECT. 3. Mode of Payment.

465. If the payment is to be made in land, the contractor will, it seems, be entitled to claim specific performance of the contract, if he has performed every condition precedent to his right to payment, or he may treat the contract as at an end and bring an action for a *quantum meruit* for the work done (*f*), or he may bring an action for breach of contract, in which case, it is suggested, the damages recoverable will be limited to the value of the land.

Land.

466. Where payment is to be made in Lloyd's bonds (*g*), debentures (*h*), or shares (*i*), and they are assigned by the contractor, the assignee takes them subject to the equities existing between the employer and the contractor (*j*) at the time of the notice of assignment (*k*).

How far subject to equities.

SECT. 4.—*Appropriation of Payments.*

467. There is a general rule of law that, in the absence of any appropriation by the employer at the time of payment, the contractor is at liberty to appropriate a general payment on account to any debt he pleases (*l*). It is specially important, in the case of building and engineering contracts, to remember that the appropriation must be to a debt (*m*). A contractor, therefore, cannot, by purporting to appropriate a payment to extras not properly ordered in accordance with the contract (*n*), get over the non-fulfilment of a condition precedent to his right to payment (*o*). When, therefore, the contractor constructs additional works which are not ordered in the manner prescribed by the contract, or which have not been certified for by the architect when such certificate is a condition precedent to payment, no debt in respect of this additional work has been incurred by the employer, and the contractor cannot by purporting to appropriate a payment to this claim alter the position of the employer (*p*).

Conditions applicable to appropriation.

(*e*) *Re Aldborough Hotel Co., Simpson's Case* (1869), 4 Ch. App. 184.

(*f*) See *Keys* v. *Harwood* (1846), 2 C. B. 905.

(*g*) For Lloyd's bonds, see title BONDS, p. 82, *ante*. See also *Munro* v. *Athenry and Ennis Junction Rail. Co.* (1868), I. R. 2 C. L. 477.

(*h*) As to debentures generally, see title COMPANIES.

(*i*) A company may decline to register any transfer of shares made by a member who is indebted to them (Companies Act, 1862 (25 & 26 Vict. c. 89), Table A, clause 10).

(*j*) See p. 270, *post*, and *Re Blakely Ordnance Co., Ex parte New Zealand Banking Corporation* (1867), 3 Ch. App. 154.

(*k*) A Lloyd's bond is not equitably subject to arrears of rent due from the grantee of the bond which accrued due after notice of the assignment though the lease was made before the notice (*Watson* v. *Mid Wales Rail. Co.* (1867), L. R. 2 C. P. 593).

(*l*) *Thompson* v. *Hudson* (1871), 6 Ch. App. 320; *Clayton's Case* (1816), 1 Mer, 572. See title CONTRACT.

(*m*) *Lamprell* v. *Billericay Union* (1849), 3 Exch. 283, 307.

(*n*) See p. 234, *post*.

(*o*) A creditor receiving money on account is not authorised to apply it towards the satisfaction of any claim which does not rest on some legal or equitable demand against the debtor (*Lamprell* v. *Billericay Union*, *supra*, *per* ROLFE, B., at p. 307).

(*p*) *Ibid.*

SECT. 4. Appropriation of Payments.

The question whether there is a debt must also be considered in the case where the employer is a corporate body, and there are statutory restrictions on the manner in which such body is able to contract (*q*).

Part IX.—Alterations, Additions, and Omissions.

SECT. 1.—*Extras.*

SUB-SECT. 1.—*In General.*

No general duty as to extras.

468. Where a building or engineering contract does not contain provisions that alterations in, additions to, or omissions from the contract may be made, the builder is under no obligation to make them; and if he does so, the liability of the employer to pay for them depends upon various considerations (*r*).

It is incumbent on the contractor to show that there was an intention on the part of the employer to enter into some new contract, and, in case the orders for the variation come from the architect, that he was authorised to give such orders (*s*).

Definition of "extras."

The word "extras" is employed to designate all works not expressly or impliedly described in the specification and plans. It appears to be a question of construction for the judge to decide, in the case of a written contract, whether additional work is of the kind contemplated by the contract or outside and independent of it (*t*).

Express power to order extras.

469. It is usual in building and engineering contracts to give the employer or his architect or engineer power to order additions to, omissions from, and variations in the specified works. It is also a common practice to prescribe the time and manner in which the orders for such variation of the works shall be given, *e.g.*, by orders in writing to be given sometimes previous to their execution.

Liability of employer for additional works.

470. When additional works are ordered during the construction of works, the question of how far the employer is liable to pay for them depends upon how the alteration originated, whether it was authorised, and in many cases (depending on the terms of the contract) in what method it was ordered.

The employer will not be liable for—(1) (in a lump sum contract) work impliedly included in the work contracted for or necessary for its completion (*u*); (2) work performed voluntarily without

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(*q*) See titles COMPANIES; CORPORATIONS; LOCAL GOVERNMENT.
(*r*) See p. 231, *post*.
(*s*) *R.* v. *Peto* (1826), 1 Y. & J. (EX.) 37; *Cooper* v. *Langdon* (1841), 9 M. & W. 60.
(*t*) *Russell* v. *Sa da Bandeira* (*Viscount*) (1862), 13 C. B. (N. S.) 149.
(*u*) See p. 186, *ante*.

request (*w*); (3) work as to which the conditions precedent prescribed in the contract have not been complied with (*x*); (4) work ordered by the architect without authority (*y*); (5) work to pay for which no contract, express or implied, can be proved (*a*); and (6) in certain cases goods of the value of £10 and upwards (*b*).

SUB-SECT. 2.—*Necessary Works.*

Necessary works not included in extras.

471. Works or materials which, although not expressly described, are necessary for the completion of a lump sum contract, are not extras, and it does not matter that they are not described in the specification (*c*), or shown on the plans or drawings, or that they are rendered necessary by defective planning or by an impracticable design (*d*), or that they are not taken out in the quantities (*e*), whether the quantities are made part of the contract (*f*) or not (*g*). The architect or engineer has no authority, even when he is empowered to order extras, to order such necessary works as extras.

If work has to be done to the satisfaction of a third person, and that third person requires certain work to be done for his satisfaction, such work cannot give rise to a claim for payment for it as an extra, if it is necessary work (*h*).

Necessary works included in certificate as extras.

472. When, however, the architect or engineer has authority to give a final and binding certificate fixing the final balance payable to the contractor, such a certificate is conclusive between the parties, even though it should direct payment for work as extra which is really comprised in the work contracted for, or for extra work not ordered in the manner prescribed by the contract (*i*).

In the case of a contract to construct works for which payment is

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(*w*) *Wilmot* v. *Smith* (1828), 3 C. & P. 453; and see p. 232, *post*.

(*x*) See p. 234, *post*.

(*y*) *Cooper* v. *Langdon* (1841), 9 M. & W. 60; *R.* v. *Peto* (1826), 1 Y. & J. (EX.) 37; and see p. 233, *post*.

(*a*) *Lamprell* v. *Billericay Union* (1849), 3 Exch. 283; *Westwood* v. *Secretary of State for India in Council* (1863), 7 L. T. 736; *Lovelock* v. *King* (1831), 1 Moo. & R. 60; *Johnson* v. *Weston* (1859), 1 F. & F. 693; *Wallis* v. *Robinson* (1862), 3 F. & F. 307; *Tharsis Sulphur and Copper Co.* v. *M'Elroy & Sons* (1878), 3 App. Cas. 1040; and see p. 230, *post*.

(*b*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4, replacing s. 17 of the Statute of Frauds (29 Car. 2, c. 3).

(*c*) *Williams* v. *Fitzmaurice* (1858), 3 H. & N. 844; *Wilson* v. *Wallace* (1859), 21 Dunl. (Ct. of Sess.) 507; *Re Shell Transport and Trading Co. and Consolidated Petroleum Co.* (1904), 20 T. L. R. 517.

(*d*) *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 579; and see *Hydraulic Engineering Co., Ltd.* v. *Spencer & Sons* (1886), 2 T. L. R. 554.

(*e*) *Scrivener* v. *Pask* (1866), L. R. 1 C. P. 715; *Re Ford & Co. and Bemrose & Sons* (1902), Hudson on Building Contracts, 3rd ed., Vol. II., p. 354.

(*f*) *Coker* v. *Young* (1860), 2 F. & F. 98.

(*g*) *Kimberley* v. *Dick* (1871), L. R. 13 Eq. 1.

(*h*) *Dobson* v. *Hudson* (1857), 26 L. J. (C. P.) 153; and see p. 207, *ante*.

(*i*) *Goodyear* v. *Weymouth and Melcombe Regis Corporation* (1865), 35 L. J. (C. P.) 12; *Apthorne* v. *St. Aubyn* (1885), 1 T. L. R. 279; *Laidlaw* v. *Hastings Pier Co.* (1874), Jenkins and Raymond, Architect's Legal Handbook, 4th ed., p. 238; *Connor and Olley* v. *Belfast Water Commissioners* (1871), 5 I. R. C. L. 55; and see p. 215, *post*.

SECT. 1. Extras.

to be made in accordance with a schedule of prices, if the particular class of work ordered is provided for in the schedule, it must be paid for accordingly, or if it is not it must, in the absence of any other prescribed mode of ascertaining the price, be paid for at a fair and reasonable price (*k*).

SUB-SECT. 3.—*Works outside the Contract.*

How far works outside contracts are extras.

473. If additional work is of such a nature as to be entirely outside the contract, it does not come within a clause relating to extras at all (*l*), and is not subject to any of the stipulations of the contract. But if the contractor accepts orders purporting to be given under the contract, when he might have refused to do them at all, he may not be able, depending on the circumstances, to set up that such orders relate to work altogether outside the contract, or that he is released from conditions precedent in regard to them. Work ordered after the completion of the contract may on that ground be entirely outside the contract (*m*).

SUB-SECT. 4.—*Alterations, Additions, and Omissions.*

Effect of ordering alterations.

474. A power to order alterations, additions, or omissions in the contract will not extend to permit the architect or engineer to change the whole scheme of the work and turn it into something entirely different from that contracted for (*n*). Thus, if additions are made to a building, the contract still exists so far as it can be traced to have been followed, but where the work is varied to such an extent that it is impossible to trace the contract at all, the contract must be treated as abandoned, and the work as having been done under an implied contract to pay by measure and value (*o*).

An unauthorised departure from the contract work by the contractor not only gives him no claim for extra payment, but may prevent his recovering payment under the contract, or even render him liable in damages for breach of his contract to complete the work in accordance with the specification and plans or his covenant not to vary or deviate from the contract, when such a covenant is contained in the contract (*p*).

A limitation is sometimes placed on the employer's or the architect's right to vary, by specifying a percentage by which the contract sum may be increased or diminished.

(*k*) See *Re Walton-on-the-Naze Urban District Council and Moran* (1905), Hudson on Building Contracts, 3rd ed., Vol. II., p. 400.

(*l*) *Reid* v. *Batte* (1829), Mood. & M. 413; *Russell* v. *Sa da Bandeira* (*Viscount*) (1862), 13 C. B. (N. S.) 149; *Thorn* v. *London Corporation* (1876), 1 App. Cas. 120.

(*m*) *Russell* v. *Sa da Bandeira* (*Viscount*), *supra*, *per* ERLE, C.J., at p. 197: "With respect to such articles as were supplied after the contract was fully completed, it appears to me that they are entirely severed from the contract and from any restriction contained in it."

(*n*) *R.* v. *Peto* (1826), 1 Y. & J. (EX.) 37.

(*o*) *Pepper* v. *Burland* (1792), Peake, 103, *per* Lord KENYON, at p. 104.

(*p*) *Ellis* v. *Hamlen* (1810), 3 Taunt. 52; *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72; *Whitaker* v. *Dunn* (1887), 3 T. L. R. 602; *Bottoms* v. *York Corporation* (1892), Hudson on Building Contracts, 3rd ed., Vol. II., p. 220; *Forman & Co. Proprietary* v. *The Ship "Liddesdale,"* [1900] A. C. 190.

SECT. 2.—*Liability to pay for Alterations and Additions.*

SECT. 2. Liability to pay for Alterations and Additions.

SUB-SECT. 1.—*In General.*

Lump sum contracts.

475. Where the contract is to construct a specified work for a lump sum, and there is no power to order extras or variations, the builder is bound to do the work as specified, and cannot recover anything for extras or variations, unless he can establish a new contract to pay for them either by showing that the employer expressly or impliedly ordered them (*q*), or that the architect, acting within the scope of his authority, did so, or that the employer ratified unauthorised orders of the architect (*r*), or that the employer accepted the work (*s*) either personally or by his duly authorised agent.

Contracts with corporations.

476. In the case of such corporations as can only contract under seal, no such parol or implied new contract can be proved. The only binding form of new contract is one under seal (*t*). If the contract contains a power for the architect or engineer to order extras, his orders will be binding on the corporation (*u*), but only so far as they are given in accordance with the contract (*w*).

In the case of a company able to contract by parol, such a new contract to pay for extras can be proved in the same manner as in the case of a private person (*x*).

Written contracts

477. Where there is a written contract, and a claim is made for payment for work alleged to be an extra, the contractor must produce the written document to prove that the work is in fact extra to that which he has contracted to perform (*y*), even when the employer has had the benefit of the work (*a*). But where there is a separate employment to do the additional work, the written contract need not be produced (*b*).

The question whether the written document need be produced depends upon whether the work under the contract and that claimed for as additional are so mixed up that it is necessary to

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(*q*) See p. 230, *ante*.

(*r*) See p. 233, *post*.

(*s*) See p. 203, *ante*, as to what constitutes acceptance.

(*t*) *Homersham* v. *Wolverhampton Waterworks Co.* (1851), 6 Exch. 137; *Rutledge* v. *Farnham Local Board* (1861), 2 F. & F. 406; *Stevens* v. *Hounslow Burial Board* (1889), 61 L. T. 839.

(*u*) *Williams* v. *Barmouth Urban District Council* (1897), 77 L. T. 383.

(*w*) *Kirk* v. *Bromley Union* (1848), 17 L. J. (CH.) 127; *Thames Iron Works Co.* v. *Royal Mail Steam Packet Co.* (1861), 13 C. B. (N. S.) 358.

(*x*) *Pauling* v. *London and North Western Rail. Co.* (1853), 8 Exch. 867; and similarly, on the analogy of a sale of land, *Lowe* v. *London and North Western Rail. Co.* (1852), 21 L. J. (Q. B.) 361.

(*y*) *Vincent* v. *Cole* (1828), 1 Mood. & M. 257; *Jones* v. *Howell* (1835), 4 Dowl. 176; *Parton* v. *Cole* (1841), 11 L. J. (Q. B.) 70; *Lovelock* v. *King* (1831), 1 Moo. & R. 60; *Holbard* v. *Stevens* (1841), 5 Jur. (O. S.) 71; *Edie* v. *Kingsford* (1854), 14 C. B. 759; *Eccles* v. *Southern* (1861), 3 F. & F. 142; *Hill* v. (1864), 17 C. B. (N. S.) 262; *Buxton* v. *Cornish* (1844), 12 M. & W. 426. See also *Fielder* v. *Ray* (1829), 3 Moo. & P. 659; *Stevens* v. *Pinney* (1818), 2 Moore (C. P.), 349.

(*a*) *Hughes* v. *Budd* (1840), 8 Dowl. 478.

(*b*) *Reid* v. *Batte* (1829), Mood. & M. 413.

SECT. 2. Liability to pay for Alterations and Additions.

look at the written contract to see whether or not the work in respect of which the claim is made had relation to it or not (*c*).

Liability of employer to sub-contractor.

478. If a sub-contractor is ordered by the employer to do work, the employer must pay him for it (*d*). If the sub-contractor claims against the employer for work done as extra to the principal contract, he must put the principal contract in evidence to show that the work is not included in it, and prove a distinct contract with the employer to do the work for which the action is brought (*e*).

SUB-SECT. 2.—*When the Employer is not liable for Extras.*

Works voluntarily done.

479. Where the contractor voluntarily, and without any request by the employer, does extra work, or employs better materials than those stipulated for, he has no claim against the employer for more than the contract price (*f*).

Even though the employer should assent to alterations from the works specified, he will not be liable to pay any more than the contract price, unless he either has expressly been informed, or ought to have known from the nature of the alterations, that additional expense might be incurred (*g*). If the alteration is by way of a concession to the contractor, the employer cannot be charged more than the contract price (*h*).

On the other hand, it would seem by analogy that if the employer consents to the contractor making use of less expensive materials than those specified, he cannot, unless there is a new contract, claim that the contractor shall make a corresponding reduction in the price (*i*).

Promise to pay for contract work as an extra.

480. Where the contractor refuses to perform work which is included in that specified and the employer promises to pay for it as an extra, such a promise by the employer is not binding, as it is made without consideration and is a mere *nudum pactum* (*k*).

Waiver of condition as to written orders.

481. If the contract provides that written orders from the architect shall be a condition precedent to payment for extras, and the employer personally gives verbal orders for extras, the question

(*c*) *Parton* v. *Cole* (1841), 11 L. J. (Q. B.) 70, *per* PATTESON, J., at pp. 70, 71.

(*d*) *Wallis* v. *Robinson* (1862), 3 F. & F. 307; and see *Bramah* v. *Abingdon (Lord)* (1812), 15 East, 62, 66.

(*e*) *Eccles* v. *Southern* (1861), 3 F. & F. 142.

(*f*) *Wilmot* v. *Smith* (1828), 3 C. & P. 453; *Forman & Co. Proprietary* v. *The Ship "Liddesdale,"* [1900] A. C. 190.

(*g*) *Lovelock* v. *King* (1831), 1 Mood. & R. 60; *Johnson* v. *Weston* (1859), 1 F. & F. 693.

(*h*) *Tharsis Sulphur and Copper Co.* v. *M'Elroy & Sons* (1878), 3 App. Cas. 1040, where, during the execution of a lump sum contract, the builders, finding it impossible to complete their contract without increasing the thickness specified in the contract of certain girders, were allowed to do so, and it was held that they could not claim for the increased thickness of the girders as an extra.

(*i*) It might also be contended in such a case that the employer has waived his right to insist on the stipulated materials being employed.

(*k*) *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597, 603.

whether this may not amount to a waiver of the condition precedent or to a new contract to pay for the extras has not been decided in any reported case (*l*). Apparently, however, something more than a mere verbal order is necessary, though there may be circumstances which will entitle the contractor to recover (*m*). If the employer merely looks on and sees the extra work being done and says nothing, this does not amount to such waiver or new contract (*n*).

SUB-SECT. 3.—*Extras ordered by the Architect.*

Extras must be covered by architect's authority to order them.

482. Where the additions or variations are ordered by the architect, the contractor, before he can recover for them, must show that it was within the scope of the architect's authority to order them (*o*).

Whether the architect was authorised to order the deviations is a question of fact for a jury, except where it depends on the construction of the contract (*p*). The authority may arise from the powers given to the architect by the contract, or from written or verbal instructions given to him by the employer, or from the course of business adopted by the parties.

The authority of the architect or engineer to order additions or variations does not empower him to completely change the character of the works contracted for (*q*).

SUB-SECT. 4.—*Effect of Final and Conclusive Certificate.*

When employer bound by certificate.

483. If the contract makes the certificate of the architect final and conclusive as to the amount to be paid to the contractor for the works actually executed, or as to the amount of the balance or as to whether extras are within the contract or not, or have in fact been executed, such a certificate is binding on both parties (*r*), and the employer cannot avoid paying in accordance with it by alleging that extras had been allowed for which had not been done, or had been improperly done (*s*), or had not been ordered in the manner which was made by the contract a condition precedent to payment (*t*). The contractor cannot under such a

(*l*) See *Norwood* v. *Lathrop* (1901), 178 Massachusetts Rep. 208, where it was held that a contractor could recover for extras done on the verbal orders of the employer's agent, given with the employer's assent, as this amounted to a waiver of the requirement of written orders.

(*m*) *Franklin* v. *Darke* (1862), 6 L. T. 291, where there was a stipulation that orders for extras should be in writing, and when the employer ordered extras verbally, saying, "You do it, and you shall be paid for it," it was held that the contractor could not recover. The question of waiver does not seem to have been raised.

(*n*) *Brown* v. *Rollo* (*Lord*) (1832), 10 Sh. (Ct. of Sess.) 667; but see p. 235, *post*.

(*o*) *R.* v. *Peto* (1826), 1 Y. & J. 37; *Cooper* v. *Langdon* (1841), 9 M. & W. 60.

(*p*) *Wallis* v. *Robinson* (1862), 3 F. & F. 307.

(*q*) *R.* v. *Peto*, *supra*, at p. 61.

(*r*) *Goodyear* v. *Weymouth and Melcombe Regis Corporation* (1865), 35 L. J. (C. P.) 12; *Richards* v. *May* (1883), 10 Q. B. D. 400.

(*s*) *Laidlaw* v. *Hastings Pier Co.* (1874), Jenkins and Raymond. Architect's Legal Handbook, 4th ed., p. 238; *Lapthorne* v. *St. Aubyn* (1885), 1 T. L. R. 279; *Brunsdon* v. *Staines Local Board* (1884), 1 Cab. & El. 272.

(*t*) *Connor and Olley* v. *Belfast Water Commissioners* (1871), 5 I. R. C. L. 55.

SECT. 2. Liability to pay for Alterations and Additions.

contract claim payment for extras, though all conditions have been observed in regard to them, if the architect does not include them in his certificate (*u*).

Where, however, the clause making the certificate of the architect conclusive is not wide enough to include the question of extras, neither party will be precluded by the certificate from claiming or resisting payment for extras (*w*).

SECT. 3.—*Orders in Writing.*

SUB-SECT. 1.—*In General.*

Usual conditions for ordering extras.

484. Building and engineering contracts in most cases impose some conditions precedent upon payment for extras. The usual conditions are the following, one or more of which may occur in a particular contract:—

(1) The contractor must obtain orders in writing for any extras; (2) the orders must be signed and, in some cases, countersigned; (3) the orders must have been given before the construction of the work ordered; (4) the orders must have been given before completion of the works under the contract; (5) the orders so given must be produced; (6) weekly accounts must be delivered; (7) a previous contract must be made for any extra work; and (8) in case of dispute the price of the extras must be settled by the architect, or by arbitration, before any claim can be made.

Order in writing condition precedent.

485. Of these conditions the effect of the one most frequently employed is that orders in writing shall be a condition precedent to payment for extras. This condition, being a limitation on the powers of the architect, cannot be waived by him, though his power to give a final conclusive certificate may over-ride the limitation, and the contractor is not entitled, as against the employer, to rely on any implied authority of the architect or on any representation by him of parol authority to order such extras (*a*). The contractor cannot obtain relief from such a stipulation in the contract (*b*), nor can he get a decree for an account of extras not ordered in the prescribed manner (*c*).

What amounts to order in writing.

486. The nature of building and engineering operations involves constant written communications between the architect or engineer and the contractor. These communications contain instructions as to the manner of carrying out the works, the explanation of plans and drawings, detailed drawings of particular parts of the works, and answers to questions put by the contractor. Some of these from one point of view may amount to a direction to do some work additional to the contract, but to constitute an order in writing

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(*u*) *Brunsdon* v. *Staines Local Board* (1884), 1 Cab. & El. 272.

(*w*) *Pashby* v. *Birmingham Corporation* (1856), 18 C. B. 2; *Lorden* v. *Price* (1896), *The Builder* (April 25, 1896).

(*a*) *Nixon* v. *Taff Vale Rail. Co.* (1848), 7 Hare, 136; *Russell* v. *Sa da Bandeira (Viscount)* (1862), 13 C. B. (N. S.) 149; *Lorden* v. *Price*, *supra*.

(*b*) *Kirk* v. *Bromley Union* (1848), 17 L. J. (CH.) 127.

(*c*) *Nixon* v. *Taff Vale Rail. Co.*, *supra*.

the condition of the particular contract must be complied with, and this may require that the order should be given before the additional work is performed (*d*). A progress certificate (*e*), or any other form of subsequent approval of the extras, may not be sufficient.

Where the contract expressly stipulates that the work is to be done under the direction and to the approval of the architect, a communication from, or a direction by, the architect as to the method of doing the work is not an order in writing for extras (*f*), and where by the contract extras are required to be ordered by the architect in writing under his hand, sketches prepared in the architect's office and furnished to the builder, but not signed by the architect, are not such orders in writing as are contemplated by the contract (*g*). In order to make the absence of written orders conclusive against the contractor, the terms of the contract relating to such orders must amount to making them a condition precedent (*h*).

When conditions as to orders may be dispensed with.

487. The exceptional cases in which the contractor can recover for extras in the absence of orders given in the manner prescribed by the contract are the following: (1) where there is a waiver or new contract to pay (*i*); (2) where the work is not additional, but entirely outside the contract (*k*); (3) where the employer has prevented the performance of the condition by fraud or otherwise (*l*); or (4) where a final and conclusive certificate has included the extras (*m*).

It might in certain circumstances be held to be a fraud on the part of an employer if he should request alterations and additions to be made, stand by and see the expenditure going on, take the benefit of the expenditure, and then refuse payment on the ground that the expenditure was incurred without proper orders having been given for the purpose (*n*).

Effect of conditions as to orders.

488. Although the absence of orders given in the prescribed manner is conclusive against the contractor's right to recover, the employer is not precluded, it would seem, by the existence of orders given in the prescribed manner from showing that the work ordered as an extra was in fact included in the work specified, unless a conclusive certificate has been given.

(*d*) "The deed, when it requires written directions, clearly means written directions before the additional works should be done" (*Lamprell* v. *Billericay Union* (1849), 3 Exch. 283, *per* ROLFE, B., at p. 303).

(*e*) See p. 212, *ante*, and *Tharsis Sulphur and Copper Co.* v. *McElroy & Sons* (1878), 3 App. Cas. 1040.

(*f*) *Dobson* v. *Hudson* (1857), 26 L. J. (C. P.) 153.

(*g*) *Myers* v. *Saul* (1860), 3 E. & E. 306.

(*h*) A condition merely binding the contractor to perform such alterations and additions as might be ordered was held in Canada not to be sufficient (*Diamond* v. *McAnnany* (1865), 16 Upper Canada C. P. 9).

(*i*) See pp. 232, 233, *ante*.

(*k*) See p. 230, *ante*.

(*l*) See p. 239, *post*.

(*m*) See p. 233, *ante*.

(*n*) *Hill* v. *South Staffordshire Rail. Co.* (1865), 12 L. T. 63, *per* TURNER, L.J., at p. 65.

SECT. 3. SUB-SECT. 2.—*Effect of Refusal to give Orders in Writing.*

Orders in Writing.

Refusal to give proper orders.

489. The builder can refuse to perform additional work not ordered in writing, if by the terms of the contract orders are required to be given in that way, but if he does perform such work without written orders, he cannot recover payment therefor (*o*).

A contractor cannot claim an increased price for the contract work on the ground that the employers have caused him to incur additional expense by a proper exercise of statutory powers (*p*).

Part X.—Maintenance and Defect Clauses.

SECT. 1.—*Distinction between Maintenance and Defect Clauses.*

Usual conditions as to defects and repairs.

490. There are various classes of conditions which are inserted in building and engineering contracts as to defects, repairs, and maintenance: *e.g.*, (1) a general repairing condition which requires the contractor to keep the works in repair during some fixed period after the architect or engineer has given his final certificate; (2) a condition that the builder will rectify any defects in materials or work which are discovered within a fixed period; (3) a maintaining and upholding condition under which the contractor may possibly be required to do more than repair, and which in some cases involves a contract on his part to keep the subject-matter of the contract in working order during the stipulated time (*q*); and (4) a condition that the contractor is to be liable for breach of contract for defective work appearing at any time.

Extent of obligation to repair.

491. Under such a covenant to repair from the date of the final certificate, the builder or contractor is apparently not bound to do more than repair the existing structure, including making good the effects of ordinary wear and tear as well as damage from other causes, and to keep it in the condition in which it was at the beginning of the period over which the obligation to repair extends, in the same way in which a lessee is bound to repair under a repairing lease; but he is under no obligation, under a covenant to repair only, to substitute good materials for bad, or to supply omissions (*r*). Under a covenant to rectify defects he is, in the absence of express stipulation, under no obligation to make good the

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(*o*) *Thames Iron Works Co.* v. *Royal Mail Steam Packet Co.* (1862), 13 C. B. (N. S.) 358; *Russell* v. *Sa da Bandeira* (*Viscount*) (1862), 13 C. B. (N. S.) 149; but see *Murdoch* v. *Luckie* (1897), 15 New Zealand L. R. 296, 313.

(*p*) *Rigby* v. *Bristol Corporation* (1860), 29 L. J. (EX.) 359.

(*q*) *Sevenoaks, Maidstone, and Tunbridge Rail. Co.* v. *London, Chatham, and Dover Rail. Co.* (1879), 11 Ch. D. 625; *Cunliffe* v. *Hampton Wick Local Board* (1892), 9 T. L. R. 378.

(*r*) On the analogy of a lessee under a repairing lease see *Proudfoot* v. *Hart* (1890), 25 Q. B. D. 42; *Lister* v. *Lane*, [1893] 2 Q. B. 212.

consequences of wear and tear, except so far as they may arise from defective construction (*a*).

SECT. 1. Distinction between Maintenance and Defect Clauses.

492. If the contractor undertakes to make good defects discovered within a fixed period, his obligation extends to defects discovered within that time although the cause of those defects may not be discovered until after the expiration of that period (*b*).

If the defects had appeared before the beginning of the period agreed upon, then rectification should have formed part of the work of completion, but the contractor will not be obliged to rectify them if he has once obtained a conclusive certificate of satisfactory completion.

Extent of obligation to make good defects.

493. Under a defects clause no liability to reconstruct the building or works can arise in case of their destruction by fire or other accident not caused by the contractor's default, as his obligation is limited to making good anything owing to defective construction. Under a maintenance and repairing clause, he would, in such a case, be obliged to reconstruct the building or works (*c*), his obligation being a general one to maintain the buildings and make good all injury to them, however caused, except by default of the employer. Where, however, the destruction has involved some building or thing necessary to the existence of the contract works, the contract obligations will be at an end (*d*).

When contractor liable to reconstruct.

494. The employer's right of action on the breach of either a covenant to remedy defects or a covenant to maintain and repair is not postponed to the end of the period agreed upon (*e*).

When right of action accrues.

SECT. 2.—*Notice to remedy Defects.*

495. Building contracts usually contain a provision that if the builder does not remedy the defects, or execute the repairs he has undertaken to perform, the employer may employ another builder to do the work and charge the defaulting builder with the cost.

Restrictions on contractor's liability.

If the contractor neglects to perform his obligation to remedy defects under a contract which provides that he shall do so during some fixed period, the employer, it would seem, must give him notice that defects have appeared, in cases where the contractor is not in possession, and also give him an opportunity to remedy the defects by allowing him within a reasonable time to enter the site of the works and to do that which is necessary. This restriction of the contractor's liability is in accordance with the general rule of law that, where a person who is not in possession of a building is under an obligation to repair it, this obligation is conditional

Notice by employer of defects.

(*a*) *District of Columbia* v. *Clephane* (1884), 110 U. S. (3 Davis), 212.

(*b*) *Cunliffe* v. *Hampton Wick Local Board* (1892), 9 T. L. R. 378

(*c*) *Brecknock and Abergavenny Canal Navigation* v. *Pritchard* (1796), 6 Term Rep. 750; *Bullock* v. *Dommitt* (1796), 6 Term Rep. 650; *Digby* v. *Atkinson* (1815), 4 Camp. 275; *London, Leith, Edinburgh, and Glasgow Shipping Co.* v. *Duffus* (1841), 3 Macph. (Ct. of Sess.) 929.

(*d*) See p. 194, *ante*.

(*e*) See *Luxmore* v. *Robson* (1818), 1 B. & Ald. 584.

SECT. 2. Notice to remedy Defects.

on his having received notice that the building is in need of repairs within the meaning of his obligation, and on his having been given an opportunity to enter and perform that obligation (*f*).

Waiver of notice.

If, however, the builder has stated that he will not remedy defects or execute repairs, or has in any other way dispensed with notice, he will be liable to be charged with the cost of the repairs, even if he has not had notice of them (*g*).

How far notice necessary.

The question whether, if the builder or contractor knows of the existence of the defects or of the necessity for repairs, actual notice to him is still necessary, has not been decided in any reported case. The reasoning on which notice is required is that, where there is knowledge in the one party and not in the other, there notice is necessary (*h*), and before the contractor can be charged with a breach of duty he must have notice that the time for doing it has arrived, so as to have an opportunity of performing his obligation (*i*). It may also be suggested that if notice is not given to the contractor who has knowledge of the defects, he has no means of knowing that the employer considers that there are defects or means to stand on his rights and to insist on the work being remedied.

Part XI.—Breach of the Contract.

SECT. 1.—*What amounts to Breach of the Contract.*

SUB-SECT. 1.—*By the Employer.*

Failure to perform condition precedent.

496. If the employer does not provide the site at the appointed time, or does not appoint an architect, or otherwise does not observe some condition precedent to the contractor's liability to commence the work, the contractor can at once throw up the contract and bring an action for damages for breach by the employer (*k*). If, however, the contractor elects to proceed with the work, he may, according to circumstances, be relieved from stipulations in the contract as to completion to time, liquidated damages etc., and still have an action for damages (*l*).

Breach during performance.

497. If the breach by the employer occurs during the progress of the work, it depends on the particular circumstances of the case whether the breach goes to the root of the contract or not. If it goes to the root of the contract, the contractor is entitled to

(*f*) *Makin* v. *Watkinson* (1870), L. R. 6 Exch. 25; *London and South Western Rail. Co.* v. *Flower* (1875), 1 C. P. D. 77; *Hugall* v. *M'Lean* (1885), 53 L. T. 94. See generally, titles REAL PROPERTY AND CHATTELS REAL; LANDLORD AND TENANT.

(*g*) *Johnstone* v. *Milling* (1885), 2 T. L. R. 105.

(*h*) *London and South Western Rail. Co.* v. *Flower* (1875), 1 C. P. D. 77, *per* BRETT, J., at p. 85.

(*i*) *Ibid.*, *per* DENMAN, J., at p. 86.

(*k*) See p. 198, *ante*.

(*l*) See p. 244, *post*.

abandon the contract and seek his remedy in damages at once. On the other hand, if it does not go to the root of the contract, he must go on and complete the work and then sue for damages in addition to the contract price (*m*). As a general rule, the longer the works have been in progress and the nearer they are to completion, the less likely is it that a breach of some particular stipulation acts as an abandonment or rescission of the contract so as to entitle the contractor to treat the contract as having been put an end to (*n*).

SECT. 1. What amounts to Breach of the Contract.

If the employer gives notice to the contractor not to do any more work, that amounts to a total breach, and entitles the contractor to treat the contract as rescinded (*o*); but the notice must be final (*p*).

The contractor has always an option to treat a breach by the employer which goes to the root of the contract, and which would have entitled him to throw up the contract, as a partial breach, and to continue the works to completion, and then seek his remedy in damages in addition to the contract price (*q*).

Rights of contractor.

SUB-SECT. 2.—*By the Contractor.*

498. The entire abandonment of the work by the contractor will justify the employer in treating the contract as having been rescinded by the contractor (*r*). The same considerations apply, in the case of breach of particular stipulations by the contractor, as in the case of similar breach by the employer (*a*). But where the contract provides that the contractor shall observe particular stipulations of the contract, such as a prescribed rate of progress, completion to time etc., under penalty of forfeiture of the contract, the breach of such a stipulation by the contractor may entitle the employer to exercise his powers of forfeiture (*b*).

Breach by contractor.

SECT. 2.—*Damages for Breach of Contract.*

SUB-SECT. 1.—*Damages for Default of the Contractor.*

499. Although the employer has paid the contract price, he may bring an action for damages for the incomplete performance of the contract (*c*), while in case the price under an entire contract has not been paid, the contractor cannot recover it if he has not performed

When right to exists.

(*m*) *Hosking* v. *Pahang Corporation, Ltd.* (1891), 8 T. L. R. 125. See also *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 424, *per* Lord BLACKBURN, at pp. 442, 443; *Rhymney Rail. Co.* v. *Brecon and Merthyr Tydfil Junction Rail. Co.* (1900), 69 L. J. (CH.) 813.

(*n*) *Cornwall* v. *Henson*, [1900] 2 Ch. 298, 303.

(*o*) *Cort* v. *Ambergate etc. Rail. Co.* (1851), 17 Q. B. 127.

(*p*) *Société Générale de Paris* v. *Milders* (1883), 49 L. T. 55; *Bartholomew* v. *Markwick* (1864), 15 C. B. (N. S.) 711; *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co., supra.*

(*q*) *Frost* v. *Knight* (1872), L. R. 7 Exch. 111, *per* COCKBURN, C.J., at p. 112.

(*r*) *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co., supra.*

(*a*) See p. 238, *ante.*

(*b*) See pp. 252 *et seq., post.*

(*c*) *Davis* v. *Hedges* (1871), L. R. 6 Q. B. 687.

SECT. 2. Damages for Breach of Contract.

the contract, but will be liable in damages to the employer for the breach (*d*). In estimating such damages, however, the value to the employer of the work done would have to be taken into consideration.

Where the employer has accepted work which has not been performed in strict conformity to the terms of the contract, but has reserved any claim he may have for defective performance (*e*), the employer may be entitled, depending on the terms of the reservation, to a reduction of the price payable to the contractor.

Subject to the Statute of Limitations (*f*), the lapse of time does not absolve the contractor from his liability for defective work, although it may make it more difficult to prove that the work was defective (*g*).

Measure of damages.

500. The measure of damages for failure by the contractor to complete a building or engineering contract will include, first, the difference (if any) between the price of the work as agreed upon in the contract and the cost the employer is actually put to in its completion (*h*), and, secondly, any loss of rent of the building, or any loss of use of the building which may accrue to the employer in consequence of any delay in obtaining the completed building or works through the contractor's breach of contract (*i*). The right to recover the second item of damage is dependent on whether the use for which the building or works were intended was within the contemplation of the parties at the time when the contract was made. In certain cases, the measure of damages may be the loss of interest on the cost of the contract works, and of the land on which they are constructed (*j*).

Special damage.

501. Where the employer intends to use the building for some special purpose which is unknown to the contractor, the employer is entitled to recover as damages for the breach of contract the loss of use of the building for the purpose for which the contractor might

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(*d*) *Waters* v. *Towers* (1853), 8 Exch. 401.

(*e*) As was the case in *Gillespie* v. *Howden* (1885), 22 Sc. L. R. 527.

(*f*) See title LIMITATION OF ACTIONS.

(*g*) *M'Intyre* v. *Gallucher* (1883), 11 R. (Ct. of Sess.) 64.

(*h*) *Thornton* v. *Place* (1832), 1 Moo. & R. 218; *Chapel* v. *Hickes* (1833), 2 Cr. & M. 214; *Portman* v. *Middleton* (1858), 27 L. J. (C. P.) 231; *Elbinger Actien Gesellschaft* v. *Armstrong* (1874), L. R. 9 Q. B. 473; *Welch, Perrin & Co.* v. *Anderson & Co.* (1891), 61 L. J. (Q. B.) 167.

(*i*) *Fletcher* v. *Tayleur* (1855), 25 L. J. (C. P.) 65; *Waters* v. *Towers* (1853), 8 Exch. 401; *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D. 670; *Cory* v. *Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181; *Re Trent and Humber Co., Ex parte Cumbrian Steam Packet Co.* (1868), 4 Ch. App. 112; *Gillespie* v. *Howden, supra*; *Marshall* v. *Macintosh* (1898), 78 L. T. 750.

(*j*) *Shepherd* v. *Pybus* (1842), 3 Man. & G. 868; *Wilson* v. *General Iron Screw Colliery Co.* (1877), 47 L. J. (Q. B.) 239, 240. See also cases as to damages for the loss of the use of ships (*The Greta Holme*, [1897] A. C. 596; *The Mediana*, [1900] A. C. 113; *The Marpessa*, [1906] P. 95). Compare *Smith* v. *Johnson* (1899), 15 T. L. R. 179, where the builder used improper mortar, in consequence of which the local authority caused the building to be pulled down, and the building owner recovered both the cost of pulling down and rebuilding and the ground rent for the time occupied in doing so. See, generally, title DAMAGES.

have reasonably supposed it was to be used, if the employer has actually sustained damage to that extent (*k*).

If, by reason of the construction not being such as was stipulated for in the contract, the work is not only useless to the employer, but actually causes damage to him, as by the breaking of a drain defectively constructed by the contractor (*l*), or by the bursting of an engine supplied by the contractor (*m*), a further element of damages is introduced, namely, compensation incurred for injuries occasioned by the accident.

Reduction of price for defective work.

502. It has been held that where defects in the performance of the work contracted for remain undiscovered owing to the negligence and default of persons employed by the employer to supervise the work, the utmost which the employer is entitled to recover is the sum which it would have cost to remedy the defects at the time when they might have been discovered by the exercise of reasonable diligence (*n*).

Non-completion to time.

503. Damages for non-completion to time will include a sum sufficient to compensate the employer for not having the use of the building or works between the expiration of the time limited by the contract (*o*) and the time when the work was completed. No damages can be recovered for the loss of the use of the building for any special purpose unless such purpose can reasonably be supposed to have been in the contemplation of the parties when they entered into the contract (*p*). These sums are recoverable in cases where the contract does not provide for liquidated damages for delay (*q*), or where liquidated damages are provided for, but the stipulation to that effect has ceased to be applicable (*r*).

Mode of claiming relief.

504. In the case of defective work done by the contractor the employer may defend an action for the price on the ground of breach of the contract, and counterclaim for the damages which he has sustained. The reduced value of the work owing to its defective construction may be an element of such damages (*s*), or he may bring an independent action against the contractor (*t*); and the fact that he has not attempted to counterclaim in a previous action by the contractor will not operate to preclude him from bringing the independent action (*u*). Even when the employer has in an action

(*k*) *Cory* v. *Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181.

(*l*) *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640, C. A.

(*m*) *Mackay* v. *Bannister* (1885), 16 Q. B. D. 174, *per* POLLOCK, B., at p. 176.

(*n*) *Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (1868), 4 Ch. App. 112.

(*o*) *Wilson* v. *General Iron Screw Colliery Co.* (1877), 47 L. J. (Q. B.) 239.

(*p*) This is on the analogy of a tenant who covenants to give up in good repair, and does not do so, being obliged to compensate his landlord for the loss of rent during the period occupied in doing the repairs (*Birch* v. *Clifford* (1891), 8 T. L. R. 103).

(*q*) See p. 243, *post*.

(*r*) See p. 244, *post*. In this latter case the loss must be estimated from the date when, considering all the circumstances, the contractor ought to have completed.

(*s*) *Mondel* v. *Steel* (1841), 8 M. & W. 858.

(*t*) Compare *Jones* v. *Bright* (1829), 5 Bing. 533; *Poulton* v. *Lattimore* (1829), 9 B. & C. 259; *Mondel* v. *Steel*, *supra*.

(*u*) *Bigge* v. *Burbidge* (1846), 15 M. & W. 598; *Davis* v. *Hedges* (1871), L. R. 6 Q. B. 687, 690.

SECT. 2. **Damages for Breach of Contract.**

by the contractor obtained a reduction of the price on account of defective work, he may yet bring an action for particular items of damage which could not have been recovered in the former action (*a*).

SUB-SECT. 2.—*Damages for the Default of the Employer.*

When right to damages exists.

505. As before stated (*b*), claims by the contractor on account of defaults by the employer fall into two classes: first, where there is a breach by the employer going to the root of the contract, and the contractor does not proceed with the work; and secondly, where the contractor treats the breach as partial and continues the work.

Breach going to root of contract.

In the first class, if the breach was previous to the commencement of the work, the measure of damages will be the amount of profit the contractor would have made if he had been allowed to do the work (*c*). If, however, the work has been partially performed, the contractor has an option to bring his action either for damages for breach of contract, or for the fair and reasonable value of the work actually executed and of the materials supplied ignoring the contract, or he can sue for both alternatively (*d*).

Partial breach.

In the second class, where the contractor continues the work, the most usual circumstances which give rise to claims are delay in giving the contractor possession of the site or in the supply of drawings, or suspension of the works caused by some act or omission of the employer and a consequent increase of expense in the performance of the works (*e*). Such claims also arise where the contractor becomes liable in damages to a sub-contractor through the default of the employer, in which case, if the existence of the sub-contract is known to the employer, it would seem that the contractor could claim, as an element of damages against the employer, the damages which he has to pay to the sub-contractor (*f*).

Loss of use of plant.

A contractor may also be entitled to damages for the loss of the use of his plant kept idle in consequence of the default of the employer and various other items of damage depending on the circumstances (*g*).

SECT. 3.—*Penalties and Liquidated Damages.*

SUB-SECT. 1.—*In General.*

Penalty clauses.

506. In order to secure the punctual execution of building and engineering contracts it is a common practice to insert stipulations

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(*a*) *Mondel* v. *Steel* (1841), 8 M. & W. 858.

(*b*) See p. 238, *ante*.

(*c*) On the principle involved in *Inchbald* v. *Western Neilgherry Coffee Co.* (1864), 17 C. B. (N. S.) 733. See also *Masterton* v. *Brooklyn Corporation* (1845), 7 Hill (N. Y.) 61, 69.

(*d*) *Lodder* v. *Slowey*, [1904] A. C. 442, 453.

(*e*) *Lawson* v. *Wallasey Local Board* (1883), 48 L. T. 507.

(*f*) See *Sawdon* v. *Andrew* (1874), 30 L. T. 23.

(*g*) On the analogy of cases of the loss of services of a ship, in which the damages recoverable are not restricted to "tangible pecuniary loss," *i.e.*, a definite sum out of pocket owing to the loss of the services. See *The Greta Holme*, [1897] A. C. 596, *per* Lord HERSCHELL, at p. 604; *The Mediana*, [1900] A. C. 13; *The Murpessa*, [1906] P. 95.

therein that, in the event of the works not being completed by a stipulated time, a sum or sums of money shall be payable by the contractor to the employer (*h*). This may be by way either of penalty or of liquidated damages. If the effect is to provide for the payment of a penalty, it binds neither party as to amount; but if the effect is to provide for the payment of liquidated damages, it is binding on both parties because they have themselves assessed the damages for the breach of contract (*i*). The usual stipulation is for a payment of so much per week or per day for delay after the expiration of the period fixed for completion. Where a sum of so much per day is fixed, Sundays and other holidays must be included in the computation, unless the damages are fixed at so much for each "working day" (*k*).

When liquidated damages or penalty.

507. Whether the sum or sums of money payable by the contractor in case of delay are to be treated as liquidated damages or a penalty is a question for the judge, and depends on the intention of the parties, to be ascertained from the terms of the contract (*l*).

The payment of so much per week or per day for delay has in many cases been held to be liquidated damages (*m*), so also has the payment of a single sum for non-completion to time (*n*).

SUB-SECT. 2.—*Release of Liquidated Damages or Penalties in General.*

Necessity for definite date from which damages to run.

508. Where the liquidated damages are stipulated for at so much per day or per week, there must be a definite date from which they are to run. If no such date is fixed by the contract, or if by the operation of intervening circumstances the date fixed by the contract has ceased to be operative, and there is no provision in the contract under which another date can be substituted, all right to recover the sum stipulated for as liquidated damages has been put an end to (*o*), because there is no date from which the penalties can run.

When time fixed in contract is extended.

In many cases the time fixed by the contract ceases to be applicable on account of some act or default of the employer or his architect. A provision, therefore, is generally inserted, in order to avoid such acts or defaults destroying the right to liquidated damages, by which the architect is empowered to grant an extension of time in certain specified events, and the contractor is bound, in case such an extension has been properly granted, to

(*h*) *Legge* v. *Harlock* (1848), 12 Q. B. 1015.
(*i*) See *Lowe* v. *Peers* (1768), 4 Burr. 2225; and title DAMAGES.
(*k*) *Brown* v. *Johnson* (1842), 10 M. & W. 331.
(*l*) See further, title DAMAGES.
(*m*) *Johnston* v. *Robertson* (1861), 23 Dunl. (Ct. of Sess.) 646; *Crux* v. *Aldred* (1866), 14 W. R. 656; *Bonsall* v. *Byrne* (1867), I. R. 1 C. L. 573; *Re Newman, Ex parte Capper* (1876), 4 Ch. D. 724; *Law* v. *Redditch Local Board*, [1892] 1 Q. B. 127, C. A.; *Re White and Arthur* (1901), 17 T. L. R. 461; *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda* (*Don José Ramos*), [1905] A. C. 6.
(*n*) *Law* v. *Redditch Local Board*, *supra*.
(*o*) *Dodd* v. *Churton*, [1897] 1 Q. B. 562.

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complete within the extended time. This has the effect of substituting for the time fixed by the contract a new time from which the liquidated damages are to run.

But such a new time can only be substituted for the original time, under such a power, where the extension is given under the circumstances and in the events expressly stipulated by the contract (*p*). Thus, a power to extend the time in the event only of strikes or other causes beyond the contractor's control would not authorise an extension of time for delay in giving to the contractor possession of the site (*q*). In such a case the contract time would have ceased to be applicable, because of the delay in furnishing the site, and there being no power to fix another date for delay from such a cause, there would be no date for completion or from which the liquidated damages could run.

Waiver of liquidated damages.

Liquidated damages cease to be payable where the employer has waived the right to insist on them, *e.g.*, where he has failed to deduct or retain the liquidated damages in cases where it is imperative on him under the contract to do so (*r*).

SUB-SECT. 3.—*Release by Interference and Prevention.*

Delay caused by employer.

509. There are many ways in which the completion of the works by the contract time may be prevented by the act or default of the employer (*s*), as, for instance, by ordering extras or not providing the site at the proper time, failure to supply drawings etc., or failure to supply any materials which the employer has agreed to supply. Where the effect of extras being ordered by the employer is to delay the contractor, it is clear that, in the absence of special stipulations in the contract, the date fixed for completion is made inapplicable and the contractor relieved from his liability to pay liquidated damages for delay (*t*). The onus lies on the contractor to prove that the delay was in fact caused by some act or omission of the employer (*a*).

The cases relating to release from the obligation to pay liquidated damages for delay in consequence of some delay caused by the employer seem to fall into three classes: (1) where a power to extend the time has been properly exercised; (2) where there was such a power, but it has not been properly exercised; and (3) where there was no such power.

Extension of time.

510. In the first class of cases, the power of extension must have been exercised by the person designated, within the time which the contract either expressly or impliedly limits for that purpose, in the manner and for the events stipulated in the contract.

(*p*) *Wells* v. *Army and Navy Co-operative Society, Ltd.* (1902), 86 L. T. 764.
(*q*) *Ibid.*
(*r*) See *Falkingham* v. *Victoria Railways Commissioner*, [1900] A. C. 452.
(*s*) See p. 238, *ante*.
(*t*) *Westwood* v. *Secretary of State for India in Council* (1863), 7 L. T. 736; *Dodd* v. *Churton*, [1897] 1 Q. B. 562.
(*a*) *Mort's Dock and Engineering Co.* v. *Wadey* (1905), 22 T. L. R. 61.

Apparently the proper time for allowing an extension is when the event happens on which the extension depends. If, for example, extras are ordered which delay the work, an extension of time should be made before the time when the delay is caused thereby. The effect of delay caused by such an order would be to set the time at large, at any rate for the time being, and it might be permanently (*b*). When this delay has once occurred the architect or engineer might, depending on the terms of the contract, have then no power to extend the time so as to reimpose on the contractor the obligation relating to liquidated damages (*c*). It would seem, however, that the extension must in any case be made at a reasonable time before the time limited for completion of the work has expired (unless there is some power in the contract to extend the time after completion), so that the contractor may know the time within which he has to complete and arrange his work accordingly.

If, however, the contractor applies to the architect for an extension of time and obtains it, he may thereby waive any rights to object to the architect's jurisdiction which otherwise he might have (*d*).

Where no extension of time.

511. The other two cases, where there is power to extend, but such power has not been exercised, and where there is no power to extend, may be considered together.

In either of these cases the effect of delay caused by the employer is to set the time at large, and exonerate the builder from liquidated damages for delay (*e*), the general rule of law being that the performance of a condition is excused by obstruction on the part of the obligee (*f*). The onus of proof of such obstruction lies on the obligor (*g*).

Where, however, the contractor has undertaken to do the specified work, together with any extras that may be ordered, within the specified time (*h*), he has by this undertaking expressly deprived himself of the protection of the rule, so far as concerns the ordering of extras.

Effect of arbitration clause.

512. The architect, in the absence of an express stipulation to that effect, is not entitled to decide the question whether delay in

(*b*) *Dodd* v. *Churton*, [1897] 1 Q. B. 562.

(*c*) *Anderson* v. *Tuapeka County Council* (1900), 19 New Zealand L. R. 1, in which case STOUT, C.J., considered the effect of all the English leading cases on the point. See also *Murdoch* v. *Luckie* (1897), 15 New Zealand L. R. 296.

(*d*) *Sattin* v. *Poole* (1901), Hudson on Building Contracts, 3rd ed., Vol. II., p. 337.

(*e*) *Russell* v. *Sa da Bandeira* (*Viscount*) (1862), 13 C. B. (N. S.) 149; *Westwood* v. *Secretary of State for India in Council* (1863), 7 L. T. 736; *Dodd* v. *Churton*, *supra*.

(*f*) Com. Dig. tit. Condition, L. (6); *Holme* v. *Guppy* (1838), 3 M. & W. 387; *Thornhill* v. *Neats* (1860), 2 L. T. 539; *Courtney* v. *Waterford and Central Ireland Rail. Co.* (1878), 4 L. R. Ir. 11; *Dodd* v. *Churton*, *supra*. See also *Mackay* v. *Dick* (1881), 6 App. Cas. 251.

(*g*) *Steel* v. *Bell* (1900), 3 F. (Ct. of Sess.) 319; *Mort's Dock and Engineering Co.* v. *Wadey* (1905), 22 T. L. R. 61.

(*h*) *Jones* v. *St. John's College, Oxford* (1870), L. R. 6 Q. B. 115; *Tew* v. *Newbold-on-Avon United District School Board* (1884), 1 Cab. & El. 260.

SECT. 8. Penalties and Liquidated Damages.

the carrying out of the works has been caused by his own obstruction or that of the employer (i).

SUB-SECT. 4.—*Release by Failure to deduct the Liquidated Damages.*

Mode of obtaining liquidated damages.

513. Different building or engineering contracts vary in the manner in which they provide that the employer shall obtain payment of the liquidated damages for delay.

Deduction from payments due.

Where it is merely provided that the employer shall be entitled to deduct or retain such liquidated damages as and when they become due from any payments to be made to the contractor, without any independent covenant on the part of the contractor to pay the liquidated damages, the employer will lose his right to claim the liquidated damages which have already accrued if he does not so deduct them (*k*). Where, however, the contract contains an independent covenant by the contractor to pay the damages, coupled with a right for the employer to deduct or retain them from payments to be made by him, the employer has a double remedy, and though he may have lost the right of deduction, he may still recover the liquidated damages against the contractor (*a*).

SUB-SECT. 5.—*Release by Forfeiture.*

Effect of forfeiture of contract.

514. If the employer exercises his power to forfeit the contract, then, unless there is a provision that in that event the liquidated damages are still to run till the date of actual completion, he cannot claim liquidated damages after the date of forfeiture (*b*).

If the determination of the contract by the employer with the work is wrongful, the remedy of the contractor is the same as in other cases of breach of contract (*c*).

Where, however, the contract, in the case of forfeiture by the employer, either expressly fixes or provides means to ascertain a date up to which the liquidated damages are to run, or declares that forfeiture is not to affect in any other respect the liabilities of the contractor, the employer may be entitled to liquidated damages up to the time of actual completion (*d*).

Position of the parties.

515. Where the liability of the builder to pay liquidated damages for delay has ceased by reason of a forfeiture, the remedy of the employer may be either expressly provided for by the terms of the

(*i*) *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310; *Lawson* v. *Wallasey Local Board* (1883), 48 L. T. 507; *Wells* v. *Army and Navy Co-operative Society, Ltd.* (1902), 86 L. T. 764.

(*k*) *Macintosh* v. *Great Western Rail. Co.* (1865), 11 Jur. (N. S.) 681; *Laidlaw* v. *Hastings Pier Co.* (1874), Jenkins and Raymond, Architect's Legal Handbook, 4th ed., p. 238.

(*a*) *Fletcher* v. *Dyche* (1787), 2 Term Rep. 32; *Duckworth* v. *Alison* (1836), 1 M. & W. 412; *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda* (*Don José Ramos*), [1905] A. C. 6.

(*b*) See *Re Newman, Ex parte Capper* (1876), 4 Ch. D. 724, reversed in Court of Appeal on other grounds, 46 L. J. (BCY.) 56.

(*c*) See p. 245, *ante*; *Felton* v. *Wharrie* (1906), Hudson on Building Contracts, 3rd ed., Vol. II., p. 455.

(*d*) *Re Yeadon Waterworks Co. and Binns* (1895), 72 L. T. 538; *Simpson* v. *Trim Town Commissioners* (1898), 32 I. L. T. 129.

forfeiture clause, or, in the absence of any such provision, may lie in an action for unliquidated damages for breach of the contract (*e*).

Where the employer is entitled to deduct the liquidated damages already accrued from the payments on account, and has done so before forfeiture or abandonment, it would seem that the contractor may have to bear the loss of the liquidated damages so far as they have actually been deducted (*f*).

SUB-SECT. 6.—*Release by Waiver.*

Waiver.

516. The employer can always expressly waive the right to liquidated damages by a new agreement, or, except in the case of a corporation which can only contract under seal (*g*), can do so by implication. The question of what amounts to waiver is governed by similar considerations as in the case of waiver of the right to forfeit the contract (*h*).

By architect's final certificate.

Where the architect has a general power to extend the time for all causes, and to take any liquidated damages due from the builder into account in certifying for the final balance, the right to liquidated damages will be lost if the architect certifies for the final balance without taking the liquidated damages into account (*i*). In such a case it will be presumed that he has extended the time for completion, unless it is proved or admitted that the matter has not been determined by him, or was not expressly or impliedly within his jurisdiction (*j*).

In the case of a shipbuilding contract, where there is delay in delivery, an employer who is not ready and willing to accept the ship before the contractor is ready and willing to deliver her is not entitled to deduct liquidated damages for delay (*k*).

SUB-SECT. 7.—*Recovery of Liquidated Damages.*

Mode of recovery

517. As before stated (*l*), the provisions as to the mode of recovery of liquidated damages vary in different contracts. Where they are only allowed to be deducted, no other mode of recovery is possible. Where there is an independent covenant on the part of the contractor to pay them, they can be counterclaimed in an action by the contractor for the price, or they may be made the subject of a separate action, apparently even when there was a previous opportunity of raising the question by a counterclaim, as in the case of a claim for defective work (*m*).

(*e*) See p. 249, *post*.

(*f*) *Felton* v. *Wharrie* (1906), Hudson on Building Contracts, 3rd ed., Vol. II., p. 455, *per* Lord ALVERSTONE, C.J., at p. 458.

(*g*) See *Kirk* v. *Bromley Union* (1848), 2 Phil. 640.

(*h*) See p. 259, *post*.

(*i*) *Arnold* v. *Walker* (1859), 1 F. & F. 671; *Laidlaw* v. *Hastings Pier Co.* (1874), Jenkins and Raymond, Architect's Legal Handbook, 4th ed., p. 238.

(*j*) *Jones* v. *St. John's College, Oxford* (1870), L. R. 6 Q. B. 115; *British Thomson Houston Co.* v. *West Brothers* (1903), 19 T. L. R. 493.

(*k*) *Forrest & Son, Ltd.* v. *Aramayo* (1900), 83 L. T. 335.

(*l*) See p. 246, *ante*.

(*m*) *Davis* v. *Hedges* (1871), L. R. 6 Q. B. 687. See also cases cited in note (*a*), p. 246, *ante*.

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In the absence of express provision, a certificate from the architect to the effect that liquidated damages have accrued is not a condition precedent to the right to deduct, set off, or sue for them (*u*).

The condition that the sums payable shall be "as and for liquidated damages" is generally in favour of the contractor (*o*).

SUB-SECT. 8.—*Recovery of Unliquidated Damages when Right to Liquidated Damages has gone.*

Right to unliquidated damages.

518. Where the time fixed by the contract has ceased to be applicable in consequence of some delay by the employer, and consequently his right to liquidated damages has gone, he can have no claim for unliquidated damages provided the builder completes within a reasonable time (*p*). If in such a case the builder should not complete within a reasonable time, the question arises whether the employer is entitled to unliquidated damages, and if so, what the measure of those damages is.

This question does not appear to have ever been decided. It is suggested, however, that where the employer is the cause of the delay he could not recover more than the rate per day or per week, as the case may be, of the liquidated damages stipulated for by the contract (*q*).

SECT. 4.—*Specific Performance.*

Specific performance when injunction granted.

519. The courts will not grant specific performance of an ordinary building or engineering contract (*r*), although in the case of a building agreement where the consideration is the grant of a lease (*s*) such relief can be given (*t*).

A contractor, however, may in certain circumstances obtain an injunction to prevent the employer from expelling him from the works pending arbitration under the contract (*u*).

(*n*) See *Carter* v. *Laudry* (1880), 3 Pugsley and Burbridge, New Brunswick, 516.

(*o*) *Re Garrud, Ex parte Newitt* (1881), 16 Ch. D. 522, *per* BRETT, J., at p. 529: "The words 'as and for liquidated damages' are inserted in favour of the builder. If they were not there, the landowner could also bring an action for damages for the breach of the agreement."

(*p*) *Tyers* v. *Rosedale and Ferryhill Iron Co.* (1875), L. R. 10 Exch. 195; and compare *Ford* v. *Cotesworth* (1870), L. R. 5 Q. B. 544.

(*q*) The employer having by the contract estimated the amount of injury delay would cause him, it would seem inequitable, when by the fault of the employer the provision as to liquidated damages has ceased to be applicable, that the contractor should be liable to pay a greater sum per day for delay.

(*r*) *Lucas* v. *Commerford* (1790), 3 Bro. C. C. 166; *Moseley* v. *Virgin* (1796), 3 Ves. 184; *South Wales Rail. Co.* v. *Wythes* (1854), 1 K. & J. 186; *Greenhill* v. *Isle of Wight (Newport Junction) Rail. Co.* (1871), 23 L. T. 885; *Merchants' Trading Co.* v. *Banner* (1871), L. R. 12 Eq. 18; *Wood* v. *Silcock* (1884), 50 L. T. 251.

(*s*) See p. 159, *ante*.

(*t*) *Olley* v. *Fisher* (1886), 34 Ch. D. 367; *Lowther* v. *Heaver* (1889), 41 Ch. D. 248. See also *Cubitt* v. *Smith* (1864), 11 L. T. 298; *Hepburn* v. *Leather* (1884), 50 L. T. 660; *Wolverhampton Corporation* v. *Emmons*, [1901] 1 K. B. 515; *Molyneux* v. *Richard*, [1906] 1 Ch. 34.

(*u*) *Garrett* v. *Salisbury and Dorset Junction Rail. Co.* (1866), L. R. 2 Eq. 358; *Fowler and Dickson* v. *Hastings Corporation* (1903), 87 L. T. 736. As to the circumstances in which such relief will not be given see *Jennings* v. *Brighton*

SECT. 3. Penalties and Liquidated Damages.

On the other hand, where railway and other companies have agreed to execute accommodation works under or in consideration of the passing of their Acts, they may be ordered specifically to perform their agreements (*w*), unless the court is of opinion that justice between the parties can be better done by an inquiry as to damages than by a decree for specific performance (*x*).

Part XII.—Forfeiture.

SECT. 1.—*In General.*

Forfeiture clauses.

520. In building and engineering contracts it is usual to insert a provision empowering the employer to forfeit certain rights or property of the contractor on the occurrence of certain events. Thus the employer may be empowered to take possession of the work so far as it has been performed, and to complete the work either by himself or by employing some other contractor. The employer may also be empowered to take possession of or retain property of the contractor, such as materials, plant, or money already due to the contractor.

A power to determine the contract must be exercised in an unqualified manner, and by some act evincing the intention to do so (*y*). On the other hand, no writing or any particular formality is necessary, if not provided for in the contract, so long as there is sufficient to show that the power has actually been exercised (*a*).

SECT. 2.—*Wrongful Forfeiture.*

Effect of wrongful forfeiture.

521. If the employer purports to determine the contract or to take possession of the property of the contractor when the contract does not empower him to do so (*b*), or if he exceeds his power under a forfeiture clause either by exercising the power when the event on which it is conditioned has not in fact happened, or, if it has happened, the event has been caused by the acts or defaults of the employer himself or his agents (*c*), or where the stipulated notice

Intercepting and Outfall Sewers Board (1872), 4 De G. J. & S. 735, n.; *Munro* v. *Wivenhoe and Brightlingsea Rail. Co.* (1865), 4 De G. J. & S. 723; and generally, title SPECIFIC PERFORMANCE.

(*w*) See *Fortescue* v. *Lostwithiel and Fowey Rail. Co.*, [1894] 3 Ch. 621; and title COMPULSORY PURCHASE AND COMPENSATION.

(*x*) *Wilson* v. *Northampton and Banbury Junction Rail. Co.* (1874), 9 Ch. App. 279, 285.

(*y*) As in the case of a licence to mine (*Roberts* v. *Davey* (1833), 4 B. & Ad. 464). Merely sending an agent to "keep an eye" on the operations of the builder, and to prevent him from removing materials contrary to the contract, does not amount to an election to forfeit (*Marsden* v. *Sambell* (1880), 43 L. T. 120). See also *Drew* v. *Josolyne* (1887), 18 Q. B. D. 590.

(*a*) *Drew* v. *Josolyne*, *supra*, *per* BOWEN, L.J., at p. 597.

(*b*) *Felton* v. *Wharrie* (1906), Hudson on Building Contracts, 3rd ed., Vol. II., p. 455.

(*c*) *Lodder* v. *Slowey*, [1904] A. C. 442.

SECT. 2. **Wrongful Forfeiture.**

(if any) is not given before the forfeiture, or where the forfeiture is by the architect without proper authority (*d*), the action of the employer, if followed by ousting the contractor from the works, will be a breach going to the root of the contract, and the remedy of the contractor is as in other cases of such a breach of contract (*e*). In such a case the contractor has an option to bring an action for the actual value of the work and labour done and materials supplied, or for damages (*f*).

Certificate of architect.

If the right to forfeit depends on a certificate by the architect, which by the terms of the contract is final and conclusive, and that certificate is given under a mistaken view of the circumstances, but honestly and in good faith, the forfeiture is not wrongful on that account (*g*). If, however, the architect gives such a certificate fraudulently, and the employer, either with or without knowledge of the fraud, purports to exercise the right to forfeit, the forfeiture is wrongful (*h*).

Remedies of the parties.

522. As a general rule, the court will not restrain the employer from even wrongfully exercising the power of forfeiture, as the contractor can be compensated in damages for any loss he may sustain by reason of the forfeiture. The court will not force the employer to employ a person to perform the works to whom he reasonably or unreasonably objects (*i*). Such a relief would be analogous to specific performance (*j*). In an exceptional case where there was an arbitration clause by which the validity of the determination of the engineer, on which the right to forfeit was based, might be questioned, an interim injunction pending the arbitration was granted (*k*).

The employer, however, on proper grounds, and on giving the usual undertaking in damages, may obtain an injunction restraining the contractor from proceeding with the works (*l*).

In case the employer has wrongfully exercised his power of forfeiture, there may be an inquiry as to what sums have been properly expended by the employer in completing the work since he took possession for the purpose of ascertaining the damages incurred by the contractor (*m*).

(*d*) *Garrett* v. *Salisbury and Dorset Junction Rail. Co.* (1866), L. R. 2 Eq. 358; *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310.

(*e*) *Boone* v. *Hackney Public Baths Commissioners* (1895), *The Builder* (17 December, 1895), p. 426; and see p. 242, *ante*.

(*f*) *Lodder* v. *Slowey*, [1904] A. C. 442.

(*g*) As in the case of other certificates. See *Scott* v. *Liverpool Corporation* (1858), 3 De G. & J. 334; *Clarke* v. *Watson* (1865), 18 C. B. (N. S.) 278.

(*h*) *Smith* v. *Howden Union Rural Sanitary Authority* (1890), Hudson on Building Contracts, 3rd ed., Vol. II., p. 151.

(*i*) *Garrett* v. *Banstead Downs and Epsom Downs Rail. Co.* (1864), 12 L. T. 654, *per* KNIGHT BRUCE, L.J., at p. 654.

(*j*) *Munro* v. *Wivenhoe and Brightlingsea Rail. Co.* (1865), 12 L. T. 655, *per* KNIGHT BRUCE, L.J., at p. 657.

(*k*) *Foster and Dickson* v. *Hastings Corporation* (1903), 87 L. T. 736.

(*l*) *Cork Corporation* v. *Rooney* (1881), 7 L. R. Ir. 191.

(*m*) *Macintosh* v. *Great Western Rail. Co.* (1863), 1 De G. J. & S. 443.

SECT. 3.—*Forfeiture of the Contract.*

SECT. 3. Forfeiture of the Contract.

SUB-SECT. 1.—*In General.*

523. "Forfeiture" is more or less a loose term, but generally it is used as meaning the taking possession of works, which the contractor is carrying out under a contract, and completely ousting him from the site. The clause in the contract which gives this power may give a right to complete the contract at the expense of the contractor and to use, and sometimes use up, his plant and materials. The proper exercise of such a power does not determine the contract; it merely alters the rights of the parties, in an agreed method. The powers of the architect or engineer in such a case may be expressly provided for, or the continuance of his powers may be left indefinite.

Effect of forfeiture on the contract.

If the employer has forfeited the contract, and afterwards enters into a new agreement with the contractor for the latter to complete the work, the special conditions of the former contract as to forfeiture and as to certificates being conditions precedent to payment do not apply unless they are expressly incorporated in the new contract (*n*).

The right of forfeiture may be stipulated to accrue either (1) on the bankruptcy of the contractor only, or (2) on his bankruptcy and also on the occurrence of other events, or (3) on the occurrence of other events only. The validity of a right to forfeit on the bankruptcy of the contractor is dependent on the nature of what is stipulated to be forfeited (*o*).

When right of forfeiture accrues.

In addition to bankruptcy, forfeiture is usually conditioned upon the happening of one or more of the following events: (1) not commencing the work (*p*); (2) not regularly proceeding with the work for some fixed number of days (*q*); (3) not proceeding to the satisfaction of the employer, or of the architect (*r*); (4) not proceeding with such despatch as, in the opinion of the architect, will enable the works to be duly completed by the time stipulated (*s*); (5) not continuing with the work (*a*); (6) not proceeding in the manner required by the architect (*b*), or not complying with his orders and directions (*c*); (7) not performing the work as specified (*d*), or not observing some stipulation of the contract (*e*), or

(*n*) *Walker* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 518; *Wood* v. *Tendring Rural Sanitary Authority* (1886), 3 T. L. R. 272.

(*o*) See p. 254, *post*.

(*p*) *Mohan and Holmes* v. *Dundalk, Newry, and Greenore Rail. Co.* (1880), 6 L. R. Ir. 477.

(*q*) *Re Gurrud, Ex parte Newitt* (1881), 16 Ch. D. 522; *Re Walker, Ex parte Barter, Ex parte Black* (1884), 26 Ch. D. 510.

(*r*) *Davies* v. *Swansea Corporation* (1853), 22 L. J. (EX.) 297; *Stadhard* v. *Lee* (1863), 3 B. & S. 364.

(*s*) *Brown* v. *Bateman* (1867), L. R. 2 C. P. 272; *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310; *Arterial Drainage Co.* v. *Rathangan River Drainage Board* (1880), 6 L. R. Ir. 513; *Cork Corporation* v. *Rooney* (1881), 7 L. R. Ir. 191.

(*a*) *Roach* v. *Great Western Rail. Co.* (1841), 10 L. J. (Q. B.) 89.

(*b*) *Walker* v. *London and North Western Rail. Co.*, *supra*.

(*c*) *Hunt* v. *South Eastern Rail. Co.* (1875), 45 L. J. (Q. B.) 87.

(*d*) *Mohan and Holmes* v. *Dundalk, Newry, and Greenore Rail. Co.*, *supra*.

(*e*) *Stevens* v. *Taylor* (1860), 2 F. & F. 419.

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being guilty of any default (*f*); (8) not completing as stipulated (*g*), or by the time agreed (*h*), or not completing under the direction and to the satisfaction of the surveyor (*i*); (9) leaving the works in an unfinished state (*k*); (10) failing, after the proper notice, to rectify defective work (*l*); (11) removing materials from the site (*m*); (12) not maintaining the works (*n*).

SUB-SECT. 2.—*On Bankruptcy of the Contractor.*

Validity of forfeiture on bankruptcy.

524. A provision empowering the employer to forfeit the contract on the bankruptcy of the contractor is introduced into building and engineering contracts for the purpose of preventing the contractor's trustee in bankruptcy from electing to complete the contract (*o*). Such a provision is valid, if it is coupled with a stipulation that the contractor's contract shall be a personal one (*p*), and further, so far as the forfeiture affects the mere licence of the contractor to enter the site, it would seem that the revocation of that licence can be conditioned on bankruptcy (*q*). The trustee, however, would be entitled to enter the site to remove any property of the bankrupt in respect of which the employer had no right under the contract (*r*).

SECT. 4.—*Forfeiture of Property of the Contractor.*

SUB-SECT. 1.—*In General.*

What property liable to forfeiture.

525. The powers of forfeiture of property belonging to the contractor which are conferred on the employer by particular building contracts usually extend to one or more of the following subjects: (1) the property in the materials brought on to the site (or appropriated to the work) which have not yet been physically annexed to the work (*s*); (2) the property in the contractor's plant, such as scaffolding and machinery (*t*); and (3) the property in the money retained by the employer, but due to the contractor for work already done at the time the right of forfeiture is exercised (*u*).

In addition or alternatively to the forfeiture of such property, it

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(*f*) *Garrett* v. *Salisbury and Dorset Junction Rail. Co.* (1866), L. R. 2 Eq. 358.
(*g*) *Baker* v. *Gray* (1856), 25 L. J. (C. P.) 161.
(*h*) *Tooth* v. *Hallett* (1869), 4 Ch. App. 242; *Marsden* v. *Sambell* (1880), 28 W. R. 952.
(*i*) *Hunt* v. *Bishop* (1853), 8 Exch. 675.
(*k*) *Re Garrud, Ex parte Newitt* (1881), 16 Ch. D. 522.
(*l*) *Arterial Drainage Co.* v. *Rathangan River Drainage Board* (1880), 6 L. R. Ir. 513.
(*m*) *Marsden* v. *Sambell, supra.*
(*n*) *Walker* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 518.
(*o*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 162.
(*p*) *Re Walker, Ex parte Gould* (1884), 13 Q. B. D. 454. See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 137, 138, 146 *et seq.*
(*q*) As a mere licence does not seem to be included in the definition of "property" in s. 168 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).
(*r*) As to vesting of materials in the employer, see pp. 260 *et seq.*, *post.*
(*s*) *Tripp* v. *Armitage* (1839), 4 M. & W. 687; *Roach* v. *Great Western Rail. Co.* (1841), 10 L. J. (Q. B.) 89; *Davies* v. *Swansea Corporation* (1853), 22 L. J. (EX.) 297; *Re Garrud, Ex parte Newitt, supra.*
(*t*) *Roach* v. *Great Western Rail. Co., supra.*
(*u*) *Ibid.*; *Davies* v. *Swansea Corporation, supra*; *Mohan and Holmes* v. *Dundalk, Newry, and Greenore Rail. Co.* (1880), 6 L. R. Ir. 477.

is often provided that, on the happening of the event entitling the employer to exercise the right, the employer shall have (1) the right to use or use up the contractor's materials and plant to complete the work (*b*); (2) a right to procure and pay for all labour and materials at the contractor's expense (*c*); (3) the right after completion to sell any surplus material to recoup the employer for any loss he may have sustained (*d*); (4) a right to payment from the contractor for any loss sustained in completing (*e*).

When property does not pass to employer.

526. Where a forfeiture clause only gives the employer a right to seize the materials on the site and use them for the purpose of completing the work, the property in those materials does not pass to the employer until they are actually built into the work (*f*). In the case of plant such a clause does not pass the property at all (*g*), though where the plant has been seized under such a clause the contractor or his trustee in bankruptcy is liable in damages if he removes the plant prior to completion (*h*). The reason of this is that the word "use" has a different meaning as applied to materials, such as bricks and timber, in which case it means to consume by building into the work, and as applied to plant, such as scaffolding, in which case it means to employ without consuming (*i*), except in the case of such plant as becomes part of the structure by being so affixed or covered up that it cannot be removed. Further, in the absence of a valid clause vesting the materials in the employer, a right to a lien on such materials after notice is lost, if before the notice is given on which the right to a lien arises the property liable to forfeiture is seized by the sheriff under an execution against the contractor (*k*).

Contractor's right of removal.

527. Where a contract is forfeited, and the employer has no power to seize or use the materials or plant, the contractor has a reasonable time after the date of forfeiture to enter upon the site to remove his materials or plant, as the case may be, but this is not so if the contractor himself has rescinded the contract, in which case he is not entitled to enter on the premises to remove the plant after the date of the rescission (*l*). This is on the analogy of the case of other licensees, who under revocable licences have a right to notice of revocation, and a reasonable time afterwards to remove their goods (*m*).

(*b*) *Tripp* v. *Armitage* (1839), 4 M. & W. 687; *Baker* v. *Gray* (1856), 25 L. J. (C. P.) 161; *Mohan and Holmes* v. *Dundalk, Newry, and Greenore Rail. Co.* (1880), 6 L. R. Ir. 477.

(*c*) *Stadhard* v. *Lee* (1863), 3 B. & S. 364; *Walker* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 518; *Re Walker, Ex parte Barter, Ex parte Black* (1884), 26 Ch. D. 510.

(*d*) *Garrett* v. *Salisbury and Dorset Junction Rail. Co.* (1866), L. R. 2 Eq. 358.

(*e*) *Mohan and Holmes* v. *Dundalk, Newry, and Greenore Rail. Co., supra; Re Walker, Ex parte Barter, Ex parte Black, supra.*

(*f*) *Baker* v. *Gray, supra.*

(*g*) *Re Winter, Ex parte Bolland* (1878), 8 Ch. D. 225.

(*h*) *Hawthorn* v. *Newcastle-upon-Tyne and North Shields Rail. Co.* (1842), 3 Q. B. 734, n.; *Re Winter, Ex parte Bolland, supra.*

(*i*) See *Poulton* v. *Wilson* (1858), 3 F. & F. 403.

(*k*) *Byford* v. *Russell*, [1907] 2 K. B. 522.

(*l*) *Marsden* v. *Sambell* (1880), 28 W. R. 952.

(*m*) *Mellor* v. *Watkins* (1874), L. R. 9 Q. B. 400.

Forfeiture of Property of the Contractor.

528. A provision in a building or engineering contract providing that any property of the contractor shall be forfeited to the employer in the event of the contractor's bankruptcy is void as against the trustee in bankruptcy so far as it purports to transfer to the employer property not already vested in him (*n*). Apparently, however, such a provision is good as between the contractor and the employer (*o*).

Effect on forfeiture of property.

If, however, the property in that which is described as being subject to forfeiture on bankruptcy is previously to the bankruptcy vested in the employer (*p*), or if he has had from the beginning of the contract a lien on this property (*q*), a power to seize such property is valid, subject, however, in the case of property vested in the employer to the doctrine of reputed ownership (*r*).

Reputed ownership.

529. In the case of building contracts it is a question of fact how far materials and plant vested in the employer are in the reputed ownership of the contractor. Apparently, however, the contractor would be held to be the reputed owner of plant in the absence of notice, as, for instance, by the plant being marked with the employer's name (*s*) or some other person's, or of a generally known custom to hire plant. As regards materials the decided cases seem to be inconsistent. In the case of contracts to build ships, the custom of shipbuilders building ships in their yards for other persons is so well known that the materials will not be held to be in the reputed ownership of the contractor (*a*); while in the case of building contracts it depends upon circumstances whether the materials are so far in the order and disposition of the contractor as to constitute him the reputed owner thereof (*b*).

When other events included.

530. If a forfeiture is conditioned to occur on bankruptcy or on other events and is exercised by reason of the bankruptcy of the contractor, the same considerations apply as in the case of forfeiture on bankruptcy alone, while if the forfeiture is exercised by reason of the happening of the other events, the additional power to forfeit in the case of bankruptcy is immaterial. For the trustee in bankruptcy, if he elects to carry on the contract, is in the same position as the

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(*n*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 152, and see also *Higginbotham* v. *Holme* (1811), 19 Ves. 88, 92; *Re Jeavons, Ex parte Mackay, Ex parte Brown* (1873), 8 Ch. App. 643; *Re Harrison, Ex parte Jay* (1880), 14 Ch. D. 19.

(*o*) *Re Harrison, Ex parte Jay, supra, per* COTTON, L.J., at p. 26: "Though the contract is good as between the parties to it, it is on principle void in the event of the builder's bankruptcy."

(*p*) *Hart* v. *Penthgain Harbour Co., Ltd.*, [1903] 1 Ch. 690. See, as to the vesting of materials etc., pp. 260 *et seq.*, *post*.

(*q*) See, as to lien, p. 265, *post*.

(*r*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 173—181. Sometimes valuable materials are marked with the employer's name.

(*s*) *Woods* v. *Russell* (1822), 5 B. & Ald. 942; *Clarke* v. *Spence* (1836), 4 Ad. & El. 448, 472; *Holderness* v. *Rankin* (1860), 28 Beav. 180; *Swainston* v. *Clay* (1863), 4 Giff. 187; *Re Attwater, Ex parte Watts* (1863), 32 L. J. (BCY.) 35.

(*b*) *Re Weilking, Ex parte Ward*, [1902] 1 K. B. 713. See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 177.

contractor, and is as much bound as the contractor was by the stipulations of the contract, and the employer is entitled to exercise the power of forfeiture as against the trustee for any act or default which would have given him a right to forfeit as against the contractor (*c*).

SUB-SECT. 3.—*Forfeiture on Events other than Bankruptcy.*

Passing of the property.

531. Where the right to forfeiture accrues on the happening of some event other than bankruptcy, and the employer properly exercises his right (*d*), the property in the thing to be forfeited passes to him, subject to the terms of the contract.

Absolute and qualified forfeiture.

532. A forfeiture of the contractor's property may be stipulated to be either an absolute transfer or a qualified one. That is to say, either it may be provided in the contract that property which belonged to the contractor before the forfeiture is to become the property of the employer, or it may be provided that the property of the contractor should be used, used up, or retained, as the case may be, for the purpose of completing the contract. In the first case the effect of such a clause, although expressed to be by way of liquidated damages, may amount to a penalty; but in the latter case, as the employer is only entitled to use, use up, or retain so much as is necessary to complete the work, the provision is not open to the objection of being a penalty (*e*). Generally such a power of forfeiture would be construed as a provision intended to operate by way of lien or security for the completion of the contract, that is to say, as a qualified forfeiture (*f*).

There is a great difference between the payment of a sum of money for delay, which increases proportionately to the delay, and the loss of materials and plant, which would bear no fixed proportion at any time to the loss incurred by the employer, or the loss of the retention money, the amount of which would be increasing, while the damage sustained by the employer would probably be decreasing.

533. Where a right to forfeit retention money exists, the employer has, it would seem, no right to forfeit instalments duly certified for, but not yet actually paid. He can only forfeit the retention money at the date of such certificate, and in addition any money in process of accruing due for work done after such certificate was given (*g*).

(*c*) See *Tooth* v. *Hallett* (1869), 4 Ch. App. 242. See title BANKRUPTCY AND INSOLVENCY, Vol. 11., pp. 162, 163.

(*d*) See p. 256, *post*.

(*e*) See p. 243, *ante*.

(*f*) *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72, *per* Lord CRANWORTH, L.C., at pp. 108, 109: "The object of these clauses was to enable the respondents to do, at the cost of the appellant, the work which he had failed, or seemed like to fail, in doing himself. . . . In such a case, if the property seized is made available as a fund for indemnifying the respondents, all the ends of the clauses in question are fully answered."

(*g*) Compare *Ricker* v. *Fairbanks* (1855), 40 Maine State Rep. 43; *Geiger* v. *Western Maryland Railroad* (1874), 41 Maryland State Rep. 4.

SECT. 5. **Mode and Time of exercising the Right to forfeit.**

SECT. 5.—*Mode and Time of exercising the Right to forfeit.*

SUB-SECT. 1.—*How the Right to forfeit is to be exercised.*

Method of ascertaining whether right of forfeiture exists.

534. The mode of ascertaining the event on which the right to forfeit is stipulated to accrue is usually provided for by the terms of the contract. If, however, the mode of ascertainment is not provided for, the mode of ascertainment will be by arbitration (*h*), if there is an arbitration clause wide enough to cover such a dispute, and in the absence of such a clause, by the jury (*i*).

By architect etc.

Where the ascertainment of the event is left to the final decision of a third person, as the architect or engineer, the decision of that third person cannot be impeached, except on the ground of its being *ultra vires* or fraudulent (*j*). The appointment of the architect or engineer, or other designated third person, in such a case is a condition precedent to the right to forfeit (*k*).

By employer.

Where the ascertainment of the event is left to the employer himself, the rule is that the employer must act reasonably. The question of reasonableness must to a great extent depend upon the particular circumstances of the case (*l*), and these may be such as to give the employer power to put into force the forfeiture in a manner which, except for the particular circumstances, would be unreasonable (*m*).

The power to forfeit, whether given to the employer or to the architect or engineer, will be strictly construed. For instance, a power given to the architect to decide whether the contractor is exercising due diligence, and making such due progress as would enable the works to be effectually completed by the stipulated time, will not give him power to determine whether or not the employer has by his own wrongful act prevented the contractor from proceeding with the work (*n*).

SUB-SECT. 2.—*Time for exercising the Right to forfeit.*

Forfeiture within reasonable time.

535. The forfeiture must be put in force within a reasonable time after the occurrence of the act or default of the builder on which the right arises, otherwise the delay in forfeiting will amount

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(*h*) *Garrett* v. *Salisbury and Dorset Junction Rail. Co.* (1866), L. R. 2 Eq. 358.

(*i*) *Northampton Gas Light Co.* v. *Parnell* (1855), 15 C. B. 630; *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310.

(*j*) See *Scott* v. *Liverpool Corporation* (1858), 3 De G. & J. 334; *Pawley* v. *Turnbull* (1861), 3 Giff. 70; *Roberts* v. *Bury Commissioners, supra;* and see p. 215, *ante*, as to certificates.

(*k*) *Hunt* v. *Bishop* (1853), 8 Exch. 675.

(*l*) See *Dickinson* v. *Richmond Main Sewerage Board* (1893), Hudson on Building Contracts, 3rd ed., Vol. II., p. 254.

(*m*) *Stadhard* v. *Lee* (1863), 32 L. J. (Q. B.) 75, *per* COCKBURN, C.J., at p. 78. Thus, contractors who are themselves under obligations to complete in time may be entitled to stipulate for forfeiture of a sub-contractor's contract when in their opinion the sub-contractor is not making satisfactory progress with the work, and in such a case the sub-contractor could not set up that the forfeiture was unreasonable or capricious.

(*n*) *Roberts* v. *Bury Commissioners, supra.* See also *Tough* v. *Dumbarton Waterworks Commissioners* (1872), 11 Macph. (Ct. of Sess.) 236.

to a waiver of the right, except where there is a continuing breach or a fresh breach of contract on the part of the contractor (*o*).

SECT. 5. Mode and Time of exercising the Right to forfeit.

A right to forfeit on the happening of an event, coupled with a provision that the amount already paid to the contractor should be considered to be the full value of the work already done, can be exercised even though nothing had been paid to the contractor before the forfeiture (*p*), in which case the contractor would receive nothing for such part of the work as he might have done.

536. Where the event on which the right to forfeit arises is delay in making such progress as will enable the work to be completed by the stipulated time, or is non-completion by the stipulated time, the right to forfeit depends upon the stipulated time being still applicable (*q*). If that time has ceased to be applicable, no time is in existence with reference to which the rate of progress can be computed, or on the expiration of which the work should be completed (*r*). Forfeiture for delay.

Again, in the case of want of due progress, the forfeiture must take place before the expiration of the stipulated time (*a*), or in the case of non-completion to time immediately after the time expires (*b*).

If the contract contains a provision for extending the time for completion, and substitutes the extended time for the stipulated time, and such an extension is properly made, the extended time will, as regards forfeiture, take the place of the stipulated time (*c*).

537. The failure to complete by the time stipulated is not a continuing breach (*d*). Premature forfeiture.

If the employer has wrongfully forfeited on account of a breach which has not in fact occurred, he cannot justify the wrongful forfeiture on account of a different breach subsequently occurring (*e*).

Under a clause giving the right to forfeit in the event of the contractor ceasing to work for so many days after notice, the employer has no right to enter on the works before the expiration of those days, as the contractor would thereby be prevented from resuming work before the expiration of the period during which the contract leaves it open to him to do so (*f*). It depends on the

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(*o*) *Marsden* v. *Sambell* (1880), 28 W. R. 952.

(*p*) *Davies* v. *Swansea Corporation* (1853), 22 L. J. (EX.) 297.

(*q*) See pp. 243, 244, *ante*.

(*r*) *Walker* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 518.

(*a*) *Ibid.*, *per* ARCHIBALD, J., at p. 531: "The clause . . . can only be acted on and enforced within the time fixed for the completion of the works, for time is clearly of the essence of the contract, and it is only by reference to the time so agreed that the rate of progress can be determined"; *Molar and Holmes* v. *Dundalk, Newry, and Greenore Rail. Co.* (1880), 6 L. R. Ir. 477.

(*b*) As allowing the contractor to proceed with the work would be a waiver of the stipulation (*Re Garrud, Ex parte Newitt* (1881), 16 Ch. D. 522).

(*c*) *Barclay* v. *Messenger* (1874), 43 L. J. (CH.) 449.

(*d*) *Platt* v. *Parker* (1886), 2 T. L. R. 786.

(*e*) *Re Harrison, Ex parte Jay* (1880), 14 Ch. D. 19; *Re Walker, Ex parte Barter, Ex parte Black* (1884), 26 Ch. D. 510.

(*f*) *Re Walker, Ex parte Barter, Ex parte Black, supra, per* FRY, L.J., at p. 520.

SECT. 5. Mode and Time of exercising the Right to forfeit.

terms of the contract and on the circumstances of the case whether the notice of intention to forfeit must particularise what is required to be done by the contractor, or whether a general notice is sufficient (*g*).

When right to forfeit implied.

538. If the contract does not contain an express right to forfeit, and time is made and still is of the essence of the contract, the employer may, if the builder or contractor does not complete to time, rescind the contract and take possession (*h*).

SECT. 6.—*Waiver of Right to forfeit.*

Effect of waiver.

539. When the time for exercising the right of forfeiture has elapsed without the right having been exercised, the employer will be treated as having waived his right (*i*). When waiver has once taken place the employer cannot go back on it and revive the right to forfeit (*k*).

If the breach is a continuing breach, payment after the breach does not amount to waiver (*l*). If after waiver another breach occurs, a new right of forfeiture arises, which can be exercised notwithstanding the previous waiver (*m*).

Where there has been a waiver of the right to forfeit and the employer ousts the contractor in purported pursuance of the power to forfeit, that will amount to wrongful forfeiture (*n*).

SECT. 7.—*Position of the Employer if he completes after Forfeiture.*

How far employer must account to contractor.

540. Unless there is some provision in the contract, not operating as a penalty, which effectually dispenses with the employer's obligation to account, an employer, entering and completing the work with the plant and materials of the contractor under a forfeiture clause, must account to the contractor for the plant and materials as well as the retention money (*o*). The employer, however, is not in the position of a mortgagee in possession, but will be allowed a larger discretion as to how he completes, so long as he does so

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(*g*) *Pauling* v. *Dover Corporation* (1855), 24 L. J. (EX.) 128, *per* PARKE, B., at p. 129: "If the engineer had desired the plaintiff to do some particular act . . . he ought to give him a notice to that effect, specifying to what extent he wished to have the work pulled down; but here the engineer's objection is, that the work is generally performed negligently; and that being so, the engineer is entitled to give a general notice."

(*h*) *Cork Corporation* v. *Rooney* (1881), 7 L. R. Ir. 191. See p. 190, *ante*.

(*i*) *Walker* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 518; *Re Garrud, Ex parte Newitt* (1881), 16 Ch. D. 522; and see *Davenport* v. *R.* (1877), 3 App. Cas. 115; *Strong* v. *Stringer* (1889), 61 L. T. 470, which were cases of the forfeiture of a lease.

(*k*) *Marsden* v. *Sambell* (1880), 43 L. T. 120.

(*l*) *Cooper* v. *Uttoxeter Local Board* (1865), 11 L. T. 596.

(*m*) *Stevens* v. *Taylor* (1860), 2 F. & F. 419; *Re Garrud, Ex parte Newitt, supra*.

(*n*) *Marsden* v. *Sambell, supra*.

(*o*) *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72.

in accordance with the contract, specification, and plans (*p*). The employer is not entitled to substitute different materials in the place of those specified at the expense of the contractor (*q*).

SECT. 7. Position of Employer if he completes after Forfeiture.

SECT. 8.—*How far Forfeiture Clause is a Bill of Sale.*

When registration unnecessary.

541. A forfeiture and user clause in an ordinary building contract constitutes "a licence to take possession of personal chattels" within the meaning of the statutory definition of a bill of sale (*r*), but the builder's liability not being a debt (*s*), it is not a licence to take possession of personal chattels as security for a debt (*a*), and consequently the contract does not require to be registered as a bill of sale (*b*).

Forfeiture is in most cases intended to be by way of security for the due performance of the contract (*c*). The presence of a clause vesting the property in the materials in the employer, coupled with a forfeiture clause, will in any case prevent the contract requiring registration as a bill of sale as a "security for any debt" under the Bills of Sale Act, 1878 (*d*).

Where the land on which the building is being carried on is mortgaged, the mortgagee's right to enter upon and take possession of the premises does not require to be registered as a bill of sale (*e*). If the mortgage confers on the mortgagee as against the mortgagor a power to sell the materials, independent of the power to enter upon and take possession of the premises, which can be exercised without the latter power being exercised, the mortgage requires to be registered as a bill of sale (*f*).

Assignment.

An assignment of a building agreement, *i.e.*, an agreement in which the consideration is the grant of a lease so far as it assigns the plant and materials, requires registration as a bill of sale (*g*).

(*p*) *Fulton* v. *Dornwell* (1885), 4 New Zealand L. R. (S. C.) 207.

(*q*) "He may not be bound to finish it in the cheapest way possible" (*ibid.*), "but he must act reasonably" (*Dillon* v. *Jack* (1903), 23 New Zealand L. R. 547, *per* STOUT, C.J., at p. 549).

(*r*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4; and see title BILLS OF SALE, p. 6, *ante*.

(*s*) See Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4; *Re Garrud, Ex parte Newitt* (1881), 16 Ch. D. 522, *per* COTTON, L.J., at p. 533: "Damages may be proved in bankruptcy as a debt, but that does not make them a debt for the purposes of another Act of Parliament. In my opinion there was no debt in the present case for which the possession was to be a security."

(*a*) *Reeves* v. *Barlow* (1884), 12 Q. B. D. 436, C. A., following *Brown* v. *Bateman* (1867), L. R. 2 C. P. 272; and *Blake* v. *Izard* (1867), 16 W. R. 108. See title BILLS OF SALE, p. 12, *ante*.

(*b*) See Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.

(*c*) *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72.

(*d*) 41 & 42 Vict. c. 31, s. 4; see p. 264, *post*.

(*e*) *Re Yates* (1888), 38 Ch. D. 112.

(*f*) *Climpson* v. *Coles* (1889), 23 Q. B. D. 465. See title BILLS OF SALE, p. 12, *ante*.

(*g*) *Church* v. *Sage* (1892), 67 L. T. 800.

Part XIII.—Materials.

SECT. 1.

SECT. 1.—*Vesting of Property in Materials etc.*

Vesting of Property in Materials etc.

SUB-SECT. 1.—*By affixing Materials etc. to the Freehold.*

Vesting of materials when built into the work.

542. As soon as materials of any description are built into a building or other erection they cease to be the contractor's property and become that of the freeholder (*h*), and where the employer has only an interest less than a freehold, he has the same interest in the built-in materials as he has in the land. Even if the employer detach them from the soil, the property does not revert to the contractor, and he acquires no right to remove them (*i*). Until, however, the materials are actually built into the work, in the absence of some stipulation intended to pass the property in them when delivered on the site, they remain the property of the contractor (*k*).

In the case of shipbuilding contracts the same rules apply where the ship is the property of the employer (*l*), and things which once have been fitted to and have formed part of the ship remain the property of the employer, although they may have been removed again for convenience (*m*). But under a contract to build a ship, without any special stipulations, no property in it passes to the employer until the ship is completed in the absence of a contract that it shall do so (*n*).

Materials to be paid for on delivery etc.

543. Where it is agreed that the materials shall be paid for, in whole or in part, on their being delivered and on this being certified by the architect or engineer, the property in them will pass to the employer as soon as they have been paid for, or as soon as the condition as to delivery and the certificate of the architect has been fulfilled, whether they have actually been paid for or not (*o*).

Vesting of plant etc.

544. In the course of building and engineering operations, in which it is necessary to use plant which is more or less affixed to the

(*h*) *Elwes* v. *Maw* (1802), 3 East, 38; *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651; *Wake* v. *Hall* (1883), 8 App. Cas. 195; *Sims* v. *London Necropolis Co.* (1885), 1 T. L. R. 584. See also 2 Smith, L. C., 11th ed. 189, and cases there cited.

(*i*) On the analogy of the rights of landlords and tenants as to fixtures, see *Lyde* v. *Russell* (1830), 1 B. & Ad. 394.

(*k*) *Tripp* v. *Armitage* (1839), 4 M. & W. 687; *Wood* v. *Bell* (1856), 25 L. J. (C. P.) 321, 385; *Baker* v. *Gray* (1856), 17 C. B. 462; *Seath* v. *Moore* (1886), 11 App. Cas. 350; *Reid* v. *Macbeth and Gray*, [1904] A. C. 223.

(*l*) *Forman & Co. Proprietary* v. *The Ship "Liddesdale,"* [1900] A. C. 190; and see *Appleby* v. *Myers*, *supra*, *per* BLACKBURN, J., at p. 659. See also *Reid* v. *Fairbanks* (1853), 13 C. B. 692.

(*m*) *Wood* v. *Bell*, *supra*, at p. 324.

(*n*) *Laidler* v. *Burlinson* (1837), 2 M. & W. 602; *Laing (Sir James) & Sons, Ltd.* v. *Barclay, Curle & Co., Ltd.*, [1908] A. C. 35; and see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18.

(*o*) *Banbury and Cheltenham Direct Rail. Co.* v. *Daniel* (1884), 54 L. J. (CH.) 265.

soil, it depends on the circumstances of the case in whom the property in the plant vests. The intention of the parties when they entered into the contract is the governing factor (*p*). During the continuance of the contract hoardings etc. seem, apart from special stipulations, to remain the property of the contractor (*q*).

SUB-SECT. 2.—*By Agreement as to Unfixed Materials.*

Vesting clause as to property in unfixed materials.

545. In many building, engineering, and shipbuilding contracts a provision is inserted vesting in the employer the property in unfixed materials brought on to the site, either when so brought on, or when so brought on and certified for, or on the happening of some event, such as the contractor being guilty of some default, or on his becoming bankrupt. Materials which have not yet been brought on to the site, but which have been appropriated to the work, are also in some cases made subject to similar provisions. A vesting clause of this nature may or may not be coupled with a forfeiture clause. Vesting clauses differ in their effect from forfeiture clauses, as they purport to pass the property automatically on the happening of the event, while forfeiture clauses, apart from vesting clauses, require to be brought into operation by the employer doing some act to show that he intends to exercise the right of forfeiture.

Vesting clauses are inserted in building contracts for the purpose of securing the money advanced to the contractor or as a security for the due performance of the contract (*r*). Whether a vesting clause has the effect of transferring the property in the unfixed materials to the employer without qualification depends on the terms of each particular contract (*s*).

Extent to which property may pass.

546. The property in the materials which is given by the contract to the employer under a vesting clause is qualified by the right the contractor has of using them for the construction of the works. The materials on the building site are there dedicated to a particular purpose in which both the employer and the contractor are interested, and after the fulfilment of this purpose the surplus, if any, revests in the contractor. Materials in such circumstances are not liable to be taken in execution under a judgment against the employer (*t*). On the other hand, the property in these materials passes to the employer sufficiently to prevent them being taken in execution under a judgment against the contractor (*a*).

(*p*) *Wood* v. *Hewitt* (1846), 15 L. J. (Q. B.) 247; *Lancaster* v. *Eve* (1859), 28 L. J. (C. P.) 235. These are not building cases, but the principle seems to be the same.

(*q*) *Purlington Advertising Co.* v. *Willing & Co., Ltd.* (1896), 12 T. L. R. 176.

(*r*) *Hart* v. *Porthgain Harbour Co., Ltd.*, [1903] 1 Ch. 690, 696.

(*s*) See *Holroyd* v. *Marshall* (1862), 10 H. L. Cas. 191.

(*t*) *Beeston* v. *Marriott* (1863), 8 L. T. 690. See also *Kerr* v. *Dundee Gas Co.* (1861), 23 Dunl. (Ct. of Sess.) 343; *Reeve* v. *Whitmore* (1863), 33 L. J. (CH.) 63.

(*a*) *Brown* v. *Bateman* (1867), L. R. 2 C. P. 272; *Blake* v. *Izard* (1867), 16 W. R. 108; *Reeves* v. *Barlow* (1884), 12 Q. B. D. 436; and compare *Byford* v. *Russell*, [1907] 2 K. B. 522.

SECT. 1. Vesting of Property in Materials etc.

Construction of vesting clause.

547. It is a question of construction of the particular contract at what stage the property in the materials is intended to pass, and a question of fact whether that stage has been reached or not (*b*), and this question of fact must be ascertained in the ordinary way, unless the contract directs that it shall be ascertained by the determination of the architect or by arbitration (*c*).

A vesting clause, to be effective, must be so worded as clearly to express the intention of the parties to pass the property in the materials (*d*).

Where there is a clause in the contract vesting the materials in the employer, a clause giving the employer the right to take possession of and use the materials does not affect the interest of the employer in the material given him by the vesting clause (*e*).

SUB-SECT. 3.—*Rights qualifying Vesting of Materials.*

Contractor's right of user.

548. Even when the property in the materials passes to the employer, it does so in the absence of express stipulation to the contrary, subject to the right of the contractor to use them for the construction of the works (*f*). It is submitted that any attempt by the employer or his architect to remove or dispose of the materials would be a breach of contract, and render the employer liable in damages to the contractor (*g*). Further, in many contracts it is stipulated that, in case materials should in the opinion of the architect not be in accordance with the specification, the contractor may be ordered to remove them, but in the absence of such a stipulation, if inferior materials are brought on to the site, the contractor would apparently be entitled to remove them for the purpose of substituting other proper materials (*h*).

Rights of contractor's trustee in bankruptcy.

549. Another class of rights to which the vesting of materials is subject is that of the trustee in case of the bankruptcy of the contractor. These rights depend upon whether the vesting

(*b*) *Seath* v. *Moore* (1886), 11 App. Cas. 350, *per* Lord BLACKBURN, at p. 370. See also *Goss* v. *Quinton* (1842), 3 Man. & G. 825; *Byford* v. *Russell*, [1907] 2 K. B. 522.

(*c*) See *Garrett* v. *Salisbury and Dorset Junction Rail. Co.* (1866), L. R. 2 Eq. 358.

(*d*) *Baker* v. *Gray* (1856), 17 C. B. 462, *per* JERVIS, C.J., at p. 479: "I think it is most likely that the parties intended that all timber which had been provided for the construction of the ship should be the property of the defendant. . . . But I do not think they have used language sufficiently clear to carry that intention into effect."

(*e*) *Brown* v. *Bateman* (1867), L. R. 2 C. P. 272; *Banbury and Cheltenham Direct Rail. Co.* v. *Daniel* (1884), 54 L. J. (CH.) 265.

(*f*) *Beeston* v. *Marriott* (1863), 8 L. T. 690.

(*g*) *Ibid.*

(*h*) *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651, *per* BLACKBURN, J., at p. 659: "We think that the plaintiffs . . . would have had a perfect right, if they thought that a portion of the engine which they had put up was too slight, to change it and substitute another in their opinion better calculated to keep in good repair during the two years, and that without consulting or asking the leave of the defendant." If the contractor under the terms of the contract can be ordered to remove inferior materials, and is so ordered, the employer will obviously have no claim to those materials for which others have been substituted at his request.

is conditioned to take place on the bankruptcy of the contractor, or on the happening of some other event. In the first case the vesting clause is invalid because a stipulation that what was the property of the contractor up to the date of the bankruptcy should go over to some one else in that event is void as being a fraud upon creditors (*i*). In the second case the clause is valid, on the ground that the trustee takes the property of the bankrupt contractor subject to all the incidents to which it is liable (*j*).

550. Another important question which arises in this connection is whether the materials are or are not in the possession, order, or disposition of the contractor so as to make him the reputed owner of them (*k*), notwithstanding that the property in them has vested in the employer. Reputed ownership.

A provision that the materials shall be "considered" the property of the employer is not sufficient to make the employer the owner and so render the contractor the reputed owner (*l*).

A ship the property in which has passed to the employer does not by remaining in the possession of the shipbuilder for completion become property in his order and disposition so as to be in his reputed ownership (*m*). For as an unfinished chattel remaining in the hands of the manufacturer remains there for the purpose of being finished, so the materials do not remain with him to be ordered or disposed of, but to be completed. There is no right to presume that every ship in a shipbuilder's yard is his own, as the contrary is notorious, and it is well known that shipbuilders very rarely build for themselves, but for others under orders given to them. Ships.

Such a ship is, however, not privileged against distress for rent owing by the shipbuilder, as it is not a thing sent or delivered to a person exercising a trade, to be wrought or manufactured in the way of his trade (*n*), there being no delivery to the shipbuilder (*o*).

In the case of a building contract, however, where the property in the materials on the site has, by a vesting clause, become vested in the employer, it has been held that they are in the possession, order and disposition of the builder, with the consent of the true owner, until the building is finished so as to make the contractor Building materials.

(*i*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 152.

(*j*) *Ibid.*

(*k*) Under Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.); and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 173—181.

(*l*) *Re Keen and Keen, Ex parte Collins*, [1902] 1 K. B. 555; *Hurt* v. *Porthgain Harbour Co., Ltd.*, [1903] 1 Ch. 690, *per* FARWELL, J., at p. 694: "In my opinion the true construction of the clause 'All such plant and material shall be considered the property of the company' is that it vests the property in the materials in the company at law subject to a condition, that when the engineer shall have certified the completion of the contract, the contractor shall be at liberty to remove them."

(*m*) *Woods* v. *Russell* (1822), 5 B. & Ald. 942; *Clarke* v. *Spence* (1836), 4 A. & E. 448, 472; *Holderness* v. *Rankin* (1860), 29 L. J. (CH.) 753, 761; *Swainson* v. *Clay* (1863), 4 Giff. 187; *Re Attwater, Ex parte Watts* (1863), 32 L. J. (BCY.) 35; *M'Bain* v. *Wallace & Co.* (1881), 6 App. Cas. 588.

(*n*) *Simpson* v. *Hartopp* (1744), Willes, 512.

(*o*) *Clarke* v. *Millwall Dock Co.* (1886), 54 L. T. 814.

SECT. 1. Vesting of Property in Materials etc.

the reputed owner thereof, and therefore on the bankruptcy of the contractor they pass to his trustee (*p*).

SUB-SECT. 4.—*How far a Vesting Clause is a Bill of Sale.*

Vesting clause not bill of sale.

551. A clause in a building contract providing that the materials brought on to the site shall be considered as attached to the freehold is not an assignment, transfer, or assurance of personal chattels, nor a licence to take possession of them as security for a debt (*q*); neither is a clause providing that the materials brought on the soil shall become the property of the employer (*r*): the right conferred in this case is not a right in equity, but a right in law (*s*). The moment the goods are brought on the land the property in them passes, and there is nothing left upon which any equity as distinct from law can attach.

SECT. 2.—*Lien.*

SUB-SECT. 1.—*For the Benefit of the Contractor.*

Extent of contractor's lien.

552. When the property in the materials has passed to the employer by reason of their having been affixed to the freehold, the contractor has no lien on them, or on the works constructed with them (*t*), unless he has expressly contracted with the employer that he shall have such a lien (*a*).

But when materials brought on the land of the employer have not been affixed to the freehold, and the property in them has not passed to the employer by the terms of the contract, the

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(*p*) *Re Weibking, Ex parte Ward*, [1902] 1 K. B. 713. See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 177.

(*q*) *Brown* v. *Bateman* (1867), L. R. 2 C. P. 272; *Blake* v. *Izard* (1867), 16 W. R. 108. Both these cases were under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), but the Act of 1878 does not seem to make any difference, as the words added to the definition of "bill of sale" by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4—"any agreement whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred"—do not include such a clause (*Reeves* v. *Barlow* (1884), 12 Q. B. D. 436, C. A.); and see title BILLS OF SALE, p. 12, *ante*.

(*r*) *Ibid.*, *per* BOWEN, L.J., at p. 439.

(*s*) *Ibid.*

(*t*) The law on this point is so clear that it never seems to have been necessary formally to declare it in any judgment in England. In Upper Canada, however, MACAULAY, J., stated the law as follows: "Although a right of lien frequently attaches to goods or chattels sold or made until the price be paid, yet no such lien attaches upon houses erected under building contracts, unless expressly sanctioned by the terms of such agreement, when it forms a species of mortgage, including an interest in the estate" (*Johnson* v. *Crew* (1836), 5 Upper Canada Q. B. (o. s.) 200, at p. 204).

(*a*) In *Wallis* v. *Smith* (1882), 21 Ch. D. 243, at p. 248, FRY, J., by saying that "a man who declines to perform his contract can have no lien for money which he has expended in part performance," may be thought to have intended to imply that if he had completed he might have had a lien on the land. There is, however, no statute or decision on which such a proposition can be based, that is to say, in the case of a building or engineering contract, although in the case of a building agreement the equitable right of the builder to a lease may be in the nature of a lien on the land. See further, title LIEN.

contractor may have a right to hold them as an unpaid vendor until they are paid for (*b*).

SUB-SECT. 2.—*For the Benefit of the Employer.*

How far implied lien.

553. The employer may have a lien on the unfixed materials by express agreement; and where advances have been made on the security of unfixed materials, on the understanding and agreement that the materials brought upon the premises should be considered a pledge for those advances, the employer has a lien on them (*c*). It is possible, however, that such a lien would not be valid against third parties by reason of the operation of the Bills of Sale Acts (*d*) if the materials were in the possession of the builder, as it might be held to constitute an agreement by which a right in equity to, or a charge or security on, the materials was conferred, but when an agreement provided that goods deposited on land were to be "deemed" to be in the possession of the owner of the land, and subject to a lien for the general balance of charges, it was held that this was not a bill of sale (*e*).

Effect of contractor's bankruptcy etc.

Where by the contract the employer is given a lien on the unfixed materials coupled with a power of seizure and user on the happening of an event, such as the bankruptcy of the contractor, the employer is protected against the contractor's trustee in bankruptcy, as the lien on the materials has been given from the very commencement of the contract, and the power to seize them on the bankruptcy of the contractor (*f*) is only given in consequence of the interest previously vested in the employer (*g*). As the contractor still remains the true owner of the materials which are subject to the lien, the doctrine of reputed ownership has no application (*h*); while for the reasons before stated the Bills of Sale Acts (*i*) do not apply. Even if it is stipulated that the lien shall only arise on the happening of an event, such as neglect to proceed with the works, and the contractor becomes bankrupt, and the event also happens, the employer can still seize the materials on the happening of the event (*j*), as the transaction is of the date of the contract, and is therefore a protected transaction (*k*). But if an

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(*b*) *Bellamy* v. *Davey*, [1891] 3 Ch. 540.

(*c*) *Tripp* v. *Armitage* (1839), 4 M. & W. 687; *Re Waugh, Ex parte Dickin* (1876), 4 Ch. D. 524; *Banbury and Cheltenham Direct Rail. Co.* v. *Daniel* (1884), 54 L. J. (CH.) 265.

(*d*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43. See title BILLS OF SALE, pp. 13, 14, *ante*.

(*e*) *Spencer* v. *Midland Rail. Co.* (1895), 11 T. L. R. 542.

(*f*) *Re Waugh, Ex parte Dickin, supra; Re Harrison, Ex parte Jay* (1880), 14 Ch. D. 19, 26; both decided under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 94; but the Bankruptcy Act, 1883, does not appear to alter the law in this respect.

(*g*) *Re Harrison, Ex parte Jay, supra*.

(*h*) *Hawthorn* v. *Newcastle-upon-Tyne and North Shields Rail. Co.* (1840), 3 Q. B. 734, n.

(*i*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43; see p. 265, *ante*, and title BILLS OF SALE, p. 14, *ante*.

(*j*) *Re Waugh, Ex parte Dickin, supra; Re Harrison, Ex parte Jay, supra*.

(*k*) Under s. 49 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 288.

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execution under a judgment against the contractor is levied on the materials before the event happens, *e.g.*, a notice of failure to proceed with the works, it is no longer competent for the building owner to acquire a lien by subsequently giving notice (*l*).

SECT. 3.—*Materials belonging to the Employer.*

Property in old materials.

554. Building contracts usually contain a provision under which the contractor agrees to clear away any old materials which may be found on the site. Such a provision may or may not, according to the terms of the contract, confer on the builder the right of property in these old materials (*m*).

In some cases the contractor agrees to allow for the old materials, or to take them for the purpose of the works. If he agrees to allow for them and has not done so, the employer is entitled to set off the value of the old materials against the price (*n*).

If the employer supplies materials to the contractor for the purpose of the works, he may be entitled to set off their value against the sum payable to the contractor. His right to do so depends on the terms of the contract and on the circumstances (*o*).

Part XIV.—Assignment and Devolution of Rights and Liabilities as between Assignee and Employer.

SECT. 1.—*Assignment of Rights.*

SUB-SECT. 1.—*In General.*

What the employer can assign.

555. An employer can assign the benefits and the burdens of a contract, as between himself and his assignee, but he cannot by such an assignment relieve himself from his obligations to the contractor, nor will such an assignment give the assignee any right to call upon the contractor to complete the contract. The contractor may, however, be a party to the assignment, in which case the assignment operates not only as an assignment (between the employer and the assignee), but also as a new contract between the assignee and the contractor, involving novation (*p*).

What contractor can assign.

556. The right possessed by the contractor which may become the subject of assignment is the right to receive payment of money

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(*l*) *Byford* v. *Russell*, [1907] 2 K. B. 522. See p. 253, *ante*.

(*m*) In an American case it has, however, been held that, in the absence of express stipulation, the materials of old buildings on the site belong to the contractor (*Morgan* v. *Stevens* (1879), 6 Abb. (N.Y.) New Cases, 356).

(*n*) *Harvey* v. *Lawrence* (1867), 15 L. T. 571.

(*o*) *Allinson* v. *Davies* (1796), Peake, Add. Cas. 82; *Grainger* v. *Raybould* (1840), 9 C. & P. 229; *Newton* v. *Forster* (1844), 12 M. & W. 772.

(*p*) See p. 179, *ante*; p. 274, *post*. For assignment of rights in general, see title CHOSES IN ACTION.

SECT. 1. Assignment of Rights.

due or to become due, whether by instalments or otherwise. A mere contract to make advances to the contractor by way of loan is not assignable, as specific performance of such a contract could not be enforced, and there is no debt or other legal chose in action which can be assigned (*q*). But a contract to pay to the contractor instalments of the agreed price on the production of certificates from the architect involves the creation of a debt, and the contractor can assign his right to payment (*r*).

Features of assignment.

The assignee, however, takes subject to the equities existing between the employer and the contractor, and can be in no better position than his assignor, whose right to payment may, according to the terms of the contract, be destroyed by forfeiture, or reduced by the deduction of liquidated damages etc. (*s*).

Assignment is subject to equities.

Such an assignment of moneys due or to become due under a building contract is not a bill of exchange or an order to pay, and is not liable to stamp duty as such (*t*).

Stamp.

Notice in writing of the assignment must be given to the debtor, or other person liable to make the payment (*u*), in order to entitle the assignee to bring an action for the money or debt. Such a notice need not be in any particular form; a mere letter is sufficient. If the assignee neglects or delays to give the notice the assignment is only an equitable one. The effect of this is to let in equities which had arisen prior to the notice. But this will not operate to postpone the assignee's claim to that of a creditor who has obtained a garnishee order, if the assignee's charge was originally prior in date, as the garnishee order cannot establish any claim in derogation of the rights which the assignee has acquired under his security (*w*). The assignment must specify the particular fund to be charged, or it will be inoperative (*a*).

Notice.

The assignee can sue without being obliged to join his assignor as a party (*b*).

557. If the contractor assigns a share of the profits of the contract, the assignee will not necessarily be constituted a partner (*c*), or be rendered liable as such (*d*). If the stipulations are consistent with the object of securing the repayment of money advanced,

Assignment of share of profits.

(*q*) *May* v. *Lane* (1894), 43 W. R. 193. Compare *South African Territories, Ltd.* v. *Wallington*, [1898] A. C. 309.

(*r*) Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6).

(*s*) *Brice* v. *Bannister* (1878), 3 Q. B. D. 579.

(*t*) See *Crowfoot* v. *Gurney* (1832), 9 Bing. 372; *Diplock* v. *Hammond* (1854), 2 Sm. & G. 141; *Buck* v. *Robson* (1878), 3 Q. B. D. 686; *Adams* v. *Morgan* (1883), 14 L. R. Ir. 140; *Re Toward, Ex parte Moss* (1884), 14 Q. B. D. 310; and see title BILLS OF EXCHANGE ETC., Vol. II., pp. 570 *et seq.*

(*u*) Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6).

(*w*) *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238.

(*a*) *Crowfoot* v. *Gurney, supra*; *Percival* v. *Dunn* (1885), 29 Ch. D. 128. Thus, a mere note given by the contractor to a person to whom he is indebted requesting the employer to pay him and oblige the contractor, without anything further, will not operate as an assignment.

(*b*) *Sanders* v. *Peek* (1884), 50 L. T. 630.

(*c*) Even independently of s. 2 of the Partnership Act, 1890 (53 & 54 Vict c. 39).

(*d*) *Kelly* v. *Scotto* (1880), 49 L. J. (CH.) 383.

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they will not be conclusive evidence of a partnership between the parties (*e*).

Although s. 25 (6) of the Judicature Act, 1873, refers to assignments which are absolute and not by way of charge, a mortgage of moneys to become payable under a building or engineering contract, with a proviso for redemption, is within the section (*f*).

Assignment by way of mortgage.

558. Where there is an assignment of a share of the profits, with power to the assignee to enter in case of the bankruptcy of the builder, the assignee's claim in the bankruptcy is postponed until the other creditors are satisfied, but he is not prevented from enforcing his rights so far as he can do so without coming in under the bankruptcy, *e.g.*, by foreclosure (*g*). It is doubtful whether a stipulation in the contract against any assignment by the contractor of money to become due under it is valid, but it is submitted that it is (*h*). A stipulation not to assign without licence from the employer is valid (*i*).

SUB-SECT. 2.—*What may be assigned.*

Instalments.

559. Instalments accruing under the contract (*j*) can be assigned as legal choses in action (*k*). An assignment, however, of moneys not earned at the date of the bankruptcy, though good as against the employer or anyone claiming under him, will not be valid as against the contractor's trustee in bankruptcy (*l*). As regards instalments which have accrued due before the bankruptcy, the assignee is entitled to them against the contractor's trustee in bankruptcy.

Retention money.

560. Retention money (*m*) may also be assigned as being money earned, but not yet payable. Such an assignment will pass the interest of the contractor in the retention money, subject to the rights of the employer as to forfeiture, deduction of penalties etc. (*n*).

Position on bankruptcy.

561. If the contractor becomes bankrupt, his trustee, if he elects to adopt the contract and complete, takes subject to valid

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(*e*) *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238.

(*f*) *Tancred* v. *Delagoa Bay and East Africa Rail. Co.* (1889), 23 Q. B. D. 239; *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765.

(*g*) *Badeley* v. *Consolidated Bank*, *supra*, at pp. 254, 261. See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 227.

(*h*) Compare *Re Turcan* (1888), 40 Ch. D. 5, where, however, it is suggested, *per* COTTON, L.J., at p. 10, that the difficulty caused by such a stipulation might be overcome by means of a declaration of trust. See also *Re Griffin* (1898), 79 L. T. 442.

(*i*) *Laurie* v. *West Hartlepool Thirds Indemnity Association and David* (1899), 4 Com. Cas. 322.

(*j*) As being covered by s. 25 (6) of Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66).

(*k*) *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 763; *Brice* v. *Bannister* (1878), 3 Q. B. D. 569.

(*l*) *Re Jones, Ex parte Nichols* (1883), 22 Ch. D. 782; *Re Toward, Ex parte Moss* (1884) 14 Q. B. D. 310. See, as to this, more fully under title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 159, 160.

(*m*) For the definition of retention money, see p. 226, *ante*.

(*n*) See p. 270, *post*.

assignments of money earned previously to the bankruptcy (*o*), and he cannot, even by expending his own money in completing the work, obtain priority over the assignees (*p*), although if he had not done so the retention money would not have become payable. Where there is an obligation on the contractor to maintain the works for a period, and the retention money due on completion of the work prior to the period of maintenance has been assigned or charged, the trustee, if he elects to complete, and does complete, will complete the assignee's right to payment on completion; and the assignee will be entitled to be paid the retention money unreduced by any set-off for failure to maintain. The employer, however, will have a right to set off in bankruptcy the damages for the breach of the contract to maintain against any claims the trustee may have against him (*q*). The trustee is not, however, debarred from contesting the validity of the assignment (*r*).

Forfeiture clause.

562. The employer cannot assign his right under a forfeiture clause to enter and seize the unfixed materials, as it is a bare licence to seize chattels (*s*).

SUB-SECT. 3.—*Equities to which the Assignment is subject.*

Time at which equities must cease.

563. The right of the assignee is subject to all equities which would have been entitled to priority over the right of the assignee if the Judicature Act had not passed (*t*). The effect of this is that the assignee from the contractor takes no better title than the contractor had at the time of notice of the assignment being given to the employer (*a*). Equities which arise subsequently to the notice given to the employer can only be set off if they are debts arising out of the same contract and sufficiently connected with the subject-matter of the assignment, *e.g.*, liquidated damages for delay (*b*). Thus where a proportionate part of the price for a railway becomes due on the completion of each section, the employer can set off damages for non-completion of the whole railway against assignees of the proportionate parts of the price (*c*).

Position of employer.

The employer may set off this claim as against that of the assignee, but cannot claim or counterclaim it as damages against him, and cannot recover anything from him (*d*). The employer, after notice of the assignment, cannot take away or diminish the rights of the assignee by any payment to, or other transactions

(*o*) *Re Toward, Ex parte Moss* (1884), 14 Q. B. D. 310.
(*p*) *Drew* v. *Josolyne* (1887), 18 Q. B. D. 590, 597.
(*q*) *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (1885), 30 Ch. D. 216.
(*r*) *Re Jones, Ex parte Nichols* (1883), 22 Ch. D. 782.
(*s*) On the analogy of a hire-purchase agreement (*Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193).
(*t*) By s. 25 (6) of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66).
(*a*) *Brice* v. *Bannister* (1878), 3 Q. B. D. 569; *Young* v. *Kitchin* (1878), 3 Ex. D. 127.
(*b*) *Young* v. *Kitchin, supra; Re Asphaltic Wood Pavement Co., Lee and Chapman's Case, supra.*
(*c*) *Newfoundland Government* v. *Newfoundland Rail. Co.* (1888), 13 App. Cas. 199.
(*d*) *Young* v. *Kitchin, supra.*

SECT. 1. Assignment of Rights.

with, the contractor (*e*) or persons claiming under him (*f*). The parties, however, can by agreement in the original contract exclude the rule that an assignee should take subject to the equities, but such a stipulation would hardly occur in the case of a building contract.

If the right to receive the money assigned depends upon the architect giving a certificate, and such a certificate is given by the architect fraudulently and in collusion with the contractor, this will afford a good defence in an action by the assignee based on the certificate (*g*).

SUB-SECT. 4.—*Assignment subject to Forfeiture.*

Effect of forfeiture.

564. Where the employer rightfully determines the contract by forfeiture, on account of some default by the contractor, or where the contractor abandons the work, then, as the contract never becomes completed, the right to payment on the part of the contractor never accrues, and there is nothing on which an assignment of money to become due can operate (*h*).

SECT. 2.—*Assignment of Liabilities.*

SUB-SECT. 1.—*Assignment by the Contractor.*

How far contractor may assign liabilities.

565. The question whether the builder can sublet the performance of the contract depends on whether the contract is a personal one or not (*i*), and this depends, in the absence of express stipulation making the contract a personal one or prohibiting assignment, upon whether the builder is selected with reference to his individual skill, cleverness, integrity, and financial responsibility, or other personal qualification, in which case the performance of the contract cannot be assigned by him, notwithstanding that the person who is offered to take his place is equally well qualified to perform it (*k*), or whether the contract is one as to which it must be indifferent to the employer whether it is done by the immediate party to the contract, or by someone on his behalf (*l*).

It would appear that the contractor cannot assign his liabilities in the following cases (*m*): (1) where there is an express stipulation against assignment or subletting; (2) where an intention of the parties not to permit assignment can be implied from the circumstances (*n*), as where a particular contractor is employed owing to

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(*e*) *Brice* v. *Bannister* (1878), 3 Q. B. D. 569.

(*f*) *Smith* v. *Kirk* (1871), 25 L. T. 426, where the court was equally divided.

(*g*) *Wakefield and Barnsley Banking Co.* v. *Normanton Local Board* (1881), 44 L. T. 697.

(*h*) See p. 251, *ante*.

(*i*) See title CONTRACT.

(*k*) *Knight* v. *Burgess* (1864), 33 L. J. (CH.) 727; *British Waggon Co.* v. *Lea* (1880), 5 Q. B. D. 149, *per* COCKBURN, C.J., at p. 153; *Tolhurst* v. *Associated Portland Cement Manufacturers*, [1903] A. C. 414, 420.

(*l*) *British Waggon Co.* v. *Lea*, *supra*.

(*m*) The reported cases relating to building contracts on this point are not sufficient in number for an absolute general rule to be deduced from them.

(*n*) *Robson* v. *Drummond* (1831), 2 B. & Ad. 303; *Knight* v. *Burgess*, [illegible]

some particular qualification, either in respect of skill, financial position, or the possession of special plant adapted for the work; (3) where the work is of a special nature (*o*), such as the construction of a lighthouse (*p*), electric lighting, well boring, or hydraulic work, or possibly in the case of works of great magnitude, requiring special engineering skill, or the possession of particular plant.

Joint contractors.

566. Where two or more persons jointly contract to perform a service for the employer, one or more of them may, in the absence of some special circumstances as to personal qualifications, assign to the other or others.

Acquiescence by employer.

567. Where the contract would otherwise not be assignable, the employer, if he has acquiesced in the assignment, and accepted the services of the assignee, will be estopped from raising any objection on the ground that the contract ought to have been carried out by the original contractor, and this will be so even where there is no formal assignment, substituted contract, or sub-contract (*a*).

Prevention by assignee.

568. If the consideration for the assignment, as between assignor and assignee, is the payment of money to the assignor on completion, then, if the assignee prevents the completion of the contract, or enters into a substituted contract, so that the event on which the money becomes payable never happens, the assignor will have no claim for the money, but he will have a claim in damages against the assignee (*b*).

SUB-SECT. 2.—*Assignment by the Employer.*

Consent of contractor necessary.

569. The employer cannot get rid of his liability to pay the price to the contractor by assignment without the consent of the latter. The contractor cannot be compelled to carry out a building contract, with all its onerous conditions, and then have to rely for payment on a person with whom he never contracted, and who may be a "man of straw" (*c*). In shipbuilding contracts in such a case, the shipbuilder would be to a certain extent protected by having a lien for payment on the unfinished ship (*d*), but that fact would not have the effect of entitling the employer to assign so as to get rid of the obligation to pay.

If on an assignment by the employer the contractor refuses to go on with the works, and is then induced to do so by a promise by the assignee to pay him, there would be sufficient consideration to

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(*o*) *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438.

(*p*) *Anon.*, cited by PATTESON, J., in *Wentworth* v. *Cock* (1839), 10 Ad. & El. 42, at p. 45.

(*a*) *Fulle* v. *Le Sueur and Le Huguet* (1859), 12 Moo. P. C. C. 501.

(*b*) *Humphreys* v. *Jones and Pickering* (1850), 20 L. J. (EX.) 88.

(*c*) *Robson and Sharpe* v. *Drummond* (1831), 2 B. & Ad. 303, *per* Lord TENTERDEN, C.J., at p. 307; *Humble* v. *Hunter* (1848), 12 Q. B. 310, *per* Lord DENMAN, at p. 317; and see further, title CONTRACT.

(*d*) Thus, where engines for a ship, which was being constructed, were lying in an unfinished state at the engine-makers', it was held that an equitable mortgage of the ship and her engines was subject to the lien of the engine-makers (*Re Hodgkin, Ex parte Softley* (1875), L. R. 20 Eq. 746).

Any rights of action which the employer may have against the contractor pass to the employer's trustee in bankruptcy (*a*). SECT. 3. Bankruptcy.

SECT. 4.—*Devolution on Death.*

SUB-SECT. 1.—*Death of the Employer.*

Rights and duties of executors etc.

573. The executors or administrators of an employer are entitled to the benefit of the performance of a building contract, but, on the other hand, they are liable to the contractor for the price. If the land on which the building is being erected goes to the heir or to a devisee, it would seem that the heir or devisee, as between himself and the personal representatives, can compel the erection of the building and throw the cost upon the personal estate of the deceased employer (*b*).

If there are several employers jointly interested in the contract, and one of them dies, then, if by agreement between the employers the executors of any party dying are to have the benefit of the work, the law will imply a contract on the part of the deceased that his executors shall pay to the other employers their proportion of the price, although the legal remedy of the contractor will be solely against the surviving employers (*c*).

SUB-SECT. 2.—*Death of the Contractor.*

Rights and duties of executors etc.

574. If a man has agreed to build a house for another by a certain time, and dies before that time, his executors are bound to perform the contract (*d*). And, on the other hand, the executors of the deceased contractor are entitled to perform the contract and recover payment for it (*e*). If the executor or administrator of the contractor enters into a fresh or supplementary contract in his capacity as personal representative, he will be personally liable on the contract, but may bring an action on it in his representative capacity, and this right of action, if accrued, will pass to an administrator *de bonis non* on the death of the original personal representative (*f*).

Where one of several joint contractors dies, his executors are entitled to share in the contract, and to have their rights as between themselves and their joint contractors ascertained on the completion, and cannot, without their consent, be bought out at a valuation (*g*).

(*a*) *Wright* v. *Fairfield* (1831), 2 B. & Ad. 727. And see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 136—139.

(*b*) *Holt* v. *Holt* (1694), 2 Vern. 321; *Cooper* v. *Jarman* (1866), L. R. 3 Eq. 98; *Re Day*, [1898] 2 Ch. 510; and compare *Bradbury* v. *Morgan* (1862), 1 H. & C. 249. See also *Lechmere* v. *Carlisle (Earl)* (1733), 3 P. Wms. 211. See also Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2; and, generally, title EXECUTORS AND ADMINISTRATORS.

(*c*) See *Prior* v. *Hembrow* (1841), 8 M. & W. 873, *per* ALDERSON, B., at p. 889.

(*d*) Fitzherbert, La Graunde Abridgement, tit. Barre, pl. 60 (1453), cited by Coke, C.J., in *Quick and Harris* v. *Ludborrow* (1615), 3 Bulst. 29, 30. See also *Siboni* v. *Kirkman* (1836), 1 M. & W. 418, 422, 423; *Corner* v. *Shew* (1838), 3 M. & W. 350, *per* PARKE, B., at p. 354; *Knight* v. *Burgess*, (1864) 33 L. J. (CH.) 727 (omission of word "assign"). See generally, title EXECUTORS AND ADMINISTRATORS.

(*e*) *Marshall* v. *Broadhurst* (1831), 1 Cr. & J. 403.

(*f*) *Moseley* v. *Bendell* (1871), L. R. 6 Q. B. 338.

(*g*) *McClean* v. *Kennard* (1874), 9 Ch. App. 336. See also *Ambler* v. *Bolton* (1872), L. R. 14 Eq. 427.

SECT 4. Devolution on Death.

Personal contracts.

If the contract is a personal one, the personal representatives of a deceased contractor will be entitled to be paid any instalments of the price which have actually accrued due, or they may have a claim by way of *quantum meruit* for work done up to the date of the death (*h*); but, on the other hand, they cannot insist on completing the personal contract of the deceased (*i*).

SECT. 5.—*Attachment of Instalments and Retention Money.*

Extent of right.

575. The general law as to attachment of debts applies to the case of moneys already due and payable under a building contract.

The right of attaching debts or obtaining garnishee orders over them, however, extends only to debts actually owing or debts accruing (*j*), that is to say, what is *debitum in præsenti solvendum in futuro*, and does not include such payments under a building contract as have not yet been earned (*k*).

Forfeiture.

The power to attach a debt accruing due under a building contract would be defeated by a forfeiture (*l*).

Assignment.

An attachment of money payable under a building contract will not take priority over an assignment (even if the assignment be only equitable) which is prior in date to the attachment (*m*).

Part XV.—Substituted Contracts and Sub-contracts.

SECT. 1.—*Substituted Contracts.*

Effect of novation.

576. The introduction of a new party into a contract, either by substitution or addition, is termed novation. When it is by way of substitution the original party, for whom the new party is substituted, is, to an extent depending on the terms of the new contract, released from further performance of the original contract. Where a new contractor is substituted for the original one and takes over the work on the terms of the original contract, he will be bound by stipulations therein relating to deduction of liquidated damages etc. (*n*).

(*h*) *Stubbs* v. *Holywell Rail. Co.* (1867), L. R. 2 Exch. 311.

(*i*) *Farrow* v. *Wilson* (1869), L. R. 4 C. P. 744, 746; and see *Wentworth* v. *Cock* (1839), 10 Ad. & El. 42, *per* PATTESON, J., at p. 45.

(*j*) R. S. C., Ord. 45.

(*k*) See title EXECUTION.

(*l*) See p. 251, *ante*.

(*m*) *Pickering* v. *Ilfracombe Rail. Co.* (1868), L. R. 3 C. P. 235; *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238.

(*n*) *Re Yeadon Waterworks Co. and Binns* (1895), 72 L. T. 538. See title CONTRACT.

SECT. 2.—*Sub-contracts.*

SUB-SECT. 1.—*Relations between Sub-contractor and Employer.*

No privity of contract.

577. As a sub-contractor is not a party to the contract between the employer and the contractor, he cannot bring an action against the employer on it, there being no privity of contract between them (*o*). If, however, the particular article, which he has undertaken to prepare or furnish, is not affixed to the freehold, he still remains the owner of it until he has completed and delivered it, and, in case the contractor should become bankrupt, he can claim the chattel and refuse to part with it except on getting payment or a charge on the purchase-money which the employer has agreed to pay the contractor for it (*p*).

Assignment of contractor's rights against sub-contractor.

Where the sub-contractor is liable to compensate the contractor for inferior work or defects in the work supplied by him, and the contractor is under a similar liability to the employer, the employer can take an assignment of the contractor's right to compensation, and bring an action thereon against the sub-contractor (*q*).

How far employer may pay sub-contractor.

578. Acceptance by the employer of the work done by a sub-contractor will in no way cause an implication that the employer has made any contract with the sub-contractor (*r*). If the sub-contractor sets up orders from the employer for work as "extra to" the principal contract, he must produce the principal contract to show that the work is not included in it, and prove a distinct contract between the employer and himself, before he can recover from the employer (*s*).

Effect of accepting sub-contractor's work.

In some circumstances, the employer cannot discharge his liability to the contractor's trustee in bankruptcy by paying the sub-contractor. In case of the bankruptcy of the contractor, the architect cannot deduct payment made to a sub-contractor for work and materials supplied by him when certifying the balance due to the principal contractor, but may be compelled to certify payment to the principal contractor without such deduction (*t*). Where, however, the contract provides that in the event of the principal contractor unduly delaying proper payment of the sub-contractors the employer may pay them himself, then if the contractor unduly delays proper payment to the sub-contractors, *e.g.*, by presenting his petition in bankruptcy, the employer is justified in paying the sub-contractors, notwithstanding the bankruptcy of the contractor (*u*).

When employer liable to sub-contractor.

579. There may be communications or dealings between the employer and the sub-contractor which amount to a contract,

(*o*) See title CONTRACT.
(*p*) *Bellamy* v. *Davey*, [1891] 3 Ch. 540.
(*q*) *Constant* v. *Kincaid & Co.* (1902), 4 F. (Ct. of Sess.) 901.
(*r*) *Bramah* v. *Abinger* (*Lord*), cited in *Paterson* v. *Gandasequi* (1812), East, 62, *per* Lord ELLENBOROUGH, at p. 66.
(*s*) *Eccles* v. *Southern* (1861), 3 F. & F. 142. See also p. 234, *ante*.
(*t*) *Re Holt, Ex parte Gray* (1888), 58 L. J. (Q. B.) 5.
(*u*) *Re Wilkinson, Ex parte Fowler*, [1905] 2 K. B. 713.

SECT. 2. Sub-contracts.

express or implied, on the part of the employer to pay the sub-contractor (*w*). If there is a promise by the employer to pay or see the sub-contractor paid, the question arises whether the promise is collateral to the contract between the contractor and the sub-contractor, and given by way of guarantee, in which case it must be in writing (*x*), or whether it is a direct promise to pay, in which case a verbal promise is sufficient.

Payments on architect's certificate.

If the employer promises to pay the sub-contractor "out of the money" that he has to pay to the principal contractor, this is a direct promise, and not a guarantee to be liable for the principal contractor's debt (*y*).

Where the contract provides that provisional sums mentioned in the specification shall be paid by the contractor or by the employer in such amounts and to such persons as the architect shall direct, and the architect certifies a sum as due to a merchant and deducts this from money due to the contractor, it has been held under the particular circumstances of the case that the merchant is entitled to claim payment from the employer (*a*).

Principal contractor as agent of employer.

If it appears that the principal contractor was acting as the agent of the employer in contracting with the sub-contractor, the employer will be liable to the latter. The burden of proof lies on the sub-contractor to show that the employer, and not the principal contractor, was the real principal, and he may call evidence to show that the employer personally gave orders to do work and supply materials for the same building to third parties as corroboration of his evidence that the employer gave him personal orders to do the work (*b*); while the employer can call the principal contractor to prove that on the accounts between him and the sub-contractor nothing is due to the latter (*c*).

SUB-SECT. 2.—*Relations between Principal Contractor and Sub-contractor.*

Rights and liabilities of principal contractor.

580. The contractor, in the absence of stipulations to the contrary or circumstances which show the contract to be personal, has a right to sublet portions of the work to sub-contractors, and to be paid for the work performed by them, being also liable for defects in such work in the same way and to the same extent as if he had performed it himself (*d*).

Forfeiture of principal contract.

The principal contractor, by subletting part of the work, impliedly contracts with the sub-contractor that he will not by any act or default of his own prevent the sub-contractor from performing his share of the work. Thus if, in consequence of the default of the principal contractor, the employer forfeits the contract and ousts

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(*w*) *Smith* v. *Rudhall* (1862), 3 F. & F. 143.
(*x*) See p. 280, *post*, and title GUARANTEE.
(*y*) *Dixon* v. *Hatfield* (1825), 2 Bing. 439; *Andrews* v. *Smith* (1835), 2 Cr. M. & R. 627; *Stevenson's Trustee* v. *Campbell & Sons* (1896), 23 R. (Ct. of Sess.) 711.
(*a*) *Hobbs* v. *Turner* (1902), 18 T. L. R. 235.
(*b*) *Woodward* v. *Buchanan* (1870), L. R. 5 Q. B. 285.
(*c*) *Gerish* v. *Chartier* (1845), 1 C. B. 13.
(*d*) *British Waggon Co.* v. *Lea* (1880), 5 Q. B. D. 149. See also p. 270, *ante*.

the sub-contractor, the sub-contractor will have a claim in damages against the principal contractor (*e*).

SECT. 2. Sub-contracts.

The sub-contractor, on his part, is liable to the principal contractor for defective work, as the relation between them is similar to that of employer and contractor (*f*).

Defective work by sub-contractor.

581. Where the sub-contractor knows that, by the terms of the contract between the employer and the principal contractor, the principal contractor is liable to liquidated damages or forfeiture for delay, the liability of the sub-contractor to the contractor for delay may be increased. And the principal contractor may be entitled to recover from the sub-contractor the liquidated damages he has had to pay owing to the delay caused by the sub-contractor, or the profit he would have made on a contract rescinded from that cause, together with the cost of work thrown away (*g*).

How far terms of principal contract binding on sub-contractor.

Such knowledge of the terms of the principal contract is, however, not sufficient to prove that the sub-contractor agreed with the principal contractor to be bound by the terms of the contract. Thus if the sub-contractor properly completes his part of the work, his right to payment will not depend upon the certificate of the architect, notwithstanding that it is a condition precedent to payment to the principal contractor (*h*).

Where the sub-contractor expressly contracts to be bound by the terms of the principal contract, provisions as to retention money will be applied to him proportionally in the ratio that his contract bears to the whole contract (*i*).

But provisions in the principal contract, which are not applicable as between the contractor and sub-contractor, will not be incorporated by implication in the sub-contract.

It has been held that a clause in the principal contract referring disputes between the employer and contractor to arbitration will not be incorporated impliedly so as to refer disputes between the contractor and the sub-contractor to arbitration (*j*).

Clause referring disputes to arbitration

But where the terms of the principal contract are expressly incorporated in the sub-contract, the provision as to arbitration will apply (*k*).

SECT. 3.—*Prime Cost and Provisional Sums.*

582. The term "p.c.," or "prime cost sum," has come to be used in building and engineering contracts because of the difficulty of

Origin of term "prime cost."

(*e*) See p. 251, *ante*.

(*f*) As to the effect of a stipulation limiting the responsibility of the sub-contractor to the replacement of faulty work supplied by him, see *Prince of Wales Dry Dock Co. (Swansea), Ltd.* v. *Fownes Forge and Engineering Co., Ltd.* (1904), 90 L. T. 527, where it was held that a sub-contractor denying that his work was faulty was liable to the principal contractor for the costs of a counter-claim successfully raised by the employer for defects in such work.

(*g*) *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D. 670.

(*h*) *Lewis* v. *Hoare* (1881), 44 L. T. 66.

(*i*) *Geary, Walker & Co.* v. *Lawrence & Son* (1906), Hudson on Building Contracts, 3rd ed., Vol. II., p. 406.

(*j*) *Goodwin* v. *Brand* (1905), 7 F. (Ct. of Sess.) 995.

(*k*) See *Temperley Steam Shipping Co.* v. *Smyth & Co.*, [1905] 2 K. B. 791.

SECT. 3. Prime Cost and Provisional Sums.

describing accurately, at the time the contract is entered into, every article to be used in the building or work. Instead, therefore, of giving a description of the article required, the contractor is directed in the specification to provide and fix the article, whatever it is, at the "p c.," or "prime cost sum," of so many shillings or pounds, as the case may be, which the architect thinks will be the probable prime cost of the article required.

Whether contractor entitled to trade and cash discounts.

The architect may in addition define the meaning of "p.c.," or "prime cost sums," and state that they are the net sum paid or payable to the merchant, either with or without, and usually without, any allowance to the contractor for profit. Notwithstanding the ordinary acceptation of the term, the contractor often seeks to recover not the net cost, but the cost to an ordinary person, out of which the contractor has had the benefit of trade discounts as well as discounts for cash. It appears to be clear that he cannot be entitled to trade discounts (*l*), but whether he is entitled to discount for cash must depend on the circumstances in each case. It would seem that, apart from special circumstances, the contractor is not entitled to cash discount. The building owner's obligation is to pay prime cost, and it would seem that he cannot be under any obligation to pay some other price. The contractor may be under no obligation to pay cash, but if he does, it would seem that he cannot charge the building owner more than he has paid, namely, prime cost. It has been held that, in the case of a quantity surveyor who obtained a discount for cash on the payment by him of certain lithographer's charges, he was, as against the person who employed him, entitled to the discount so obtained, but this case depended on proof of a custom (*m*).

Provisional sums.

583. A provision is often inserted in building contracts that the builder shall provide a sum either for contingencies, such as extras, or, on the other hand, to pay for some contemplated work a tender for which may have been obtained from some merchant or specialist, or for some work the exact nature of which has not been defined at the date of the contract. The sum so provided is generally referred to as a provisional sum. Clauses are often inserted defining the rights of the building owner and the architect in respect of these sums, and where such clauses exist the contract must be referred to. Apart from any special terms, it would seem that, if no expenditure is required for such contingencies, a provisional sum inserted therefor can be deducted. In the other case, that is, if the provisional sum is inserted in the contract for a specific work, it would seem that the work cannot be omitted and given to another contractor without rendering the employer liable for damages for loss of profit (*n*).

Liability of employer to builders' merchants.

584. The question of the liability of the building owner to builders' merchants employed to carry out work contemplated by provisional sums has occasioned much litigation. This arises

(*l*) Compare *Hippisley* v. *Knee Brothers*, [1905] 1 K. B. 1.
(*m*) *London School Board* v. *Northcroft* (1889), Hudson on Building Contracts, 3rd ed., Vol. II., p. 142.
(*n*) *Gallagher* v. *Hirsh* (1899), New York 45 App. Div. 467.

generally from three causes: either because the builder's merchant declines to take orders from the builder or prefers to take them from the architect, and the architect, without consulting his employer, gives orders to the merchant direct (in which case it is doubtful on whose account he gives the orders), or because ambiguous provisions are inserted in the contract, or because of conditions empowering the architect to direct payment of these sums due to the merchant. It has been held that where an architect has this power, and he certifies a sum as due to a merchant and deducts this sum from money due to the contractor, the building owner under the particular circumstances of the case is liable to pay the merchant (*o*). There is, however, apart from special circumstances, no right in the merchant to recover money from anyone with whom he has not contracted, and this is a question of fact. Where the merchant has received an order from the architect, it is also a question of fact whether the architect is personally liable, or whether he is the agent of the building owner or even of the builder in ordering the goods.

Power to order direct payment to merchants.

A clause is sometimes inserted in the building contract, for the protection of the merchant, to the effect that, if the contractor is delaying payment to the merchant, the architect shall have power to order direct payment by the building owner to the merchant. Such a power is not annulled by the builder's bankruptcy, and if the architect acts on it the merchant is entitled to be paid in priority to the claim of the builder's trustee in bankruptcy (*p*).

Part XVI.—Guarantees and Sureties.

SECT. 1.—*For due Performance by the Contractor.*

When sureties required.

585. In building and engineering contracts the contractor sometimes has to find sureties who by a bond (*q*) or otherwise make themselves responsible for the due performance of the contract by the contractor. Urban authorities are required by statute (*r*) to take sufficient security in the case of contracts to the amount of £100 or upwards (*s*). Boards of guardians are authorised to require sureties from the contractor if they deem it advisable (*t*).

(*o*) *Hobbs* v. *Turner* (1902), 18 T. L. R. 235.

(*p*) *Re Wilkinson, Ex parte Fowler*, [1905] 2 K. B. 713.

(*q*) As to bonds generally, see title BONDS, pp. 79 *et seq.*, *ante*, and for form of such bond, see Encyclopædia of Forms, Vol. VI., p. 244.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174 (4). See title PUBLIC HEALTH ETC.

(*s*) It has not been decided whether this sub-section is mandatory or only directory. S. 174 (1) has been decided to be mandatory (*Young & Co.* v. *Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517), and s. 174 (2) to be directory (*Soothill Upper Urban Council* v. *Wakefield Rural Council*, [1905] 2 Ch. 516). If the sub-section is mandatory, the effect of not taking security would be to avoid the contract; if it is only directory, the contract would be valid. See further, titles LOCAL GOVERNMENT; PUBLIC HEALTH ETC.

(*t*) General Poor Law Order of 1847, Statutory Rules and Orders Revised, Vol. X., "Poor, England," p. 74.

SECT. 1.

For due Performance by the Contractor.

Where sureties are required by the contract it will depend on the terms of the contract whether or not the providing of the sureties is a condition precedent to payment (*u*).

586. The principles relating to the validity of the undertaking of sureties, their release, and the remedies of the employer are generally the same in the case of building contracts as in that of other contracts of suretyship (*w*).

Position of sureties.

Certificate withheld.

A surety may be discharged by actual completion of the works the subject of the guarantee in accordance with the specification, although a certificate, which is a condition precedent to payment to the contractor, has not been given, but this depends on the terms of the guarantee (*x*). Where there has been concealment by the contractor of defective work, and a certificate has been fraudulently obtained by him from the engineer, the surety will not be discharged (*y*).

Alteration in contract.

An immaterial alteration in the contract made after the guarantee has been entered into will not discharge the surety (*z*).

Concealment etc.

A mere misrecital of a fact, as that a specification had been signed when in fact it had not, is not such a fraud or concealment as will release the surety (*a*). But if the works are without the knowledge of the surety made subject to the supervision and approval of the engineer of some third party, the surety will be discharged (*b*).

Where the employer "shall and may" insure the works at the expense of the contractor, a surety will be discharged by his failure to do so (*c*).

Extension of work or of time.

An increase of the amount of work to be done or an extension of time for constructing the work will also have the effect of discharging the contractor's sureties (*d*).

Premature payment.

The surety will also be discharged if, without his knowledge and assent, the employer makes any payment to the contractor before the time when such payment is due under the contract (*e*), unless authorised by the guarantee so to do.

Insanity.

If the contractor becomes insane, and consequently unable to perform the work, the sureties are entitled to complete the contract (*f*).

(*u*) See *Roberts* v. *Brett* (1865), 11 H. L. Cas. 337 ; and see p. 226, *ante*.
(*w*) See title GUARANTEE.
(*x*) Compare *Lewis* v. *Hoare* (1881), 44 L. T. 66.
(*y*) *Kingston-on-Hull Corporation* v. *Harding*, [1892] 2 Q. B. 494.
(*z*) *Andrews* v. *Lawrence* (1865), 19 C. B. (N. S.) 768.
(*a*) *Russell* v. *Trickett* (1865), 13 L. T. 280.
(*b*) *Stiff* v. *Eastbourne Local Board* (1868), 20 L. T. 339.
(*c*) *Watts* v. *Shuttleworth* (1861), 7 H. & N. 353.
(*d*) *Harrison* v. *Seymour* (1866), L. R. 1 C. P. 518.
(*e*) *General Steam Navigation Co.* v. *Rolt* (1859), 6 C. B. (N S.) 550, 584, where instalments of price were paid to the contractor before he had done the work in respect of which they were payable; *Warre* v. *Calvert* (1837), 7 Ad. & El. 143, where the contract provided for advances from time to time of not more than three-fourths of the value of the work completed, and the sums advanced exceeded the whole value of the work; *Calvert* v. *London Dock Co.* (1838), 7 L. J. (CH.) 90, where retention money was advanced to the contractor.
(*f*) *Tracey* v. *M'Cabe* (1893), 32 L. R. Ir. 21.

An employer who is sued by the contractor may bring in the surety as third party to a counterclaim against the contractor for a breach of the contract guaranteed (*g*).

SECT. 1. For due Performance by the Contractor.

SECT. 2.—*For Payment of the Contractor.*

587. Sureties to guarantee the payment of the contractor are frequent in the case of private employers (*h*), and they are sometimes necessary where the employer is a public body, especially where the price is payable out of poor rates. When sureties for payment taken.

In some cases there may also be a guarantee for the payment of a sub-contractor. In such a case, if there is an obligation on the part of the contractor to supply the work within a fixed time coupled with a similar obligation on the part of the sub-contractor, and the employer waives delay on the part of the contractor, and the contractor is liable to pay the sub-contractor in full, the surety cannot set up the delay on the part of the sub-contractor as a defence in an action by the sub-contractor on his guarantee (*i*).

SECT. 3.—*For Financing the Contractor.*

588. In some cases the contractor finds it necessary to obtain sureties to guarantee his banking account (*k*) or other liabilities he may incur (*l*), and such sureties are sometimes given a charge over the contractor's interest in the contract. Charging of contractor's interest.

The effect of such charges to sureties is similar to other cases of assignment of payments to be made under the contract (*m*).

Part XVII.—Arbitration Clauses in Building Contracts.

SECT. 1.—*In General.*

589. It is very common to insert in building and engineering contracts a clause to the effect that, in case disputes arise between the contractor on the one side and the employer or his architect on the other, such disputes shall be referred to arbitration. Such clauses vary in their scope in different contracts. In some cases they include all disputes that may arise without exception; in others only disputes as to particular subjects are to be referred to arbitration. In some cases the arbitrator is named or is an independent Usual arbitration clauses.

(*g*) *Turner* v. *Hednesford Gas Co.* (1878), 3 Ex. D. 145.
(*h*) *Andrews* v. *Lawrence* (1865), 19 C. B. (N. S.) 768, is an instance of such a guarantee.
(*i*) *Oastler* v. *Pound* (1863), 7 L. T. 852.
(*k*) *Brice* v. *Bannister* (1878), 3 Q. B. D. 569; *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (1880), 30 Ch. D. 216.
(*l*) *Heming* v. *Maline and Tremery* (1835), 4 L. J. (EX.) 245.
(*m*) See p. 267, *ante*.

SECT. 1. In General.

person appointed in some prescribed way; in others each party is to appoint an arbitrator, and these arbitrators in case of difference are to appoint an umpire; while in others, again, the architect or engineer is the arbitrator, notwithstanding that he is the agent of the employer (*n*).

Construction.

Arbitration clauses in building contracts are to be construed in accordance with the general law of arbitration (*o*), and are governed by the Arbitration Act, 1889 (*p*).

Stay.

In the case of an action by a contractor for damages arising from an alleged wrongful forfeiture of a contract containing an arbitration clause covering the cause of action, the court may exercise its discretion by refusing a stay (*q*).

SECT. 2.—*What is included in an Arbitration Clause.*

Application of arbitration clause.

590. Whether a particular dispute is within the scope of an arbitration clause depends in each particular case on the wording of the clause; and when the arbitration is to be by the architect or engineer, the clause should be construed strictly (*r*).

Thus a clause providing that disputes in any way relating to the contract and the conditions connected with or relating to the proposed buildings and works should be referred to the architect as arbitrator does not, it would seem, give the architect power arbitrarily to determine the final balance due to the contractor on completion (*s*); and, in the absence of express provisions, the architect will not have jurisdiction to decide in his capacity as arbitrator whether or not the employer has committed breaches of the contract, *e.g.*, by delaying the works or wrongfully ousting the contractor (*t*).

Where the reference is to an independent arbitrator or umpire, an arbitration clause will apparently be construed rather more widely than in the case of reference to the agent of one of the parties (*u*).

(*n*) For forms of arbitration clauses see Encyclopædia of Forms, Vol. II., pp. 94, 586, 601; and for form of agreement to refer, *ibid.*, p. 109.

(*o*) As to the general law of arbitration, see title ARBITRATION, Vol. I.

(*p*) 52 & 53 Vict. c. 49.

(*q*) *Pickering* v. *Cape Town Rail. Co.* (1865), L. R. 1 Eq. 84; and see *Nobel Brothers Petroleum Production Co.* v. *Stewart (P.) & Co.* (1890), 6 T. L. R. 378; *contra*, *Renshaw* v. *Queen Anne Mansions Co.*, [1897] 1 Q. B. 662; *Parry* v. *Liverpool Malt Co.*, [1900] 1 Q. B. 339.

(*r*) *Northampton Gas Light Co.* v. *Parnell* (1855), 15 C. B. 630; *Tough* v. *Dumbarton Water Works Commissioners* (1872), 11 Macph. (Ct. of Sess.) 236; *Lawson* v. *Wallasey Local Board* (1883), 48 L. T. 507; *Hutcheson & Co.* v. *Eaton & Son* (1884), 13 Q. B. D. 861.

(*s*) *Pushby* v. *Birmingham Corporation* (1856), 18 C. B. 2.

(*t*) *Northampton Gas Light Co.* v. *Parnell, supra*; *Moyers* v. *Soady* (1886), 18 L. R. Ir. 499; *Swiney and M'Larnon* v. *Ballymena Commissioners* (1888), 23 L. R. Ir. 122; *Mackay & Son* v. *Leven Police Commissioners* (1893), 20 R. (Ct. of Sess.) 1093; *Wells* v. *Army and Navy Co-operative Society, Ltd.* (1902), 86 L. T. 764. But see *Lawson* v. *Wallasey Local Board, supra*; *Levy & Co.* v. *Thomsons* (1883), 10 R. (Ct. of Sess.) 1134.

(*u*) *Re Hohenzollern Actien Gesellschaft für Locomotivbau and the City of London Contract Corporation* (1886), 2 T. L. R. 470.

SECT. 2. What is included in an Arbitration Clause.

591. Where there has been abandonment or rescission of the contract, the arbitration clause will, it would seem, cease to apply unless there is a special provision extending the scope of the clause to such a case (*w*), or unless the arbitration clause is sufficiently wide to include the question whether such abandonment or rescission is a breach of the contract between the parties (*a*).

When arbitration clause does not apply.

Where a sub-contractor agrees to be bound by the terms of a principal contract, which contains a clause referring disputes between the employer and the contractor to arbitration, this does not operate as a submission to arbitration of disputes between the contractor and the sub-contractor (*b*), unless that term of the principal contract is expressly incorporated in the sub-contract (*c*).

SECT. 3.—*Difference between Arbitration and Certifying.*

Distinction between architect as arbitrator and as certifier.

592. In cases where the architect or engineer who has to give a certificate of approval of the work done is also the person designated to act as arbitrator in case of disputes, it is very important to distinguish between his duties and powers in his capacity as a certifier from those in his capacity as arbitrator. It must also be observed that he may be acting in regard to the same matter at one time in the one capacity and at another time in the other (*d*). When the architect or engineer is acting in his capacity as certifier the provisions of the Arbitration Act, 1889 (*e*), do not apply, while when he is acting in his capacity as arbitrator they do.

In most cases it is possible to make this distinction, but it sometimes occurs that a building contract is framed in such a way as to make the two capacities inseparable. For instance, where the approval or condemnation of work and materials is left to the sole discretion of the architect, it would seem that as to these matters he is acting during the whole progress of the works in a *quasi*-judicial capacity, whereas in other cases he might be acting as agent of the employer while the work was being done, and in a judicial capacity when subsequently deciding a dispute as to the sufficiency of the work or materials. In this former case the employer might not discover the negligent approval of insufficient work etc. until after the expiration of the *quasi*-judicial powers of the architect.

Use of skill and judgment.

593. The first distinction to be observed is that where architects and engineers have to decide matters by the exercise of their skill and knowledge of the particular subject on which they have to give a decision, or where their certificate or determination (not award)

(*w*) *Mansfield* v. *Doolin* (1869), 4 I. R. C. L. 17, 25; *Bell* v. *Keesing* (1888), 7 N. Z. L. R. 155. See also *General Billposting Co.* v. *Atkinson* (1908), 24 T. L. R. 285.

(*a*) *Renshaw* v. *Queen Anne Mansions Co.*, [1897] 1 Q. B. 662; *Parry* v. *Liverpool Malt Co.*, [1900] 1 Q. B. 339.

(*b*) *Goodwins* v. *Brand & Son* (1905), 7 F. (Ct. of Sess.) 995.

(*c*) See *Temperley Steam Shipping Co.* v. *Smyth & Co.*, [1905] 2 K. B. 791.

(*d*) *Cross* v. *Leeds Corporation* (1902), Hudson on Building Contracts, 3rd ed., Vol. II., p. 369.

(*e*) 52 & 53 Vict. c. 49. See title ARBITRATION, Vol. I., p. 441.

SECT. 3.

is made a condition precedent to the contractor's right to payment, they are not arbitrators (*f*).

Difference between Arbitration and Certifying.

Where architects or engineers have to decide the value of works done by the contractor, they are *primâ facie* valuers, and not arbitrators (*g*). But although a valuation or appraisement is generally not an award, it may become so under particular circumstances.

Valuation.

Thus, where the intention of the parties is that their respective cases should be heard and a decision arrived at upon the evidence adduced before the person who is to value, then, although the object to be arrived at is the ascertainment of the value of the works, the matter can properly be considered as an arbitration (*h*).

Prevention of disputes.

Where the function of the architect in the particular matter is to prevent a dispute arising, then he is not an arbitrator, but where the agreement is that any dispute shall be inquired of and determined by the architect, that may, where there is to be anything of the nature of a judicial inquiry, be a submission to arbitration, and the determination of the architect may be an award, although it is in the form of a certificate (*i*).

Intention of parties.

594. The important question is the intention of the parties. If they intend to have a valuation, and not a judicial inquiry, the fact of the person named hearing evidence will not overrule their intention, and his determination is a valuation, and not an award (*k*). And it does not matter whether the architect is called an arbitrator if the intention of the parties was that he should act as a valuer or certifier (*l*).

Whether the clause referring matters arising under the contract to the architect is intended to provide for a judicial inquiry or not, the tendency is to treat the matter as a submission to arbitration, even in cases where the subject-matter of the architect's determination may not require a judicial inquiry. But when the architect has given his decision as a certifier without the contractor having previously claimed to be heard by him, or to be allowed to adduce evidence, the tendency will be to treat the intention of the parties as being that he should determine by the exercise of his skill and judgment, and not judicially (*m*).

Revocation.

595. It is also important to distinguish the functions of the architect as certifier or valuer from those as arbitrator in view of

(*f*) *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72; *Scott* v. *Liverpool Corporation* (1858), 28 L. J. (CH.) 230; *Wadsworth* v. *Smith* (1871), L. R. 6 Q. B. 332.

(*g*) See *Re Carus-Wilson and Greene* (1886), 18 Q. B. D. 7.

(*h*) On the analogy of a valuation of tenant's compensation (*Re Hopper* (1867), L. R. 2 Q. B. 367).

(*i*) *Wadsworth* v. *Smith*, *supra*, *per* BLACKBURN, J., at p. 337.

(*k*) On the analogy of a valuation of compensation (*Re Dawdy* (1885), 15 Q. B. D. 426).

(*l*) Compare *Collins* v. *Collins* (1858), 26 Beav. 306; *Re Hammond and Waterton* (1890), 62 L. T. 808.

(*m*) *Goodyear* v. *Weymouth and Melcombe Regis Corporation* (1865), 35 L. J. (C. P.) 12; *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597, 601, 613; *Laidlaw* v. *Hastings Pier Co.* (1874), Jenkins and Raymond, Architect's Legal [illegible], 4th ed., pp. 238, 256.

SECT. 3. Difference between Arbitration and Certifying.

the power to revoke a submission to arbitration by leave of the court (*n*), while an agreement for valuation is irrevocable (*o*).

Also if the architect should die, or become incapable, or refuse to act, then, if it is an arbitration, a substitute may be appointed by the court (*p*), while it has been held that this power does not exist in the case of persons selected to decide questions by the exercise of their skill and judgment (*q*).

Appointment of substitutes.

The same considerations apply in the case of an umpire as in that of a reference to the decision of one valuer or arbitrator.

How far certificate clause controlled by arbitration clause.

596. Where a building contract contains a clause by which the determination or certificate of the architect is made final and conclusive between the parties, or is made a condition precedent to any right of the contractor to payment (*r*), and the contract also contains a clause by which all disputes are to be referred to arbitration, a question arises as to how far the arbitration clause affects the certificate clause.

Matters in architect's discretion.

Where the arbitration clause, as in many cases, in express terms excepts certain matters and leaves them to the sole discretion of the architect, no arbitration can arise in respect of these matters except by agreement, and, in the absence of an allegation of fraud, neither the court nor the arbitrator has jurisdiction to review the determination of the architect as to them (*s*).

Where certificate conclusive.

Where, on the other hand, there is no express restriction of the scope of the arbitration clause, the jurisdiction of the arbitrator does not apparently extend to review the correctness of measurements (*t*) and valuations (*u*) where they are made conclusive between the parties, or conditions precedent to a right to payment (*b*). The architect or engineer in giving such a certificate is acting so as to prevent a dispute arising, and the jurisdiction of the arbitrator only comes into existence when a dispute has actually arisen. When there are two clauses giving similar jurisdiction either to the architect or to the arbitrator, the effect seems to be that when the architect has given his certificate before a dispute has actually

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(*n*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 1. See title ARBITRATION, Vol. I., p. 449.

(*o*) *Northampton Gas Light Co.* v. *Parnell* (1855), 15 C. B. 630.

(*p*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 5, 6. See title ARBITRATION, Vol. I., p. 456.

(*q*) *Re Hammond and Waterton* (1890), 62 L. T. 808.

(*r*) See p. 210, *ante*.

(*s*) *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597; *Lawson* v. *Wallasey Local Board* (1883), 48 L. T. 507.

(*t*) *Macdonald* v. *Malcolm* (1855), 17 Dunl. (Ct. of Sess.), 1033.

(*u*) *Re Meadows and Kenworthy* (1897), Hudson on Building Contracts, 3rd ed., Vol. II., p. 292.

(*b*) *Clemence* v. *Clarke* (1880), Hudson on Building Contracts, 3rd ed., Vol. II., p. 41, *per* LINDLEY, J., at p. 52: "What interpretation is to be put upon two such clauses? I apprehend—and you must give them both effect—it would stand in this way; that if it is capable of being made the subject of a reference, it is not to be conclusive for the purpose of that reference, but it is to be conclusive for every other purpose. That would be the construction I should put upon it, assuming that the certificate is a proper subject-matter of reference, which I doubt very much indeed." See also *Brunsdon* v. *Staines Local Board* (1884), 1 Cab. & El. 272 (a case of extras).

SECT. 3. **Difference between Arbitration and Certifying.**

arisen it is final and conclusive between the parties, but if a dispute has arisen before the architect has certified, then his power of certifying is destroyed, and the jurisdiction of the arbitrator arises (*c*).

Certificate not made conclusive.

Where, however, although the architect has power to give a certificate, that certificate is not made conclusive between the parties, and is not made a condition precedent to payment, such a certificate would be subject to an arbitration clause in the contract (*d*).

When arbitration substituted for certificate.

597. In some contracts payment has to be made either on the certificate of the engineer or on the award of the arbitrator (*e*). In such a case the award of the arbitrator, if there has been arbitration, is just as much a condition precedent to payment as the certificate would otherwise be (*f*).

If the architect, however, purports to decide in his capacity of arbitrator questions as to which his determination is conclusive, together with other questions as to which he is really an arbitrator, he will subject himself, in respect of both classes of matters, to the jurisdiction which the court has over him as arbitrator (*g*).

When arbitration clause inoperative.

598. Where in fact there is, or can be, no dispute, the arbitration clause does not come into operation at all (*h*).

Where, however, the parties have once actually referred a question to arbitration, they will, it would seem, be bound by the award, although either might previously have successfully opposed the reference to arbitration (*i*).

SECT. 4.—*Disqualification of Arbitrator.*

Effect of arbitrator being agent of one of the parties.

599. Although the general law as to the disqualification of arbitrators applies to building contracts, just as it does in other cases, this class of contracts often presents the peculiarity of the person designated as arbitrator being the agent of one of the parties. This peculiarity has given rise to much litigation. The effect of the decisions is that where an architect has two duties to perform, *i.e.*, to superintend and control the work and to act as arbitrator, no honest exercise of his functions in the one capacity will disqualify him from acting in the other capacity (*k*). Nor will even extremely strong expressions of opinion in his capacity of

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(*c*) *Lloyd Bros.* v. *Milward* (1895), Hudson on Building Contracts, 3rd ed., Vol. II., p. 288. See also *Clemence* v. *Clarke* (1880), Hudson on Building Contracts, 3rd ed., Vol. II., p. 41.

(*d*) *Re Hohenzollern Actien Gesellschaft für Locomotivbau and City of London Contract Corporation* (1886), 2 T. L. R. 470; *Robins* v. *Goddard*, [1905] 1 K. B. 294.

(*e*) *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597.

(*f*) *Ibid.*, *per* MELLISH, L.J., at p. 613.

(*g*) *Mills* v. *Bayley* (1863), 32 L. J. (EX.) 179.

(*h*) *Greenock Parochial Board* v. *Coyhill & Son* (1878), 5 R. (Ct. of Sess.) 732.

(*i*) *Goodwin* v. *R.* (1898), 28 Can. S. C. R. 273.

(*k*) *Scott* v. *Carluke Local Authority* (1879), 6 R. (Ct. of Sess.) 616.

superintendent disqualify him from acting as arbitrator (*l*), except where such expressions shew that he is not open to argument (*m*).

Thus, an architect is not disqualified from acting as arbitrator by the fact that there is money due to him as architect from the employer (*n*) nor by being subsequently appointed manager to the employer (*o*); nor by holding shares in a company which is employing him in a case where the fact is known by the contractor (*p*); nor by subsequently expressing an opinion during the progress of the works as to matters in dispute (*q*); nor by complaints of the way in which the contractor is performing the works (*r*); nor by his measurements being impeached (*s*); nor by revising the specifications or schedules for the works (*t*); nor by the fact that one of the parties has brought an action against him, alleging fraud and misrepresentation (*u*); nor on the ground that he is in substance made the judge as to his own competence to advise his employers, unless there is sufficient reason to suppose that he will not act fairly (*a*); nor, when the reference is to the principal engineer for the time being, by the fact that some other person has been put over his head as principal engineer of amalgamated works which include the works the subject-matter of the contract (*b*); nor by the fact that the construction of the work may improve his own estate (*c*); nor unless the court is satisfied that the arbitrator cannot deal impartially with the matters in dispute (*d*), or without adjudicating on his own defaults and neglects (*e*).

(*l*) *Cross* v. *Leeds Corporation* (1902), Hudson on Building Contracts, 3rd ed., Vol. II., p. 369, where the engineer had characterised the claim of the contractor on which he was to adjudicate as being "outrageous."

(*m*) *Nuttall* v. *Manchester Corporation* (1892), 8 T. L. R. 513; *Baring Brothers* v. *Doulton & Co.* (1892), 61 L. J. (Q. B.) 704; *Jackson* v. *Barry Rail. Co.*, [1893] 1 Ch. 238; *Re Frankenberg and Security Co.* (1894), 10 T. L. R. 393.

(*n*) *Morgan* v. *Morgan* (1832), 2 L. J. (EX.) 56.

(*o*) *Phipps* v. *Edinburgh and Glasgow Rail. Co.* (1843), 5 Dunl. (Ct. of Sess.) 1025.

(*p*) *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72. Unless the pecuniary interest is known to the builder it will disqualify (*Beddow* v. *Beddow* (1878), 9 Ch. D. 889).

(*q*) *Hughes* v. *Liverpool Corporation*, Annual Practice, 1890-1891, p. 152; *Jackson* v. *Barry Rail. Co.*, [1893] 1 Ch. 238; *Ives and Barker* v. *Willans*, [1894] 2 Ch. 478; *Halliday* v. *Hamilton's (Duke) Trustees* (1903), 5 F. (Ct. of Sess.) 800.

(*r*) *Scott* v. *Carluke Local Authority* (1879), 6 R. (Ct. of Sess.) 616.

(*s*) *Mackay* v. *Barry Parochial Board* (1883), 10 R. (Ct. of Sess.) 1046.

(*t*) *Adams* v. *Great North of Scotland Rail. Co.* (1889), 26 Sc. L. R. 765, 772.

(*u*) *Belcher* v. *Rowlean School Site and Buildings, Ltd.* (1901), 85 L. T. 468. See also *Buchan* v. *Melville* (1902), 39 Sc. L. R. 398.

(*a*) *Ives and Bacher* v. *Willans*, *supra*, at p. 488; *Eckersley* v. *Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667.

(*b*) *Re Wansbeck Rail. Co. and Trowsdale* (1866), L. R. 1 C. P. 269, where the railway had been amalgamated with other railways, and the person referred to was not the principal engineer of the amalgamated railways, though he remained engineer of that part which was the subject-matter of the contract.

(*c*) *Johnston* v. *Cheape* (1817), 5 Dow, 247; *Drew* v. *Drew* (1852), 14 Dunl. (Ct. of Sess.) 559, affirmed by House of Lords, *Times* (March 12, 1855).

(*d*) *Re Donkin and Company of Proprietors of Leeds and Liverpool Canal* (1893), 9 T. L. R. 192.

(*e*) *Nuttall* v. *Manchester Corporation* (1892), 8 T. L. R. 513; *Eckersley* v. *Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667; *Wells* v. *Army and Navy*

SECT. 4. Disqualification of Arbitrator.

The parties have agreed on a tribunal, which they knew would not be absolutely impartial, and they must abide by their agreement (*f*). But if an arbitrator has misconducted himself, the court may remove him (*g*).

Part XVIII.—Architects and Engineers.

SECT. 1.—*Employment and Authority.*

SUB-SECT. 1.—*In General.*

When contract written.

600. Architects and engineers are not usually employed under a written contract when the employment is to design and superintend a building or works, but in the case where drawings and plans are submitted in a competition the published conditions of the competition, coupled with the acceptance by the architect, may constitute a written contract to employ the successful competitor.

If the contract between the employer and the contractor contains provisions which define, limit, or extend the authority of the architect, the authority will be construed strictly, and as not extending to confer powers not necessary for the effectual exercise of the powers expressly granted (*h*).

When under seal.

In the case of corporations and local bodies bound to contract under seal (*i*), the appointment of an architect or engineer requires to be under seal (*j*).

SUB-SECT. 2.—*Authority as Agent.*

Duties of architect.

601. The objects for which an architect or engineer is employed comprise the preparation of drawings and plans for the buildings or works in contemplation, and also the superintendence of their construction, and he generally is, depending on the terms of the

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Co-operative Society (1902), Hudson on Building Contracts, 3rd ed., Vol. II., p. 376.

(*f*) See also, as to disqualification of the architect as certifier or *quasi*-arbitrator, p. 218, *ante*.

(*g*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 11 (1). It is misconduct under this section for an arbitrator deliberately to decide contrary to law (*Darlington Wagon Co.* v. *Harding and Trouville Pier and Steamboat Co.*, [1891] 1 Q. B. 245).

(*h*) *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597; *Lawson* v. *Wallasey Local Board* (1883), 48 L. T. 507; *Betts* (*Frederick*), *Ltd.* v. *Pickfords, Ltd.*, [1906] 2 Ch. 87.

(*i*) For these, see titles CORPORATIONS; LOCAL GOVERNMENT.

(*j*) *Hunt* v. *Wimbledon Local Board* (1878), 4 C. P. D. 48, approved in *Young & Co.* v. *Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517; but sealing may be dispensed with where the consideration has been executed, if the corporation is not one to which the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174, applies (*Lawford* v. *Billericay Rural District Council*, [1903] 1 K. B. 772). See title CORPORATIONS. See *Dyte* v. *St. Pancras Board of Guardians* (1872), 27 L. T. 342.

contract, the agent of the building owner or employer in both these respects (*k*). SECT. 1. Employment and Authority.

With regard to drawings and plans, although the architect is the agent of the building owner, he has no implied authority to warrant that they are correct, or that the work can be carried out in accordance with them, or that temporary constructional works, in the case of engineering contracts, are practicable (*l*).

If, however, the architect makes representations as to the accuracy of plans, or as to the quantities of work to be done, or other matters, and does so fraudulently, and with the intention that they should be acted on, and they have actually been acted on, and that to the prejudice of the contractor, the employer will be liable in respect of them, and cannot escape liability by relying on a clause in the contract purporting to throw the onus of inquiry on the contractor (*m*). Fraud.

The authority of the architect as agent does not empower him without the knowledge or consent of his employer to make promises that conditions contained in it will be varied or waived (*n*), and if the employer is a corporation, which can only contract under seal, the authority must be under seal (*o*). Promises as to waiver of conditions etc.

If there are omissions in the plans, drawings, or specifications, the architect has no implied authority to order as extras such things omitted as are necessary to complete the contract (*p*), or, where the scheme is impracticable, to order as an extra work which is necessary to enable the works to be constructed (*q*). Faulty plans etc.

In most cases an architect has to supply detailed or working drawings during the progress of the work. This duty, however, is only to be exercised for the purpose of directing the contractor as to the exact manner in which the work described generally in the contract plans and drawings is to be done (*r*). Working drawings.

602. Where an architect is merely instructed to prepare plans, his employment is that of a skilled draughtsman, and not that of an agent, and he has no implied authority to obtain tenders or to negotiate for advances (*s*); but where he has authority to obtain tenders, he is entitled to use the customary means of obtaining them (*t*). And further, if the tenders he submits are not accepted by the building owner, it would seem that he is entitled to get others Procuring of tenders.

(*k*) *R.* v. *Pelo* (1826), 1 Y. & J. 37, at p. 54; *Wallis* v. *Robinson* (1862), 3 F. & F. 307; *Kimberley* v. *Dick* (1871), L. R. 13 Eq. 1; *Laidlaw* v. *Hastings Pier Co.* (1874), Jenkins and Raymond, Architect's Legal Handbook, 4th ed., p. 238.

(*l*) *Thorn* v. *London Corporation* (1876), 1 App. Cas. 120.

(*m*) *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation*, [1907] A. C. 351.

(*n*) *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597.

(*o*) *Young* v. *Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517.

(*p*) *Sharpe* v. *San Paulo Rail. Co.*, *supra*.

(*q*) *Tharsis Sulphur and Copper Co.* v. *M'Elroy & Sons* (1878), 3 App. Cas. 1040.

(*r*) *R.* v. *Pelo*, *supra*, at p. 54; *Cooper* v. *Langdon* (1841), 9 M. & W. 60.

(*s*) *Spratt* v. *Dornford* (1862), Hudson on Building Contracts, 3rd ed., Vol. II., p. 7.

(*t*) As to employing a quantity surveyor for this purpose, see p. 309, *post*.

SECT. 1. Employment and Authority.

sent in within the time limited, or, if no time is limited, within a reasonable time (*u*). An authority to obtain tenders does not imply an authority to enter into a contract with a builder or contractor, even when the tender is within the price the employer is prepared to pay (*a*).

Dismissal of contractor.

603. In the absence of a special provision to that effect in the building contract, the architect has no authority to dismiss the contractor from his employment, but such a power is usually inserted in contracts in the form of a forfeiture clause (*b*).

Employment of sub-contractors.

604. The authority of the architect to designate persons as sub-contractors or specialists (*i.e.*, persons to manufacture or supply special articles) depends on the terms of the contract in each case, and this may become important in considering the question to whom these sub-contractors are to look for payment (*c*).

Varying the contract.

605. The architect or engineer has no general authority to vary, waive, or dispense with any conditions contained in the contract without being specially authorised to do so; and even where he is authorised by the contract to give directions as to the manner in which the work is to be carried out, he can only give such directions as fall within the contract, and may not vary the whole scheme of the proposed works (*d*), or allow the substitution of entirely different materials for those specified in the contract (*e*).

Ordering of extras.

606. An architect or engineer has authority to order extras only when the contract so provides, and then only to the extent provided therein. He cannot order work as an extra, or certify for materials as having been supplied, when in fact the work has not been done, or the materials supplied (*f*). The architect or engineer cannot waive or dispense with a condition that extras shall be ordered in writing, or any similar condition (*g*). If, however, he has power by a final and conclusive certificate to adjust the amount payable by the employer to the contractor, the employer must pay the amount certified for if the certificate is honestly given, although the certificate may include work not done, or materials not supplied, or extras not executed or work properly included in the contract work or extras not ordered in the manner prescribed by the contract (*h*).

(*u*) See *Tetley* v. *Shand* (1871), 25 L. T. 658; *Imperial Ottoman Bank* v. *Cowan* (1873), 29 L. T. 52; *Barrowman* v. *Free* (1878), 4 Q. B. D. 500.

(*a*) On the analogy of an estate agent (*Hamer* v. *Sharp* (1874), L. R. 19 Eq. 103). See title AGENCY, Vol. I., p. 166.

(*b*) See p. 249, *ante*.

(*c*) See p. 275, *ante*.

(*d*) *R.* v. *Pelo* (1826), 1 Y. & J. 37; *Sharpe* v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597; *Ramsay* v. *Brand* (1898), 25 R. (Ct. of Sess.) 1212.

(*e*) *Steel* v. *Young* (1907), 9 F. (Ct. of Sess.) 360.

(*f*) In the same way as shipowners are not liable on bills of lading for goods which have not been shipped (*Grant* v. *Norway* (1851), 10 C. B. 665). And see *Sharpe* v. *San Paulo Rail. Co.*, *supra*.

(*g*) See p. 234, *ante*.

(*h*) *Goodyear* v. *Weymouth and Melcombe Regis Corporation* (1865), 35 L. J. (C. P.) 13; *Connor & Solley* v. *Belfast Water Commissioners* (1871), 5 I. R. C. L.

SECT. 1. Employment and Authority.

607. Architects and engineers, instead of employing a quantity surveyor to take out quantities for the purpose of tenders, sometimes take out the quantities themselves (*i*). It is doubtful whether any authority to do this can be implied (*k*).

Taking out quantities etc.

Many building and engineering contracts provide that deviations are to be measured up and paid for in accordance with a schedule of prices. If the architect or engineer has by the contract to certify the balance due to the contractor, he would have implied authority to measure the deviations for that purpose (*l*).

Personal liability of architect.

608. So long as an architect acts honestly and within the scope of his employment as agent of the employer, he can incur no personal liability for his acts to the contractor (*m*).

If an architect or engineer exceeds his authority in ordering additional works of the contractor, he may incur liabilities towards the contractor for breach of warranty of authority (*n*), but as such unauthorised acts would not bind his employer, it would seem that he could hardly incur any liability towards his employer (*o*) in respect of them.

SECT. 2.—*Duties of Architects and Engineers.*

SUB-SECT. 1.—*Professional Skill and Care.*

Liability for want of skill.

609. Although architects and engineers do not require to possess any diplomas or qualifying certificates, they are bound to possess a reasonable amount of skill in the art or profession they exercise for reward, and to use a reasonable amount of care and diligence in the carrying out of work which they undertake, including the preparation of plans and specifications (*p*). Every person who enters into a profession undertakes to bring to the exercise of it a reasonable degree of care and skill (*q*), and represents himself as understanding the subject and qualified to act in the business in which he professes to act (*a*). The employer buys both skill and judgment, and the

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55; *Laidlaw* v. *Hastings Pier Co.* (1874), Jenkins and Raymond, Architect's Legal Handbook, 4th ed., p. 238; *Lapthorne* v. *St. Aubyn* (1885), 1 Cab. & El. 486.

(*i*) This was the course pursued by the architect in *Young* v. *Blake* (1887), Hudson on Building Contracts, 3rd ed., Vol. II., p. 106.

(*k*) See, however, *Lansdowne* v. *Somerville* (1862), 3 F. & F. 236, in which case KEATING, J., left the following questions to the jury: "Was there such a custom [for the architect to take out the quantities], and was it known to the parties, and did they contract on the footing of the custom?" The jury found that there was such a custom known to the parties on the footing of which they contracted.

(*l*) *Brattie* v. *Gilroy* (1882), 10 R. (Ct. of Sess.) 226.

(*m*) See p. 301, *post*.

(*n*) See title AGENCY, Vol. I., p. 221.

(*o*) See p. 295, *post*.

(*p*) *Badgley* v. *Dickson* (1886), 13 Ontario Appeals, 494, *per* OSLER, J.A., at p. 500; *Beck* v. *Smirke* (1894), Hudson on Building Contracts, 3rd ed., Vol. II., p. 286 (surveyor).

(*q*) *Lanphier* v. *Phipos* (1838), 8 C. & P. 475, *per* TINDAL, C.J., at p. 479 (surgeon).

(*a*) *Jenkins* v. *Betham* (1854), 15 C. B. 168. *per* JERVIS, C.J., at p. 188 (surveyor and valuer); *Harmer* v. *Cornelius* (1858), 5 C. B. (N. S.) 236, *per* WILLES, J., at p. 246 (scene painter). See title BAILMENT, Vol. I., pp. 559, 560.

SECT. 2. Duties of Architects and Engineers.

architect ought not to undertake the work if it cannot succeed, and he should know whether it will or not (*b*).

Where the directions of the employer to the architect are susceptible of more than one meaning, and the architect honestly, but erroneously, adopts the one which his employer did not intend, he will not be liable (*c*).

Amount of skill requisite.

610. As to the amount of skill required, the architect or engineer need not necessarily exercise an extraordinary degree of skill. It is not enough to make him responsible that others of far greater experience or ability might have used a greater degree of skill, or even that he might have used some greater degree. The question is whether there has been such a want of competent care and skill, leading to the bad result, as to amount to negligence (*d*).

The duty of the architect to employ this competent degree of skill is only applicable, however, to the exercise of his functions as agent of his employer, and not to his exercise of those as arbitrator or *quasi*-arbitrator (*e*), for when he is acting in the latter capacities he is not liable either for want of skill or for negligence (*f*).

Where an architect or engineer is employed upon works which involve the use of some new invention with which he has no practical acquaintance, and he has not professed that he is acquainted with it, his failure may not render him liable for want of skill (*g*).

The professional skill and care required from architects and engineers can be more conveniently considered in detail in connection with the liabilities of architects or engineers to their employers (*h*).

SUB-SECT. 2.—*Quasi-judicial Duties.*

No liability to employer.

611. In most building and engineering contracts the architect or engineer, in addition to his duties as agent of his employer, has to perform certain duties of a *quasi*-judicial nature, such as deciding between the parties whether work and materials are such as are specified in the contract, valuing as between the parties, and determining questions which may arise between them. He is then in a position which is similar to that of an arbitrator or an average adjuster, and in that position is not liable to his employer either for want of skill, ignorance of law, or negligence (*i*).

Careful discrimination is necessary to separate the functions of an architect or engineer in these two capacities (*k*).

Besides these *quasi*-judicial functions as certifier or valuer,

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(*b*) *Duncan* v. *Blundell* (1820), 3 Stark. 6, *per* BAYLEY, J., at p. 7.
(*c*) See *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395.
(*d*) See *Rich* v. *Pierpont* (1862), 3 F. & F. 35 (medical man).
(*e*) *Chambers* v. *Goldthorpe*, [1901] 1 K. B. 624, C. A.
(*f*) See para. 611, *infra*.
(*g*) *Turner* v. *Garland and Christopher* (1853), Hudson on Building Contracts, 3rd ed., Vol. II., p. 2.
(*h*) See p. 295, *post*.
(*i*) *Chambers* v *Goldthorpe*, *supra*.
(*k*) *Jenkins* v. *Betham* (1854), 15 C. B. 168, *per* JERVIS, C.J., at p. 188. See this point fully discussed p. 283, *ante*.

in many instances the architect or engineer employed to supervise the work is nominated in the contract as the arbitrator to decide disputes which have actually arisen in respect of the same work (*l*).

SUB-SECT. 3.—*Delegation of Duties.*

Extent of power to delegate.

612. The employment of an architect or engineer being a personal contract, he cannot delegate his duties entirely (*m*). But he need not individually go into every matter in detail (*n*), and may make use of the skill and labour of others in the performance of his duties (*o*). The ordinary course of business would make it unreasonable and impossible for the architect or engineer to be constantly on the site, supervising the construction of every part of the works, and taking upon himself the functions of a clerk of the works. The architect or engineer, however, is responsible for the acts and defaults of the subordinates to whom he intrusts the superintendence of details (*p*). The architect is not entitled to rely implicitly on the judgment of the clerk of the works, and, although a clerk of the works may be appointed by the employer, the architect may be liable to his employer for the clerk of the works' negligence (*q*).

SUB-SECT. 4.—*Personal Contracts.*

Death etc. of architect.

613. The contract of employment of an architect or engineer is a personal one, and consequently there is an implied condition that the contract shall only continue so long as the person employed remains alive, and in sufficiently good health to perform his part of the contract. For this reason the death, insanity, or continued disablement by illness of the architect dissolves the contract of employment (*r*), and neither party (nor in case of death the representatives of the deceased) can bring an action for the breach, which has in fact been brought about by the act of God (*s*).

Illness of architect.

614. In case of temporary illness, the omission to perform the services contracted to be supplied would not entitle the employer to rescind the contract, except where constant personal supervision had been stipulated for (*t*).

(*l*) See p. 281, *ante*.

(*m*) *Banger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72, 117.

(*n*) *Clemence* v. *Clarke* (1880), Hudson on Building Contracts, 3rd ed., Vol. II., p. 41.

(*o*) *Kirkwood* v. *Morrison* (1877), 5 R. (Ct. of Sess.) 79; and see *British Waggon Co.* v. *Lea* (1880), 5 Q. B. D. 149.

(*p*) *Moneypenny* v. *Hartland* (1824), 1 C. & P. 352, 354.

(*q*) *Saunders* v. *Broadstairs Local Board* (1890), Hudson on Building Contracts, 3rd ed., Vol. II., p. 159; *Lee* v. *Bateman* (*Lord*) (1893), *Times* (October 31, 1893).

(*r*) *Boast* v. *Firth* (1868), L. R. 4 C. P. 1 (apprentice); *Robinson* v. *Davison* (1871), L. R. 6 Exch. 269 (concert singer); *Grove* v. *Johnston* (1889), 24 L. R. Ir. 352 (rate collector).

(*s*) See title CONTRACT.

(*t*) *Cuckson* v. *Stones* (1858), 1 E. & E. 248. See *Poussard* v. *Spiers* (1876), 1 Q. B. D. 410; as to payment of architects and engineers in case of death etc.

SECT. 2. Duties of Architects and Engineers.

615. If the contract has relation to the personal conduct of the party who dies or retires, his death or retirement puts an end to the contract, but it is not so if the contract has no such relation (*a*).

SUB-SECT. 5.—*Duration of Duties.*

Death of employer. As agent.

616. The employment of an architect or engineer in the capacity of agent of the building owner or employer may be determined at any moment, with or without good cause. The only remedy of an architect who has been dismissed without good cause is an action for damages (*b*), as the court will neither decree specific performance of the contract of employment, nor grant an injunction restraining the building owner from employing another architect (*c*).

As arbitrator or certifier.

617. When the architect or engineer is, by the terms of the contract, to give decisions in a *quasi*-judicial capacity, and he alone is the person to give such decisions, the building owner has no right to prevent him acting, though he may dismiss him from his service, and he cannot revoke the agreement to abide by the decision of the architect (*d*), but where the person designated to perform those functions is described as "the architect or engineer of the employer for the time being," or as "A. B. or other the architect for the time being," the building owner can appoint another person to act as architect or engineer. Who is the architect for the time being in the case of his acting as arbitrator depends upon who is the person coming under that description at the time when the dispute arises (*e*). In the case of a certificate the person entitled to give it would seem to be the architect at the time when the certificate is to be given (*f*).

In case the employer should attempt to dismiss the architect or engineer, and should prevent him from going on to the site of the works for the purpose of measuring and certifying, the court will grant a mandatory order compelling the employer to allow the entry for the purposes of valuation (*g*).

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during the course of their employment, see *Davison* v. *Reeves* (1892), 8 T. L. R. 391; and p. 305, *post*.

(*a*) *Phillips* v. *Alhambra Palace Co.*, [1901] 1 K. B. 59, *per* Lord ALVERSTONE, C.J., at p. 63.

(*b*) *Hickey* v. *Browne* (1842), 4 I. L. R. 277.

(*c*) See title CONTRACT.

(*d*) *Mills* v. *Bayley* (1863), 2 H. & C. 36. See also *Murray* v. *Cohen* (1888), 9 New South Wales L. R. Eq. 124.

(*e*) *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72; *Re Wansbeck Rail. Co. and Trowsdale* (1866), L. R. 1 C. P. 269; *Strachan* v. *Cambrian Railways* (1905), Hudson on Building Contracts, 3rd ed., Vol. II., p. 398.

(*f*) See *Kellett* v. *Stockport Corporation* (1906), 70 J. P. 154. In America the view has been taken that it must be the architect employed during the construction of the particular work to which the certificate is to apply, as he alone has the requisite knowledge (*Wangler* v. *Swift* (1882), 90 N. Y. (Ct. of Appeal) 38).

(*g*) *Smith* v. *Peters* (1875), L. R. 20 Eq. 511.

SECT. 3.—*Liabilities of Architects and Engineers to their Employers.*

SECT. 3. Liabilities of Architects and Engineers to their Employers.

SUB-SECT. 1.—*In General.*

Employer's remedies.

618. If an architect acts without due care and skill (*h*) in the designing or supervision of the works intrusted to him, the building owner is entitled to dismiss him (*i*). Besides this, the architect or engineer will forfeit either wholly or in part his right to remuneration, as a person who holds himself out as skilled in any art cannot recover for services which are useless, and which by the ordinary exercise of reasonable skill he ought to have known would be useless, for the object in respect of which he was employed (*j*). In addition to this, if the negligence or want of skill of the architect or engineer has occasioned loss to his employer, he will be liable to the latter in damages (*k*). These are not limited to the amount of the remuneration which under the agreement the architect or engineer was to receive, but are measured by the actual loss occasioned to the employer (*l*). The employer can set up such a claim for damages as a defence to an action by the architect or engineer for his fees, as well as by way of counterclaim, or in a separate action for damages (*m*).

Tests of want of skill.

619. The question whether the architect or engineer has used a reasonable and proper amount of care and skill is one of fact, and appears to rest on the consideration whether other persons exercising the same profession, and being men of experience and skill therein, would or would not have acted in the same way as the architect in question (*n*).

It is evidence of ignorance and unskilfulness in any particular to act contrary to the established principles of art or science which are universally recognised by members of the profession (*o*).

Compliance with statutes and bye-laws.

620. It is part of the duty of an architect to ascertain and to comply with the requirements of all public and local statutes

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(*h*) See p. 291, *ante*.

(*i*) *Harmer* v. *Cornelius* (1858), 5 C. B. (N. S.) 236.

(*j*) See title AGENCY, Vol. I., p. 196.

(*k*) *Gordon* v. *Millar* (1858), 1 Dunl. (Ct. of Sess.) 832; *Armstrong* v. *Jones* (1869), Hudson on Building Contracts, 3rd ed., Vol. II., p. 15; *Ellison* v. *Laurie* (1878), *Times* (February 19, 1878); *Rogers* v. *James* (1891), 56 J. P. 277.

(*l*) *Saunders* v. *Broadstairs Local Board* (1890), Hudson on Building Contracts, 3rd ed., Vol. II., p. 159.

(*m*) *Davies* v. *Hedges* (1871), L. R. 6 Q. B. 687; *Mondel* v. *Steel* (1841), 8 M. & W. 858; *Armstrong* v. *Jones*, *supra*; *Saunders* v. *Broadstairs Local Board*, *supra*; *Rogers* v. *James*, *supra*; and see title DAMAGES.

(*n*) See *Chapman* v. *Walton* (1833), 10 Bing. 57, *per* TINDAL, C.J., at p. 63: "It is not only an unobjectionable mode, but the most satisfactory mode, of determining this question to show by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion as the defendant. If . . . as many out of a given number would have been of his opinion as against it he who only stipulates to bring a reasonable degree of skill to the performance of his duty would be entitled to a verdict."

(*o*) See *Slater* v. *Baker* (1767), 2 Wils. 359.

SECT. 3. **Liabilities of Architects and Engineers to their Employers.**

regulating buildings in the locality of the building, and with all sub-statutory legislation, such as bye-laws (*p*), made under them. Ignorance or disregard of the legal requirements as to buildings may result not only in a fine on the employer, but also in an order for the whole or part of the building to be pulled down (*q*), and the architect would be liable to his employer for the loss so incurred (*r*). The knowledge of the law which an architect is expected to have is not a minute and accurate knowledge, but a knowledge of the general rules of law applicable to the exercise of his profession (*s*).

Failure on the part of the architect to submit plans to the proper authorities, or to give the notices required by law, may involve the employer in penalties, and even if the contractor has undertaken to give all the necessary notices, it would seem that it is still the duty of the architect in superintending the work to see that the contractor does so, at any rate in so far as the notices are building notices, or on the contractor's default to do so himself or inform his employer. Where a judicial decision has altered what was previously supposed to be the law affecting a particular profession, it seems to be the duty of persons practising that profession to acquaint themselves within a reasonable time with the effect of such a decision and to act accordingly in the exercise of their profession (*t*).

If the building owner, however, knowingly instructs the architect to design a building which will contravene the law, the architect will incur no liability; but, on the other hand, it would seem that he would not be able to recover any fees for superintendence, as a contract to build in contravention of an Act of Parliament is illegal (*a*).

Interference with private rights.

621. As regards private rights, the architect should inquire from his employer as to the existence of any easements or restrictions affecting the site, and must in the preparation of his design avoid infringing them. The employer owes a duty to his neighbours not to infringe their rights, and cannot so delegate the execution of building operations to a contractor as to relieve himself from that obligation (*b*).

The architect or engineer may render himself liable to an adjoining owner by preparing plans and superintending work which necessitates a trespass on the adjoining owner's land (*c*).

(*p*) *James* v. *Masters*, [1893] 1 Q. B. 355.

(*q*) See *Hopkins* v. *Smethwick Local Board* (1890), 59 L. J. (Q. B.) 250, and title PUBLIC HEALTH ETC.

(*r*) On the principle of *Hadley* v. *Baxendale* (1854), 9 Exch. 341, 354. See title DAMAGES.

(*s*) *Jenkins* v. *Betham* (1855), 15 C. B. 168, *per* JERVIS, C.J., at p. 189.

(*t*) See *Lee* v. *Walker* (1872), L. R. 7 C. P. 121.

(*a*) *Stevens* v. *Gourley* (1859), 7 C. B. (N. S.) 99. See also *Stone* v. *Cartwright* (1795), 6 Term Rep. 411.

(*b*) *Cubitt* v. *Porter* (1828), 8 B. & C. 257; *Bower* v. *Peate* (1876), 1 Q. B. D. 321; *Hughes* v. *Percival* (1883), 8 App. Cas. 443; *Jolliffe* v. *Woodhouse* (1894), 10 T. L. R. 553. See also p. 315, *post*.

(*c*) *Monks* v. *Dillon* (1884), 12 L. R. Ir. 321.

SUB-SECT. 2.—*Liability for Failure to examine Site, Foundations etc.*

SECT. 3. Liabilities of Architects and Engineers to their Employers.

622. If an architect or engineer fails to exercise reasonable precaution in the examination of the site on which the works are to be constructed, and does not ascertain the circumstances affecting it, such as the nature of the soil and strata, the existence and condition of buildings thereon, whether there are rights of way, or of light and air, or other easements affecting it, and consequently his plans are defective or impracticable, he may be liable to his employer for any loss occasioned to him thereby (*d*); and the fact that the builder or contractor is liable to the employer under a contract to construct the works, notwithstanding the defective plans, will not necessarily exonerate the architect or engineer, the employer having a double remedy and being entitled to bring an action against either the architect or the builder, or against them both (*e*).

Plans defective by reason of site etc.

SUB-SECT. 3.—*Liability as to Plans, Specifications etc.*

623. The liability of an architect or engineer in respect of plans, drawings, and specifications may arise either through their being defective or incomplete, or through their not being supplied to the contractor either at all, or in proper time.

Grounds of liability.

The design of a building or of works may be defective or incomplete, for example—(1) as not being in accordance with the art and science of architecture, or opposed to sound principles of building or engineering; (2) as not being in accordance with the instructions of the employer; (3) as contravening statutes and bye-laws; and (4) as disregarding restrictions imposed on the use of the land, either by public or private rights.

Defective design.

The mere approval of the plans and specification by the employer will not exonerate the architect or engineer from liability when the design of the works is structurally defective, or does not carry out the instructions of the employer, although the employer has been told by the architect or engineer to examine them (*f*).

Effect of employer's approval.

The measure of damages, where the design of the work is impracticable or useless, must depend upon whether the work has been commenced or not. If the work has not been commenced, the damages would be the amount of any fees the architect or engineer had been paid, and any other losses incurred by the employer which are the immediate and probable consequence of the architect's negligence. If, however, a contract has been entered into with a contractor, the damages will be added to by any proper claim made by the contractor for work thrown away and loss of profit on the contract, if the work in consequence of the useless design is abandoned. Where unnecessary works have been specified the measure of damages would appear to be the amount paid or payable for such unnecessary works, while where work which should have been specified has been omitted by the architect, and has to be paid

Measure of damages.

(*d*) *Moneypenny* v. *Hartland* (1826), 2 C. & P. 378; *Columbus Co.* v. *Clowes*, [1903] 1 K. B. 244.
(*e*) *Brown* v. *Laurie* (1854), 5 Lower Canada Reports, 65.
(*f*) *Smith* v. *Barton* (1866), 15 L. T. 294 (valuer).

SECT. 8. **Liabilities of Architects and Engineers to their Employers.**

for in addition to the contract price, the measure of damages will not necessarily be the whole cost of the omitted work, although it might be.

Failure or delay in supplying plans etc.

624. Where, by reason of a failure or delay in the supplying of plans, the contractor becomes entitled to rescind the contract altogether, or is released from his obligation to complete the works within the specified time etc., the architect or engineer may become liable to his employer for the loss incurred by him (*g*), and part of such loss may be the loss of the rent or profit which would have been derived from the building or the loss of interest on his money (*h*).

Property in plans.

625. Plans and drawings prepared by architects and engineers are, in the absence of a special agreement, the property of the person who pays for them, and even if there were a custom that the architect should retain them, such a custom would be unreasonable (*i*).

SUB-SECT. 4.—*Liability as to Quantities.*

Taking out quantities.

626. If the architect himself takes out the quantities, and does so negligently or unskilfully so as to make them greater than they should be, thus increasing the price, he will be liable to his employer (*j*) if the terms of the contract between builder and building owner are such that the excess cannot be taken into account and deducted from the moneys due to the builder.

SUB-SECT. 5.—*Liability by recommending the Acceptance of a Tender.*

Solvency etc. of contractor.

627. An architect or engineer does not warrant the solvency or capability of a builder or contractor whose tender is accepted, but he is bound to give his employer the benefit of any information he may have in respect of such solvency or capability, and not to allow his employer to enter blindly into a contract with a person whom he has any reason to suspect of being impecunious or inefficient. And it would seem, depending on the circumstances, that he might be liable for not making reasonable inquiries (*k*).

SUB-SECT. 6.—*Liability as to Superintendence.*

Supervision must be thorough.

628. Although an architect is not expected to be constantly on the works, and to supervise every detail, it is not sufficient for him to pay occasional visits and to get any defects which he may happen to notice set right; his duty is to give such an amount of supervision as will enable him to give an honest certificate whether or no

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(*g*) On the principle of *Hadley* v. *Baxendale* (1854), 9 Exch. 341, 354; see title DAMAGES.

(*h*) See *The Marpessa*, [1906] P. 95. C. A., affirmed [1907] A. C. 241.

(*i*) *Herreford* (*Lady*) v. *Driver* (1851), 20 L. J. (CH.) 476; *Ebdy* v. *M'Gowan* (1870), Hudson on Building Contracts, 3rd ed., Vol. II., p. 18; *Gibbon* v. *Pease*, [1905] 1 K. B. 810.

(*j*) See *M'Connell* v. *Kilgallen* (1878), 2 L. R. Ir. 119, 121. As to quantity surveyor's liability under similar circumstances, see p. 312, *post*.

(*k*) See *Heys* v. *Tindall* (1861), 1 B. & S. 296.

SECT. 3. Liabilities of Architects and Engineers to their Employers.

the work has been done in accordance with the contract (*l*). And though his supervision may be partially, as to matters of detail, intrusted to subordinates, such as clerks of the works, inspectors etc., the architect or engineer cannot exonerate himself by saying that the negligence was theirs (*m*).

The failure of the architect or engineer to discover at the time that the work done or materials supplied are not up to the standard of the contract may involve the employer in loss, where the employer's rights against the contractor are limited to having such defects made good as were ascertainable at some particular time (*n*). The loss to the employer, due to the engineer's negligence, in such a case might be the difference between the amount for which the builder or contractor is actually liable and the whole cost of the repairs, or the whole expense of rectifying the defects.

SUB-SECT. 7.—*Liability as to Certificates and Measurements.*

How far liable for inaccuracy.

629. Except where the valuation or certificate is given by the architect or engineer acting in a *quasi*-judicial capacity, he is liable to his employer for all negligent or unskilful measurement and valuation of work done. If the architect should negligently or unskilfully over-estimate the amount of progress certificates, the employer might, in the event of the builder or contractor becoming bankrupt, have to complete the work at his own expense, and so lose the amount by which the builder had been overpaid (*o*).

SUB-SECT. 8.—*Liability for Fraud and Secret Commissions.*

Effect of secret commissions.

630. Any fraudulent or dishonest act on the part of an architect or engineer will render him liable to his employer. In particular such liability would arise in the case of an architect receiving some secret commission or bribe from the builder. Any such contract, whether resulting in loss to the employer or not, makes the architect liable to an action on the part of his employer, for no agent can retain secret profits made at his principal's expense (*p*).

Charges for copies of specification etc.

It is a practice among some architects to insert a provision in the quantities that the builder shall pay the architect for copies of the specification and drawings which are necessary for the execution of the works. Such payments received by the architect from the builder, if made without the knowledge of the building owner, are a breach of the right of the employer to demand the faithful services of the architect to the exclusion of any arrangement with

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(*l*) *Jameson* v. *Simon* (1899), 1 F. (Ct. of Sess.) 1211.

(*m*) *Armstrong* v. *Jones* (1869), Hudson on Building Contracts, 3rd ed., Vol. II., p. 15; *Saunders* v. *Broadstairs Local Board* (1890), Hudson on Building Contracts, 3rd ed., Vol. II., p. 159.

(*n*) *Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (1868), L. R. 6 Eq. 396.

(*o*) In a Canadian case, *Irving* v. *Morrison* (1877), 27 Upper Canada C. P. 242, an architect was held to be liable to his employer for the amount of the loss so occasioned.

(*p*) *Rogers* v. *James* (1891), 56 J. P. 277; and see title AGENCY, Vol. I., pp. 189—191.

Measuring up deviations etc.

631. In cases where there is a condition in the contract that deviations shall be measured up, the architect's charge for this work is sometimes added to the builder's charge for extras and certified for by the architect. This is objectionable, for if this work is included in the work paid for by the architect's commission, it would be a fraud on the part of the architect to certify a payment to the builder including charges of the architect which the building owner is not liable to pay; while, if the work is not included in the architect's commission, the including such charges in those of the builder and certifying for them is a breach of the duty of the architect to his employer. In some cases architects employ a clerk or other nominee to prepare the bills of quantities (whether for tenders or for extras and omissions), whose name is made to appear as the quantity surveyor, but who, though he takes the fees from the builder, hands them over to the architect. Such a course of proceeding seems to be a fraud on the building owner (*a*).

Prevention of Corruption Act, 1906.

632. It is now a misdemeanour to give or receive any consideration for an agent's doing or forbearing to do any act in relation to the business of his principal (*b*).

(*q*) See *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549.

(*r*) With regard to this the Royal Institute of British Architects state, in their Schedule of Professional Practice, that if an architect should take out quantities for tenders, he should do so with the concurrence of his employer, and that it is desirable that the remuneration for this work should be paid by the employer. See clause 18 of the Royal Institute of British Architects Schedule of Professional Practice Revised, 1898.

(*s*) *Harrington* v. *Victoria Graving Dock Co.*, *supra*.

(*t*) *Bulfield* v. *Fournier* (1894), 11 T. L. R. 62, *per* Lord RUSSELL OF KILLOWEN, C.J. See, however, *Holden* v. *Webber* (1860), 29 Beav. 117.

(*a*) See *Panama and South Pacific Telegraph Co.* v. *India-rubber, Gutta Percha and Telegraph Co.* (1875), 10 Ch. App. 515. See also *Re Canadian Oil Works Corporation, Hay's Case* (1875), 10 Ch. App. 593; *Salford Corporation* v. *Lever*, [1891] 1 Q. B. 168, C. A.; *Re North Australian Territory Co., Archer's Case*, [1892] 1 Ch. 322, C. A.

(*b*) Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34), s. 1 (1). See title CRIMINAL LAW AND PROCEDURE.

SECT. 4.—*Liabilities of Architects and Engineers to Contractors.*

SECT. 4. Liabilities of Architects and Engineers to Contractors.

SUB-SECT. 1.—*In General.*

633. As there is no contractual relation between the architect or engineer and the builder or contractor, no liability in respect of negligence or want of skill can arise (*c*), and the contractor has no ground of action against the architect (*d*) so long as the architect or engineer acts honestly and within the scope of his authority as agent of the building owner or employer. He does not in any way warrant that his employer is solvent, or that he will pay the price, or that he will act reasonably, or that he will observe the terms of the contract.

Liable only for breach of warranty of authority or for fraud.

Further, an architect or engineer, being an agent with a disclosed principal, does not in any way incur a liability to pay for the work, unless, of course, he has in some way led the person employed to believe that payment was to come from himself (*e*). Where there is a written contract the obligations are defined.

If, however, the architect should exceed his authority without the knowledge of the builder, and thus cause him to provide work or materials or otherwise to incur expense for which the employer is not responsible, the architect will be liable to an action by the builder or contractor for breach of warranty of authority (*f*), whether the architect had a *bonâ fide* belief that he was authorised to do what he did or not (*g*); while if the groundless assertion of authority was made fraudulently, the builder or contractor can bring an action for deceit or misrepresentation against the architect or engineer (*h*). If the contractor knew, or could have known, the limits of the architect's authority, as, for instance, from the terms of the building contract, this is an answer to an action for breach of warranty of authority (*i*).

634. The measure of damages in case of breach of warranty of authority seems to be the amount that will indemnify the contractor and put him in the same position as if the act of the architect had been within his authority. Thus the contractor would be entitled to recover the cost of the work ordered without

Measure of damages.

(*c*) *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, C. A., *per* Lord ESHER, M.R., at p. 497: "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."

(*d*) *Ambrose* v. *Dunmow Union* (1846), 9 Beav. 508, 515; *Robertson* v. *Fleming* (1861), 4 Macq. 167; *Stevenson* v. *Watson* (1879), 4 C. P. D. 148.

(*e*) See *Chidley* v. *Norris* (1862), 3 F. & F. 228, and title AGENCY, Vol. I., p. 220.

(*f*) *Randell* v. *Trimen* (1856), 18 C. B. 786; *Collen* v. *Wright* (1857), 8 E. & B. 647.

(*g*) See *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148, and title AGENCY, Vol. I., p. 222.

(*h*) *Ludbrook* v. *Barrett* (1877), 46 L. J. (C. P.) 798; *Stevenson* v. *Watson*, *supra*.

(*i*) *Halbot* v. *Lens*, [1901] 1 Ch. 344

SECT. 4. Liabilities of Architects and Engineers to Contractors.

authority, together with a reasonable profit, and the costs which he has had to pay in the course of any litigation caused by the breach of warranty of authority (*k*). If the warranty is fraudulent, the architect will be open to an action for deceit, as well as for breach of warranty of authority (*l*).

An architect or engineer may also make himself liable to persons supplying materials for the works, if he orders such materials without naming his principals (*m*).

Liability to specialists.

SUB-SECT. 2.—*Liability for Plans, Quantities etc.*

No warranty that plans are practicable.

635. An architect or engineer does not warrant to the builder or contractor the practicability of the plans, drawings, and specifications prepared by him, or of the temporary means of construction indicated in the specification. It is the duty of the contractor to investigate these matters for himself, and any usage for him to rely on the drawings or specifications is bad (*n*). If he does not inquire into the matter he runs the risk of not being able to carry out the work, and must take the consequences (*o*).

Accuracy of bills of quantities.

636. In the same way the architect or engineer does not warrant the correctness of the bills of quantities supplied to the persons who propose to tender, whether they have been prepared by an independent quantity surveyor or by the architect or engineer himself (*p*).

The liability for inaccurate quantities prepared by the architect rests on the same principle as where they are prepared by an independent quantity surveyor. If the architect is employed by the builder, he is liable to him for negligence in their preparation (*q*), but where the architect has been employed by the building owner to prepare the quantities, and the amount of his charges therefor is to be added to the amount of the tender, the payment by the builder of those charges will not impose any more liability on the architect than it will do in the case of an independent quantity surveyor (*r*).

But if the architect or engineer expressly makes himself responsible to the builder or contractor for the accuracy of the quantities,

(*k*) *Randell* v. *Trimen* (1856), 18 C. B. 786; *Collen* v. *Wright* (1857), 8 E. & B. 647; *Simons* v. *Patchett* (1857), 7 E. & B. 568; *Meek* v. *Wendt*, [1889] W. N. 19.

(*l*) See *Re National Coffee Palace Co., Ex parte Panmure* (1883), 24 Ch. D. 367, 371; *Derry* v. *Peek* (1889), 14 App. Cas. 337.

(*m*) *Beigthell and Young* v. *Stewart* (1900), 16 T. L. R. 177, where an architect, who invited the plaintiffs to give tenders for lamps, and referred to his "clients," but did not name them, afterwards ordered the lamps without saying that he did so as agent, and was held liable to pay the plaintiffs.

(*n*) *Thorn* v. *London Corporation* (1876), 1 App. Cas. 120. See p. 187, *ante*.

(*o*) *Bottoms* v. *York Corporation* (1892), Hudson on Building Contracts, 3rd ed., Vol. II., p. 220. See also *Jackson* v. *Eastbourne Local Board* (1886), Hudson on Building Contracts, 3rd ed., Vol. II., p. 67.

Sherren v. *Harrison* (1860), Hudson on Building Contracts, 3rd ed., Vol. II., p. 6; *Scrivener* v. *Pask* (1866), L. R. 1 C. P. 715.

(*q*) See *Priestley* v. *Stone* (1888), 4 T. L. R. 730.

(*r*) *Young* v. *Blake* (1887), Hudson on Building Contracts, 3rd ed., Vol. II., p. 106.

he will be liable to compensate him if the quantities are not reasonably accurate (*s*).

SECT. 4. Liabilities of Architects and Engineers to Contractors.

SUB-SECT. 3.—*Liability for Fraud.*

637. An architect or engineer will be liable to the builder or contractor if he acts fraudulently to his prejudice, whether in refusing to certify or in certifying dishonestly, and whether in collusion with his employer or not (*t*).

Liability for fraud.

The architect cannot excuse himself from liability for fraud by alleging that he merely acted as the agent of his employer, for all persons directly concerned in the commission of a fraud are to be treated as principals, and a contract of agency cannot impose any obligation on the agent to commit a fraud (*u*).

The mere fact of an architect refusing to certify or to ascertain the amount owing (*a*) is no proof of fraud, nor is the fact that measurements made by him for the purpose of valuation are inaccurate, or made on a wrong principle (*b*).

SECT. 5.—*Liability of Architects and Engineers to Prosecution etc.*

638. Architects and engineers permanently employed by public bodies may incur a criminal or *quasi*-criminal liability by being in some way interested in the contract (*c*).

Criminal etc. liabilities.

An officer employed under the Public Health Act, 1875, must not be concerned or interested in any contract with the authority by whom he is employed, otherwise he becomes incapable of being employed under the Act in future, and is further liable to a penalty of £50, which may be sued for by a common informer (*d*).

Architects and engineers may be guilty of corruption under the Prevention of Corruption Act, 1906 (*e*), and if employed by public bodies, under the Public Bodies Corrupt Practices Act, 1889 (*f*).

(*s*) *Bolt* v. *Thomas* (1859), Hudson on Building Contracts, 3rd ed., Vol. II., p. 4.

(*t*) *Waring* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1850), 2 H. & Tw. 239; *Macintosh* v. *Great Western Rail. Co.* (1850), 19 L. J. (CH.) 374; *Dudley* v. *Lincoln Waterworks Co.* (1850), 2 Mac. & G. 68; *Scott* v. *Liverpool Corporation* (1856), 25 L. J. (CH.) 227; *Goodyear* v. *Weymouth and Melcombe Regis Corporation* (1865), 35 L. J. (C. P.) 12; *Ludbrook* v. *Barrett* (1877), 46 L. J. (C. P.) 798; *Re De Morgan, Snell & Co. and Rio de Janeiro Flour Mills and Granaries, Ltd.* (1892), 8 T. L. R. 272.

(*u*) *Cullen* v. *Thomson's Trustees and Kerr* (1862), 4 Macq. 424, 432. In an Irish case the court went so far as to hold that the contractor had no right of action against an engineer for refusing to certify even if the refusal was the result of fraud, or of collusion with the employer (*Murphy* v. *Bower* (1866), I. R. 2 C. L. 506). This case, however, is inconsistent with *Ludbrook* v. *Barrett*, *supra*, and *Stevenson* v. *Watson* (1879), 4 C. P. D. 148.

(*a*) *Stevenson* v. *Watson*, *supra*; *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, C. A.

(*b*) *Re Meadows and Kenworthy* (1897), Hudson on Building Contracts, 3rd ed., Vol. II., p. 292.

(*c*) See title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*d*) 38 & 39 Vict. c. 55, s. 193; *Whiteley* v. *Burley* (1888), 21 Q. B. D. 154, C. A.

(*e*) 6 Edw. 7, c. 34. See title CRIMINAL LAW AND PROCEDURE.

(*f*) 52 & 53 Vict. c. 69. See titles CRIMINAL LAW AND PROCEDURE; PUBLIC AUTHORITIES AND PUBLIC

SECT. 5. Liability of Architects and Engineers to Prosecution etc.

They may also be liable to an indictment for manslaughter in case of a fatal accident through their negligence (*g*).

SECT. 6.—*Limitation of Actions.*

Limitation of actions.

639. The limitation of actions against architects and engineers is governed by the general principles of law (*h*), and also, where they are officers of public bodies, by the special provisions applicable to such officers (*i*).

SECT. 7.—*Remuneration of Architects and Engineers.*

SUB-SECT. 1.—*Payment for completed Work.*

Under express contract.

640. If the employer has entered into an express contract, whether oral or in writing, with the architect or engineer, the remuneration of the latter will necessarily be governed by the terms of this contract.

Implied contract.

641. Where no express contract has been entered into as to the terms of the employment of an architect or engineer, the right to remuneration rests on a contract to pay what is reasonable, implied by requesting and accepting the services (*k*) or by inducing the architect by fraud to perform them without intending to pay for them (*l*).

If the contract does not specifically provide for payment, evidence is admissible to show that the parties intended the services to be gratuitous, or that payment was only to be made in the discretion of the employer (*m*).

When employer is to fix amount.

642. If the agreement, however, is that the employer shall decide how much the remuneration is to be, the architect or engineer need not accept any amount fixed by the employer, nor need he wait till an amount has been fixed, but he is entitled to reasonable remuneration, such as the employer ought to have fixed (*n*).

Probationary drawings.

643. Where drawings etc. are merely submitted for approval, no claim for remuneration arises unless the work is approved or used (*o*), and similarly in the case of plans or drawings submitted in competition, subject of course to the terms of the published terms of the competition (*p*).

(*g*) See title CRIMINAL LAW AND PROCEDURE. There is no reported case in which an architect or engineer has been sought to be rendered criminally responsible in such circumstances.

(*h*) See title LIMITATION OF ACTIONS.

(*i*) See title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*k*) *Munson* v. *Baillie* (*Sir W.*), *Bart.* (1855), 2 Macq. 80; *Moffatt* v. *Laurie* (1855), 15 C. B. 583, 593; *Landless* v. *Wilson* (1880), 8 R. (Ct. of Sess.) 289.

(*l*) *Rumsey* v. *North Eastern Rail. Co.* (1863), 32 L. J. (C. P.) 244.

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

(*n*) *Bryant* v. *Flight* (1839), 5 M. & W. 114; *Bird* v. *M'Gahey* (1819), 2 C. & K. 707.

(*o*) *Moffatt* v. *Dickson* (1853), 13 C. B. 543; *Moffatt* v. *Laurie*, *supra*.

(*p*) *Ward* v. *Lowndes* (1859), 28 L. J. (Q. B.) 265.

Such "probationary drawings" (*q*) are in the nature of a tender, that is, a mere proposal or offer to do work, and without acceptance there is no mutuality on which an implied contract to pay for them can be based.

If the plans or drawings submitted for approval are used for any purpose, they will have to be paid for (*r*).

644. If the architect or engineer is authorised to obtain tenders, he is entitled to payment of any expenses reasonably or necessarily incurred in connection therewith (*s*). Procuring of tenders.

SUB-SECT. 2.—*Where the Work is not completed.*

645. Where an architect or engineer has partly performed the services for which he has been employed, and the employer terminates the employment, the architect whose services are not required may sue either on a *quantum meruit*, or for damages for the breach of the contract (*t*). Prevention by employer.

If the designer is instructed to prepare plans for a building or for works to cost approximately a certain sum, and all the tenders sent in are considerably in excess of the sum mentioned, it seems to be a question of fact for the jury whether the employer is entitled to repudiate the employment and refuse to pay the architect (*a*), on the ground that there was a condition that the works should be capable of being constructed for the sum, or approximately the sum, mentioned and that the buildings as designed could not be carried out for that sum or anything near it (*b*).

646. The contract to employ an architect or engineer, being a personal one, is dissolved by the death or incapacity of the person employed (*c*), but not so that it is rescinded *ab initio*, but only so as to be rendered void in the future. Death of architect.

Where the architect or engineer is entitled to payment by instalments at particular times, and dies during the progress of the work, his personal representative will be entitled to recover any instalments due at the time of his death (*d*). In the absence of an agreement that payment is only to be made on the completion of the work, it would seem that the personal representative of the

(*q*) *Moffatt* v. *Dickson* (1853), 13 C. B. 543.
(*r*) *Landless* v. *Wilson* (1880), 8 R. (Ct. of Sess.) 289.
(*s*) See *Bayley* v. *Wilkins* (1849), 7 C. B. 886.
(*t*) *Prickett* v. *Badger* (1856), 1 C. B. (N. S.) 296; and see title CONTRACT.
(*a*) *Burr* v. *Ridout* (1893), *Times* (22nd February, 1893).
(*b*) *Nelson* v. *Spooner* (1861), 2 F. & F. 613, at p. 618. In this case COCKBURN, C.J., left the following questions to the jury: (1) whether it was an express condition that the works should be capable of being executed for the estimated sum; if not, then (2) whether there was an implied condition that the work should be capable of being done for a sum reasonably near to the estimated sum; if so, then (3) was the estimate reasonably sufficient? and as to a claim for work and labour on the plans etc., (4) whether the labour was bestowed or not under the special contract.
(*c*) See p. 291, *ante*.
(*d*) *Stubbs* v. *Holywell Rail. Co.* (1867), L. R. 2 Exch. 311.

SECT. 7. Remuneration of Architects and Engineers.

deceased architect could recover the value of the work he had actually done, and by which the employer had benefited (*e*).

Any payments made by the employer on account during the progress of the work would not seem to be recoverable by him in case of the disablement of the architect by the act of God, as the consideration would not have completely failed (*f*).

Negligence.

647. An architect cannot recover payment for services unskilfully performed (*g*), and, if he has received payment, may be compelled to refund it, provided that his lack of skill amounts to a total failure of consideration by reason of his employer deriving no benefit from his services, besides being liable for damages (*h*).

Where, however, the architect has performed his duties properly, and the employer has obtained the thing he bargained for duly constructed, the employer cannot be said to have derived no benefit from the architect's services, merely because he has not reaped the pecuniary advantage he expected from the works designed (*i*).

SUB-SECT. 3.—*Amount of Remuneration in General.*

Amount payable.

648. Where an express agreement has been made as to the amount of the remuneration to be paid to an architect or engineer, he must be paid accordingly. Where, however, no agreement has been made, the architect or engineer is entitled to reasonable remuneration. The amount of such reasonable remuneration is a question for the jury (*j*).

Professional scale of charges.

649. In the case of architects the usual professional charge for designing and superintending the construction of buildings is 5 per cent. on the total cost of the works. This charge has been sanctioned by the Royal Institute of British Architects, in a schedule of professional charges issued by them, which also fixes charges of 2½ per cent. on the estimated cost for an approved design with plans, elevations, sections, and specifications, and of ½ per cent. in addition for procuring tenders. The commission of 5 per cent. is by the same schedule made payable in certain instalments. Attempts have been made to induce the courts to accept these

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(*e*) This was admitted on the part of the defendant company in *Stubbs* v. *Holywell Rail. Co.* (1867), L. R. 2 Exch. 311.

(*f*) See title CONTRACT.

(*g*) *Farnsworth* v. *Garrard* (1807), 1 Camp. 38, *per* Lord ELLENBOROUGH, at p. 39: "If there has been no beneficial service, there shall be no pay"; *Moneypenny* v. *Hartland* (1826), 2 C. & P. 378; *Duncan* v. *Blundell* (1820), 3 Stark. 6, where the plaintiff proved that by defendant's order he had erected a stove and laid a tube under the floor to carry off the smoke, which it entirely failed to do, so that the stove could not be used, and was non-suited on the ground that "when a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed, and he should know whether it will or not"; *Hunt* v. *Wimbledon Local Board* (1878), 4 C. P. D. 48, 54, C. A.

(*h*) *Columbus Co., Ltd.* v. *Clowes*, [1903] 1 K. B. 244.

(*i*) See title AGENCY, Vol. I., p. 194.

(*j*) *Bryant* v. *Flight* (1839), 5 M. & W. 114; *Bird* v. *M'Gahey* (1849), 2 C. & K. 707.

charges as customary, but without success (*k*). On the other hand, it is right to take into consideration the practice adopted by a large proportion of the profession (*l*).

This scale is therefore only binding on an employer who has either expressly or impliedly agreed to be bound by it. But in estimating what is a reasonable charge juries have frequently adopted this 5 per cent. on the cost as being a reasonable charge.

Competition drawings.

The value of competition drawings is arrived at by ascertaining the reasonable cost of the labour and materials expended in preparing them, and not by the chance of obtaining a prize, as the latter is too remote (*m*).

Engineers.

Engineers as a body have not adopted any scale or limited their charges.

SUB-SECT. 4.—*Work outside Design and Superintendence.*

Scale of remuneration for outside work.

650. Architects, engineers, and surveyors are often employed to perform work other than that of designing and superintending the construction of buildings and works, such as measuring, valuing, and surveying, qualifying as witnesses, and attending in court and before arbitrators, settling the accounts of builders and tradesmen etc. For work of this nature they are entitled, in the absence of any express agreement, to reasonable remuneration. A scale for the valuation of land and property, called "Ryde's scale," is in use among land surveyors, but there is no custom making it binding upon their employers (*n*).

Generally the courts do not regard with favour the mode of fixing the remuneration for this class of work by way of a percentage (*o*). Where, however, the employer is himself a surveyor, and can be shown to have recognised Ryde's scale in other transactions, then, in the absence of any suggestion of other terms of employment, it may be assumed that the employment was on the terms of Ryde's scale (*p*).

SUB-SECT. 5.—*By whom the Remuneration is payable.*

Payment by employer.

651. The ordinary employment of an architect or engineer being by the employer, he has to look to the employer for payment (*q*).

(*k*) *Gwyther* v. *Gaze* (1875), Hudson on Building Contracts, 3rd ed., Vol. II., p. 21; *Burr* v. *Ridout* (1893), *Times* (22nd February, 1893); *Farthing* v. *Tomkins* (1893), 9 T. L. R. 566.

(*l*) *Whipham* v. *Everitt* (1900), Roscoe, Digest of Building Cases, 4th ed., 171, *per* KENNEDY, J., at p. 172.

(*m*) *Watson* v. *Ambergate, Nottingham and Boston Rail. Co.* (1851), 15 Jur. 448.

(*n*) *Debenham* v. *King's College, Cambridge* (1884), 1 T. L. R. 170; *Brocklebank* v. *Lancashire and Yorkshire Rail. Co.* (1887), 3 T. L. R. 575; *Drew* v. *Josolyne* (1888), 4 T. L. R. 717.

(*o*) *Upsdell* v. *Stewart* (1794), Peake, 255, *per* Lord KENYON, at p. 256: "As to the custom offered to be proved, the course of robbery on Bagshot Heath might as well be proved in a court of justice"; *Chapman* v. *De Tastet* (1817), 2 Stark. 294. See also *Seymour* v. *Bridge* (1884), 14 Q. B. D. 460; *Perry* v. *Barnett* (1885), 15 Q. B. D. 388, 393.

(*p*) *Buckland and Garrard* v. *Pawson & Co.* (1890), 6 T. L. R. 421.

(*q*) Compare *Webb* v. *School* (1851), 3 Philadelphia Rep. (C. P.) 125. See p. 300, ante.

SECT. 7. **Remuneration of Architects and Engineers.**

In many cases there is a provision in the building contract giving power to deviate from the works specified, and that additions or omissions due to such deviations are to be measured up by the architect so as to ascertain the amount to be added to or deducted from the contract price. Some architects add a charge for this service, and include it in the certificate given to the builder, and look to him for payment, but this work is done in the interest of the building owner, and the liability to pay rests on him, and not on the builder, who can only be made responsible to the architect in the case of special agreement, or in case he has actually received the amount from the building owner (*r*).

As between vendor and purchaser.

If a lessee is under a covenant with his lessor to do repairs to the satisfaction of the lessor's architect, such architect's certificate is part of the title, and must be obtained if required by a purchaser of the lease at the vendor's expense (*s*).

SUB-SECT. 6.—*When the Remuneration is payable.*

Where no express stipulation.

652. In a contract to perform work, if there is no express or implied stipulation that no payment is to be made until the work is completed, the person employed is entitled to payment from time to time for the work actually done (*t*).

Entire contracts.

If, however, the contract is one to perform an entire work, such as to prepare plans drawings and the specification for a fixed sum, or for a percentage on the whole cost of the work, the right to payment does not arise until the whole work has been done (*u*), unless the contract, as it does in many cases, provides for payment by instalments. Any such instalments constitute a debt due and payable, for which the architect can sue as and when it becomes due (*w*).

Payment conditional on happening of event.

653. If payment is made dependent on the happening of some event, the right to payment only arises on the happening of that event (*x*), except where it depends on something to be done by the employer, and there is an implied contract by the employer that he will do that thing, and he has not done it.

Lien on plans etc.

654. The architect has a lien on the plans and drawings prepared by him, and need not deliver them up until he is paid (*b*), and may bring his action for his charges although he still retains the plans. Even if he demands more than a reasonable price for the plans, and that is refused, he is not precluded from bringing an action for his charges and recovering reasonable remuneration (*c*).

(*r*) *Beattie* v. *Gilroy* (1882), 10 R. (Ct. of Sess.) 226.
(*s*) *Re Moody and Yates* (1885), 28 Ch. D. 661.
(*t*) *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651, 660. See p. 307, *ante*.
(*u*) See *Johnson* v. *Gandy* (1855), 26 L. T. (o. s.) 72.
(*w*) Compare *Workman, Clark & Co., Ltd.* v. *Lloyd Brazileno*, [1908] 1 K. B. 968, C. A.
(*x*) *Moffatt* v. *Laurie* (1855), 15 C. B. 583; *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q. B. 488.
(*a*) *M'Connell* v. *Kilgallen* (1878), 2 L. R. Ir. 119.
(*b*) *Hughes* v. *Lenny* (1839), 5 M. & W. 183.
(*c*) *Ibid.*

SUB-SECT. 7.—*Bankruptcy of the Architect or Engineer.*

SECT. 7. Remuneration of Architects and Engineers.

655. On the architect or engineer becoming bankrupt all moneys owing to him become the property of his trustee in bankruptcy, to whom pass also the bankrupt's rights of action for breach of contract and wrongful dismissal (*d*). If, however, the trustee does not interfere, the bankrupt can himself sue for work done after the bankruptcy (*e*).

Rights of trustee.

If the architect or engineer is employed on the terms of being paid a salary, his remuneration does not vest in the trustee in bankruptcy, unless an order is made by a bankruptcy court (*f*), appropriating part of the bankrupt's salary or income for the benefit of his creditors (*g*).

The trustee in bankruptcy has no power to make the bankrupt architect work to earn salary or any other remuneration (*h*), though the court has power to suspend or refuse the bankrupt's certificate where he refuses to earn money (*i*).

Part XIX.—Quantity Surveyors.

SECT. 1.—*Employment and Duties of Quantity Surveyors.*

SUB-SECT. 1.—*Employment to take out Quantities for Tenders in General.*

Authority of architect to employ.

656. The usual course of business in building contracts is for the architect to employ a quantity surveyor to take out the quantities of the contemplated buildings or works. The authority of the architect to do this is express or implied: he may have explained to his employer the necessity of obtaining bills of quantities (*k*), or he may rely on an authority implied by his authorisation to obtain tenders (*l*), if it would be impracticable to obtain proper tenders without bills of quantities for the use of persons intending to tender. Such authority has also been implied where the employer knew that quantities had been taken out, and either actively or tacitly acquiesced in this being done (*m*).

(*d*) *Jameson* v. *Brick and Stone Co., Ltd.* (1878), 4 Q. B. D. 208; *Emden* v. *Carte* (1881), 17 Ch. D. 768. See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 136, 159.

(*e*) *Jameson* v. *Brick and Stone Co., Ltd.*, *supra*.

(*f*) Under Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53. See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 191.

(*g*) *Re Brindley, Ex parte Brindley* (1887), 4 Morr. 101; *Re Shine, Ex parte Shine*, [1892] 1 Q. B. 522, C. A.

(*h*) *Re Hutton, Ex parte Benwell* (1884), 14 Q. B. D. 301; *Board of Trade* v. *Block* (1888), 13 App. Cas. 570. See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 166, 167.

(*i*) *Re Barker, Ex parte Constable, Re Jones, Ex parte Jones* (1890), 25 Q. B. D. 285.

(*k*) See p. 164, *ante*.

(*l*) *Waghorn* v. *Wimbledon Local Board* (1877), Hudson on Building Contracts, 3rd ed., Vol. II., p. 39.

(*m*) *Moon* v. *Witney Guardians* (1837), 3 Bing. (N. C.) 814.

SECT. 1. Employment and Duties of Quantity Surveyors.

Another ground on which this implication of authority is founded is that of custom (*n*), but this custom apparently does not extend to Ireland (*o*).

It is doubtful whether architects, instead of employing a quantity surveyor, have implied authority to take out the quantities themselves (*p*).

In the case of engineering contracts, there does not appear to be any settled practice as to the employment of quantity surveyors for the taking out of quantities for tenders. Many engineers take out their own quantities; quantities for engineering works being very much simpler than quantities for building works.

SUB-SECT. 2.—*Employment to reduce Tenders.*

How far within architect's authority.

657. It often occurs that when tenders are obtained the lowest of them is found to be higher than the sum which the employer is willing to expend on the construction of the required works. A quantity surveyor, usually the surveyor who has taken out the quantities for tenders, is then employed to reduce the quantities so as to make the design less costly, and to bring the expense within the amount which the employer is willing to lay out. It is doubtful whether an architect has any implied authority to employ a quantity surveyor to do this work. In any case, such an authority cannot be implied if the employer limited the authority of the architect to designing a work at a limited cost, for if the architect has disregarded his instructions by designing a building the cost of which exceeds the amount to which he was limited, he cannot charge his employer with the expense of rectifying his own mistake (*q*). Even in such a case, however, the employer might ratify the employment by acquiescence (*r*).

SUB-SECT. 3.—*Employment to measure up Deviations.*

How far within architect's authority.

658. The authority of an architect or engineer to employ a quantity surveyor to measure up deviations in the works depends to some extent upon the duties cast upon the architect or engineer by the contract (*s*). If he is designated as the person to perform this work, whether it be included or not in the work for which his remuneration is fixed, he cannot have authority from his employer to employ a quantity surveyor to do the work and charge his employer. If, however, the building contract merely directs that

(*n*) *Taylor* v. *Hall* (1870), I. R. 4 C. L. 467, *per* MONAHAN, C.J., at p. 479; *Young* v. *Smith* (1880), Hudson on Building Contracts, 3rd ed., Vol. II., p. 57; *North* v. *Bassett*, [1892] 1 Q. B. 333.

(*o*) *Antisell* v. *Doyle*, [1899] 2 I. R. 275, disapproving the *dictum* of MONAHAN, C.J., in *Taylor* v. *Hall*, *supra*.

(*p*) See p. 291, *ante*. See, however, *Lansdowne* v. *Somerville* (1862), 3 F. & F. 236, in which case KEATING, J., left the following questions to the jury: "Was there such a custom, and was it known to the parties, and did they contract on the footing of the custom?" The jury found that there was such a custom known to the parties on the footing of which the parties had contracted.

(*q*) *Evans* v. *Carte* (1881), Hudson on Building Contracts, 3rd ed., Vol. II., p. 64.

(*r*) *Ibid.*, *per* Lord COLERIDGE, C.J., at p. 66.

(*s*) As to the authority of the architect or engineer to measure up these deviations, see p. 291, *ante*.

the value of the deviations is to be ascertained in some manner, without saying by whom, there may be a custom authorising the architect, at all events in any large matter, to employ a quantity surveyor to measure up (*a*). If the quantity surveyor is employed by the architect to vindicate the correctness of his certificate, which has been questioned by the building owner, a customary authority to employ a quantity surveyor cannot be implied in such a case (*b*).

SUB-SECT. 4.—*Measuring up Deviations for the Builder.*

659. If the builder employs a quantity surveyor to measure up deviations, he does so on his own account, and not on that of the employer, as it is for him, and not for the employer, to make out an account of what is due to him for his work, because, if the owner is not satisfied with the builder's account, he can employ a surveyor to check it at his own expense (*c*). Employment of builder.

SECT. 2.—*Liabilities of Quantity Surveyors.*

SUB-SECT. 1.—*Liability to the Employer.*

660. In the ordinary course where the architect, in his capacity as agent of the building owner, engages a quantity surveyor to prepare bills of quantities for the purpose of procuring tenders, the relation of employer and employed exists between the building owner and the quantity surveyor, and the usual provision in the instructions to those tendering that the person tendering is to add the amount of the quantity surveyor's charges to his tender does not alter this relation, as when complied with it merely amounts to a conditional contract by the builder to pay the quantity surveyor's fees in certain events, which, after all, come indirectly out of the employer's pocket (*d*). Privity of contract.

The quantity surveyor owes a duty to his employer to take out the quantities carefully and skilfully (*e*).

SUB-SECT. 2.—*Liability to the Contractor.*

661. The customary mode of adding the quantity surveyor's charges to the tender does not import any contractual relation No privity of contract.

(*a*) *Birdseye* v. *Dover Harbour Board Commissioners* (1881), Hudson on Building Contracts, 3rd ed., Vol. II., p. 62, where evidence was given of a custom that in any large matter, say over £2,000, the architect was entitled to call in a quantity surveyor, to be paid by the employer, and the jury found in favour of the custom; *Beattie* v. *Gilroy* (1882), 10 R. (Ct. of Sess.) 226.

The schedule of charges sanctioned by the Royal Institute of British Architects as revised in 1898 states (paragraph 1) that the usual remuneration by way of 5 per cent. commission on the total cost of the works is "exclusive of measuring and making out extras and omissions." This schedule, however, has not the force of a custom binding on the employer (*Farthing* v. *Tomkins* (1893), 9 T. L. R. 566). On the other hand, it would be difficult to imply that the architect would be bound to do this work in the absence of anything in the contract making it incumbent on him.

(*b*) *Plimsaul* v. *Kilmorey* (*Lord*) (1884), 1 T. L. R. 48.

(*c*) *Beattie* v. *Gilroy*, *supra*.

(*d*) *Moneypenny* v. *Hartland* (1826), 2 C. & P. 378; see also *Scrivener* v. *Pask* (1865), L. R. 1 C. P. 715.

(*e*) *Moneypenny* v. *Hartland*, *supra*.

SECT. 2. Liabilities of Quantity Surveyors.

between the contractor and the quantity surveyor (*f*), except the contract by the contractor to pay the surveyor in accordance with the conditions of the contract between the employer and the contractor (*g*).

The quantity surveyor is not liable to the contractor for any representations contained in the bills of quantities, unless such representations are made fraudulently (*h*).

Fraud.

If the quantity surveyor fraudulently either for his own purposes, or in collusion with the employer, makes out the quantities short, he is liable to the contractor in the first case alone, and in the second jointly with the employer (*i*).

Negligence.

If one or more persons intending to tender for a contract employ a quantity surveyor to take out the quantities on their behalf, the quantity surveyor is liable to him or them if he negligently takes out the quantities short.

Architect taking out quantities.

If the architect or engineer takes out the quantities himself, his liability to the builder is the same as that of an independent quantity surveyor (*k*).

SECT. 3.—*Remuneration of Quantity Surveyors.*

SUB-SECT. 1.—*Amount of the Remuneration.*

Scale of charges.

662. The amount which a quantity surveyor is entitled to claim, in the absence of any express contract fixing his remuneration, is a reasonable reward for the work and labour expended by him in preparing the bills of quantities.

Quantity surveyors usually charge from 1 (or even less) to 2½ per cent. on the contract price, but there is no custom binding on the employing them to pay by a percentage rate at all (*l*).

SUB-SECT. 2.—*Lithographers' Charges.*

Discounts.

663. As a number of copies of the bills of quantities are required for the purpose of obtaining tenders, it is usual for the quantity surveyor to have them lithographed. The quantity surveyor in such a case usually employs his own lithographer, and though it would be improper for the quantity surveyor to receive any commission from the lithographer, he may retain anything in the nature of a discount for cash (*m*) as distinguished from trade discounts (*n*). The charge for lithography is, however, usually inserted

(*f*) *Young* v. *Blake* (1887), Hudson on Building Contracts, 3rd ed., Vol. II., p. 106. See also *Scrivener* v. *Pask* (1865), L. R. 1 C. P. 715.

(*g*) *North* v. *Bassett*, [1892] 1 Q. B. 333. There is no reported case in which a quantity surveyor has been held to be under any liability to the builder for the accuracy of his quantities where the employment has been in the customary manner.

(*h*) *Priestley* v. *Stone* (1888), 4 T. L. R. 730.

(*i*) *Ibid.*; and see p. 303, *ante*.

(*k*) See p. 303, *ante*.

(*l*) *Gwyther* v. *Gaze* (1875), Hudson on Building Contracts, 3rd ed., Vol. II., p. 21.

(*m*) *London School Board* v. *Northcroft* (1889), Hudson on Building Contracts, 3rd ed., Vol. II., p. 142.

(*n*) See *Hippisley* v. *Knee Brothers*, [1905] 1 K. B. 1.

at the end of the bill of quantities (*o*), and the contractor is directed to add that charge to the amount of his tender, and sometimes a stipulation is inserted in the building contract that the builder shall pay the quantity surveyor out of the first instalment of the contract price.

SECT. 3. Remuneration of Quantity Surveyors.

SUB-SECT. 3.—*When the Employer is liable to pay.*

664. The liability of the employer to the quantity surveyor depends on the authority of the architect, express or implied, to employ the quantity surveyor, and when this exists the employer is, in the absence of any inconsistent stipulations, liable to pay the charges of the quantity surveyor. How far employer liable.

The memorandum, which is sometimes annexed to the bills of quantities, to the effect that the person who obtains the contract shall pay the charges of the quantity surveyor out of the first instalment of the price, has the effect, in the case of a contract being entered into, of discharging the employer from his liability to pay the quantity surveyor (*p*). This has been described as a conditional contract.

If, however, the employer does not proceed to enter into a contract with a contractor for the construction of the works, he remains liable to the quantity surveyor, as the condition governing the shifting of the liability has never happened (*q*).

665. The employer may also render himself liable to pay the quantity surveyor, even when the latter is engaged by the architect without authority, by ratification of, or acquiescence in, the employment (*r*). The employer may expressly contract himself out of any liability to pay the quantity surveyor, or expressly limit the authority of the architect to employ a quantity surveyor (*s*). When employed without authority.

666. The liability of the employer to pay the quantity surveyor for altering the quantities for the purpose of reducing the tenders depends entirely on the authority of the architect to employ the quantity surveyor for this purpose (*a*), and the same is the case as regards measuring up deviations. Alteration of quantities and measurement of deviations.

SUB-SECT. 4.—*When the Contractor is liable to pay.*

667. If the contractor has expressly contracted to pay the charges of the quantity surveyor, he will be liable to do so, or he may be liable on the conditional contract before referred to (*b*). When contractor liable.

(*o*) See *Campbell (D.) & Son* v. *Blyton* (1893), Hudson on Building Contracts, 3rd ed., Vol. II., p. 250.

(*p*) *Young* v. *Smith* (1880), Hudson on Building Contracts, 3rd ed., Vol. II., p. 57; *North* v. *Bassett*, [1892] 1 Q. B. 333.

(*q*) *Moon* v. *Witney Guardians* (1837), 3 Bing. (N. C.) 814, *per* TINDAL, C.J., at p. 818; *Gribbon* v. *Moore* (1869), Hudson on Building Contracts, 3rd ed., Vol. II., p. 12; *Gwyther* v. *Gaze* (1879), Hudson on Building Contracts, 3rd ed., Vol. II., p. 21; *Waghorn* v. *Wimbledon Local Board* (1877), Hudson on Building Contracts, 3rd ed., Vol. II., p. 39.

(*r*) *Evans* v. *Curle* (1881), Hudson on Building Contracts, 3rd ed., Vol. II., p. 64.

(*s*) *Gwyther* v. *Gaze*, *supra*.

(*a*) See p. 310, *ante*.

(*b*) *Locke* v. *Morter* (1885), 2 T. L. R. 121; see p. 313, *ante*.

PART XX. Injuries to Persons or Property.

cannot divest himself of this duty by employing some other person (whether contractor, architect, or engineer) to do what is necessary to prevent the mischief, or by stipulating that such other person shall take precautions against it (*n*).

If the acts of the employer, though amounting to a public nuisance, also cause particular damage to a neighbouring landowner, the latter will be entitled to maintain an action against the employer (*o*).

These considerations will apply with still greater force if there is anything unlawful in the work which the contractor is employed to do (*p*).

Indemnity.

671. The employer may to a certain extent safeguard himself by taking an indemnity from the contractor, but this has no effect on the rights of third persons, and he still remains subject to the duty and liable for the consequences of its breach (*q*).

Contractor and sub-contractor.

672. A contractor in his relation to a sub-contractor is in a similar position as regards liability for nuisance or negligence as is the employer in his relation to the principal contractor (*r*).

Personal control etc. by employer.

673. If the employer retains in his own hands the control over the execution of the works, or if he interferes with the contractor in carrying them out, he will be liable to third persons for any injuries sustained by them or their property (*s*).

(*n*) *Gregory* v. *Piper* (1829), 9 B. & C. 591; *Bower* v. *Peate* (1876), 1 Q. B. D. 321, *per* COCKBURN, C.J., at p. 326; *Rendleson* v. *Murray* (1838), 8 Ad. & El. 109; *Hole* v. *Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488; *Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470; *Gray* v. *Pullen* (1864), 5 B. & S. 970; *R.* v. *Stephens* (1866), L. R. 1 Q. B. 702; *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330; *Pitts* v. *Kingsbridge Highway Board* (1871), 25 L. T. 195; *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314; *Lemaitre* v. *Davis* (1881), 19 Ch. D. 281; *Dalton* v. *Angus* (1881), 6 App. Cas. 740; *Hughes* v. *Percival* (1883), 8 App. Cas. 443; *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48; *Jolliffe* v. *Woodhouse* (1894), 10 T. L. R. 553; *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, C. A.; *Hill* v. *Tottenham Urban District Council* (1898), 79 L. T. 495; *Penny* v. *Wimbledon Urban District Council*, [1899] 2 Q. B. 72, C. A.; *The Snark*, [1900] P. 105, C. A.

(*o*) *Rose* v. *Groves* (1843), 5 Man. & G. 613; *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400; *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109, reversed on another point *sub nom. Paddington Corporation* v. *A.-G.*, [1906] A. C. 1. See title NUISANCE.

(*p*) *Ellis* v. *Sheffield Gas Consumers Co.* (1853), 2 E. & B. 767; *Pitts* v. *Kingsbridge Highway Board*, *supra*.

(*q*) *Dodd* v. *Holme* (1834), 1 Ad. & El. 493; *Ellis* v. *Sheffield Gas Consumers Co.*, *supra*. "In violations of a right to property, whether real or personal, . . . he who procures the wrong is a joint wrong-doer, and may be sued either alone or jointly with the agent in the appropriate action for the wrong complained of" (*Lumley* v. *Gye* (1853), 22 L. J. (Q. B.) 463, *per* ERLE, J., at p. 472).

(*r*) *Rapson* v. *Cubitt* (1842), 9 M. & W. 710; *Knight* v. *Fox and Henderson* (1850), 20 L. J. (EX.) 9; *Overton* v. *Freeman* (1852), 21 L. J. (C. P.) 52; *Murray* v. *Currie* (1870), L. R. 6 C. P. 24; *Pearson* v. *Cox* (1877), 2 C. P. D. 369; *Blake* v. *Thirst* (1863), 8 L. T. 251.

(*s*) *Burgess* v. *Gray* (1845), 1 C. B. 578; *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392, C. A.; *Bennet* v. *Castle* (1898), 14 T. L. R. 288, C. A.

674. The liability of the employer for injuries will not absolve the contractor from liability, and the contractor will always remain liable for any tortious acts of his own or of his servants (*t*).

Joint liability.

The contractor may be sued either alone or jointly with his employer; but it must be noticed that the effect of bringing an action and recovering judgment against either the employer or contractor is to bar any claim against the other (*a*), and also that, as the employer and the contractor are joint tort-feasors, there is no contribution between them (*b*).

(*t*) *Bates* v. *Pilling* (1826), 6 B. & C. 38; *White* v. *Peto Brothers* (1888), 58 L. T. 710.

(*a*) See title JUDGMENTS AND ORDERS.

(*b*) See title TORT.

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SUB-SECT. 1.—*General Nature of Building Societies.*

Definition.

675. Building societies are societies formed for the purpose of raising, by the subscriptions of the members, a fund out of which advances may be made to members, by way of mortgage, upon the security of freehold, copyhold, or leasehold estate (*a*), the primary object being to assist the members in obtaining a small landed property (*b*).

Mode of carrying on business.

The method adopted is for the members to take shares of a definite amount, which amount is, as a rule, payable to the society by small periodical subscriptions. Out of the funds so acquired advances are made to members from time to time upon mortgage of freehold, copyhold, or leasehold property, the amount of such advances being the nominal amount of the shares held by the member less in most cases a considerable discount.

Although treated in the earlier legislation as bodies of comparatively humble interest, many building societies have developed into large institutions. Some societies have so far deviated from their original intention as mainly to devote their funds to financing builders (*c*), the funds being derived from members who subscribe for shares as an investment and are known as investing members. But whatever

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(*a*) See Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 13. Compare the preamble to the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32).

(*b*) Preamble to Building Societies Act, 1836 (6 & 7 Will. 4, c. 32).

(*c*) See *Murray* v. *Scott* (1884), 9 App. Cas. 519, *per* Lord BLACKBURN, at p. 548.

SECT. 1. Introductory.

their magnitude, and whatever their sphere of operation, building societies are, subject to the distinction hereafter explained between unincorporated and incorporated societies, carried on under the provisions of the same statutes.

SUB-SECT. 2.—*The Registrar.*

State control through Registrar.

676. *The functions* and powers of the Registrar of Building *Societies in England* are vested in the central office of the Registry of Friendly Societies, consisting of the Chief Registrar and assistant registrars of Friendly Societies (*d*).

The Registrar is the instrument through which the State exercises control. Thus, in the case of incorporated societies, he issues certificates of incorporation, registers rules and alterations of rules, prescribes the form of and receives the annual accounts and statements, and possesses powers of inspecting and dissolving societies and of suspending and cancelling registry of incorporation, and is charged with the duty of laying an annual report before Parliament of the accounts of all societies and the proceedings of the registry (*e*).

His functions in the case of unincorporated societies are more limited, his chief duties relating to alterations of rules and statements of accounts.

SECT. 2.—*Different Classes of Societies.*

SUB-SECT. 1.—*General Division.*

Classification of building societies.

677. Building societies are divided into the following classes: (1) unincorporated, (2) incorporated, (3) terminating, and (4) permanent.

The division of societies into unincorporated and incorporated and into terminating and permanent is a cross division. A terminating or a permanent society may be either incorporated or unincorporated. The distinction between terminating and permanent societies is one drawn from their method of operation in practice, but is not of much legal importance. With the exception of a difference regarding the limit of their borrowing powers (*f*), and the circumstances under which they terminate (*g*), both terminating and permanent societies are subject to the same law. The only division of importance from a legal point of view is the division into unincorporated and incorporated societies.

SUB-SECT. 2.—*Unincorporated and Incorporated Societies.*

Unincorporated societies.

678. Unincorporated societies were all formed under the Building Societies Act, 1836 (*h*). That Act did not contain general provisions

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 1, 2. As to the constitution of the central office, see title FRIENDLY SOCIETIES.

(*e*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 17, 18, 40; Building Societies Act, 1894 (57 & 58 Vict. c. 47), ss. 2, 4—7, 27.

(*f*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 15.

(*g*) *Ibid.*, ss. 5, 32 (1).

(*h*) 6 & 7 Will. 4, c. 32. No short title is given to this Act either by the Act itself, or by the Short Titles Act, 1896 (59 & 60 Vict. c. 14). But it is referred to as the Building Societies Act, 1836, in the Building Societies Act, 1894 (57 & 58

SECT. 2. Different Classes of Societies.

regulating the constitution of building societies, but supplied their place by enacting that such of the provisions of the Friendly Societies Acts of 1829 (*i*) and 1834 (*j*) as might be applicable to the purpose of any benefit building society should apply to such society (*k*). Societies formed under those Acts are not bodies corporate, but their property is vested in trustees or their treasurer, by whom actions may be brought or defended (*l*).

Incorporated societies.

Incorporated societies are all incorporated under the provisions of the Building Societies Act, 1874 (*m*). Except for certain special purposes (*n*), the need for trustees is thereby removed, as the corporate body thereby created is itself capable of being clothed with legal rights and obligations.

All societies formed since November 2, 1874 (*o*), are incorporated under the last-mentioned Act, which provided means whereby existing unincorporated societies might receive certificates of incorporation and thereby become bodies corporate (*p*).

SUB-SECT. 3.—*Terminating and Permanent Societies.*

Terminating societies.

679. A terminating society is a society which by its rules is to terminate and have its affairs wound up and its assets distributed at a fixed date, or when a result specified in its rules is attained (*q*).

Method of carrying on business.

The members of such a society agree to take one or more shares of a definite nominal amount and to pay subscriptions either (1) until a certain date, usually fixed as being the date on which, if all subscriptions were duly paid, the total nominal amount of all

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Vict. c. 47), s. 25, and will be so cited throughout this title. The Act was repealed, except so far as regards then existing societies, by the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 7, thus rendering it impossible to form any new societies under the former Act. Only sixty societies now remain to which the Act of 1836 applies, and this number is liable to be diminished from time to time by dissolution or by incorporation. By the Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 25 (2), the Act of 1836 was repealed as from August 25, 1896, as to all societies formed thereunder after the year 1856. In England the opinion has been expressed that all such societies, unless they obtained incorporation before the date of the repeal, ceased to be legally constituted under the Building Societies Acts, and, if consisting of more than 20 persons, became illegal associations under s. 4 of the Companies Act, 1862 (25 & 26 Vict. c. 89). See *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102, 113; *Shaw* v. *Benson* (1883), 11 Q. B. D. 563; *Re Thomas, Ex parte Poppleton* (1884), 14 Q. B. D. 379; and title COMPANIES. The contrary has been held in Scotland (*Smith's Trustees* v. *Irvine and Fullerton Building Society* (1905), 6 F. (Ct. of Sess.) 99).

(*i*) 10 Geo. 4, c. 56. This statute and that cited in the next note have no short title, but are commonly referred to as in the text, and will, for convenience, be so cited throughout this title.

(*j*) 4 & 5 Will. 4, c. 40.

(*k*) Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 4.

(*l*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 21.

(*m*) 37 & 38 Vict. c. 42. See p. 327, *post*.

(*n*) *E.g.*, the investment of surplus funds. See p. 378, *post*.

(*o*) The date on which the Building Societies Act, 1874 (37 & 38 Vict. c. 42), came into operation (*ibid.*, s. 2).

(*p*) *Ibid.*, ss. 9, 10, 11; Building Societies Act, 1875 (38 & 39 Vict. c. 9), s. 2, which was substituted for s. 8 of the Act of 1874; and see p. 327, *post*.

(*q*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 5. See generally, as to such societies, *Fleming* v. *Self* (1854), 3 De G. M. & G. 997, *per* Lord CRANWORTH, L.C., at pp. 1013 *et seq.*

SECT. 2. Different Classes of Societies.

the shares would have been received, or (2) until the society has in hand sufficient to pay all members who have not received any advance the full nominal amount of their shares. From time to time the funds in hand are applied in paying to those of the members who desire advances the nominal amount of their shares less a considerable discount. The members who thus receive payment of their shares in advance give mortgage security for the payment of the future subscriptions on their shares and of any other payments which may become due from them under the rules during the continuance of the society. Members who do not receive advances usually have the right of withdrawing from the society (*r*), and those who have received advances can usually redeem the security given by them (*s*). Upon the agreed date arriving or the object being attained the funds are applied in paying to those members who have received no advance the full nominal amount of their shares, and any surplus is divided as profits among the same persons.

Back payments.

One result of the ordinary scheme of a terminating society is that persons desiring to become members after its formation must pay down a sum equal to the amount of the subscriptions already paid by the original members with interest thereon. These payments are known as "back payments," and considerably check the increase of membership. In some cases this difficulty has been overcome by issuing a fresh series of shares each year, each series being calculated to mature in a certain number of years (usually about twelve) and working itself out as if it were a separate terminating society, though the money received is all put into one general fund.

Permanent societies.

680. A permanent society is a society whose rules do not specify any fixed date or given result as the period for its termination (*t*). It therefore continues to be a going concern as long as there is a demand for, and funds available for making, advances to existing or new members.

Method of carrying on business.

Persons can join such a society at any time. The shares are of fixed nominal amount, and are payable by a definite number of subscriptions, or, in most cases, may be paid up in full in one sum. When the share has been paid up in full, and no advance has been made, the member receives interest on the amount. At any time before an advance has been made, and whether his shares are paid up in full or not, a member may withdraw, and will be paid such sum as he is entitled to under the rules usually in the order of his notice of withdrawal; sometimes the right of withdrawal is by the rules expressly given "provided the funds permit." A member desiring an advance receives the nominal amount of his shares, usually subject to a discount or to the payment of a premium, and gives a mortgage to secure the repayment of the amount advanced and interest thereon by a definite number of instalments, and also the payment of any money becoming payable by him under the rules whilst the mortgage is outstanding. As a rule, after an advance has been made no further subscriptions are payable.

(*r*) See p. 358, *post*.
(*s*) See p. 366, *post*.
(*t*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 5.

Part II.—Incorporation of Building Societies.

SECT. 1.—*Incorporation of Newly-established Societies.*

SECT. 1. Incorporation of Newly-established Societies.

681. Any number of persons, not less than three (*u*), may form a building society (*a*), either permanent or terminating (*b*).

Steps requisite to procure incorporation.

The first step to be taken by the promoters is to agree upon a set of rules for the government of the society. Two copies of the proposed rules, signed by three of the promoters and by the intended secretary or other officer, must be sent to the Registrar (*c*). The Registrar, if he finds the proposed rules contain the statutory provisions, and are otherwise in accordance with the Building Societies Acts (*d*), returns one copy, with a certificate of incorporation, to the secretary or other officer, and retains and registers the other copy (*e*). The society thereupon becomes a body corporate by its registered name, having perpetual succession and a common seal (*f*).

Penalty for commencing business without incorporation.

If any persons representing themselves to be a society commence business without first obtaining a certificate of incorporation, they are liable, upon summary conviction before justices at the complaint of the Registrar, to a penalty not exceeding £5 for every day business is so carried on (*g*).

Effect of certificate of incorporation.

A certificate of incorporation, purporting to be signed by the Registrar, will, in the absence of any evidence to the contrary, be received as evidence in all courts of law and elsewhere (*h*), and cannot be declared void by the court on the ground that it has been obtained irregularly (*i*).

SECT. 2.—*Incorporation of Unincorporated Societies.*

Method of incorporating unincorporated society.

682. Any unincorporated society the rules of which have been certified under the Act of 1836 may obtain a certificate of incorporation, and thereupon it becomes an incorporated society, and is thenceforth subject to the statutes regulating incorporated societies (*k*).

The application for registration must be made to the Registrar, and must be made by the authority of a general meeting of the

(*u*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 17.

(*a*) As it is now and has been since the passing of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 7, impossible to form a new unincorporated society, the present section of this title treats only of the formation of incorporated societies.

(*b*) *Ibid.*, s. 13.

(*c*) *Ibid.*, s. 17, Building Society Regulations, 1895, r. 41. For form of application for registration, see *ibid.*, r. 2, and Form C; Encyclopædia of Forms, Vol. III., p. 8. The fee payable is £5 (Building Society Regulations, 1906). The Building Society Regulations, 1895, are printed in Statutory Rules and Orders, revised to December 31, 1903, II., title Building Society.

(*d*) See p. 331, *post*.

(*e*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 17.

(*f*) *Ibid.*, s. 9.

(*g*) *Ibid.*, s. 43.

(*h*) *Ibid.*, s. 20.

(*i*) *Glover* v. *Giles* (1881), 18 Ch. D. 173.

(*k*) Building Societies Act, 1875 (38 & 39 Vict. c. 9), s. 2.

SECT. 2. Incorporation of Unincorporated Societies.

society specially called for that purpose (*l*). The application must be accompanied by a copy of the rules of the society and a statutory declaration that such authority for the application was duly given, and that the rules were certified under the Act of 1836 (*m*).

Registration of rules.

683. It is a necessary preliminary to the grant of a certificate of incorporation that the existing rules shall have been registered with the Registrar (*n*). This may be effected in two ways: (1) on a proper application being made for the purpose, the clerk of the peace for the county in which the society is established should transmit to the Registrar the transcript of the rules of the society filed with the rolls of the sessions of the peace (*o*), and the Registrar keeps and registers the transcript (*p*); (2) if the clerk of the peace does not transmit the transcript of the rules of the society, the society may furnish the Registrar with a copy of the rules, purporting to be certified, or to be a true copy of the rules certified, by the barrister appointed to certify the rules of friendly societies (*q*), authenticated by the statutory declaration of the secretary or other officer, as the Registrar may require, and the copy of the rules is kept and registered by the Registrar (*r*).

In practice if the Registrar has not, at the time he receives the application for incorporation, received the transcript of the rules, he applies for it to the clerk of the peace. If he does not receive it within seven days, he so informs the applicant for incorporation, who must furnish the necessary evidence of the rules being certified (*s*).

Effect of

684. After incorporation the previously existing rules, so far as they do not conflict with the provisions of the statutes regulating incorporated societies, continue in force until altered or rescinded in accordance with those statutes (*t*).

The court cannot, at the instance of some of the incorporators, declare the incorporation void on the ground that it has been obtained by fraud or irregularity (*u*).

All rights of action and other rights and all estates and interests

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(*l*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 12; Building Society Regulations, 1895, r. 1; and see p. 352, *post*.

(*m*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 12; Building Society Regulations, 1895, r. 1. For form of application and declaration, see Building Society Regulations, 1895, and Forms A and B; Encyclopædia of Forms, Vol. III., pp. 11, 12. A fee of £5 is payable (Building Society Regulations, 1906).

(*n*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 10 and 11. These provisions have virtually expired, as the Registrar has the rules of all the sixty unincorporated societies now in existence; see note (*g*), p. 324, *ante*.

(*o*) A transcript of the rules of a society certified under the Act of 1836 had to be deposited with the clerk of the peace of the county in which the society was established (Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 7).

(*p*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 10.

(*q*) Under Friendly Societies Act, 1834 (4 & 5 Will. 4, c. 40), s. 4, rendered applicable to unincorporated societies by Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 4. The barrister is now replaced by the Registrar (Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 7).

(*r*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 11.

(*s*) Building Society Regulations, 1895, r. 1.

(*t*) Building Societies Act, 1875 (38 & 39 Vict. c. 9), s. 2.

(*u*) *Glover* v. *Giles* (1881), 18 Ch. D. 173.

in real and personal estate belonging to, or held in trust for, an unincorporated society vest on incorporation in the incorporated society without any conveyance or assignment, except in the case of stocks and securities in the public funds, and estates in copyhold or customary hereditaments, the title to which cannot be transferred without admittance (*w*).

SECT. 2. Incorporation of Unincorporated Societies.

Part III.—Name and Chief Office of Society.

SECT. 1.—*Name of Society.*

SUB-SECT. 1.—*Original Name.*

685. The name of the society must be set forth in the rules which are forwarded to the Registrar prior to incorporation (*a*). On the grant of a certificate of incorporation the society becomes a corporate body by its registered name (*b*). The registration of the rules is a condition precedent to incorporation, and the Registrar will refuse registration if the name chosen for the society is identical with that in which a subsisting society is already registered, or so nearly resembles the name of a subsisting society as to be calculated to deceive, unless such subsisting society is in course of being terminated or dissolved and assents to such registration (*c*).

Limitations on choice of name.

The last words of the name of any new incorporated society must be "Building Society," and the Registrar may refuse to allow the insertion or retention of any words which imply that the society is other than a building society (*d*).

An unincorporated society retains its name on incorporation, and the provisions as to identity and similarity of name do not apply until it changes its name (*e*).

Unincorporated society.

686. An incorporated society may not use any name or title other than its registered name. If a society contravenes this provision, the society, and also every director or member of the committee of management who is a party to the contravention, is liable on

Necessity for use of registered name.

(*w*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 27, as amended by Building Societies Act, 1877 (40 & 41 Vict. c. 63), s. 3. S. 27 of the Act of 1874 as unamended referred only to property of which the society as unincorporated was possessed on November 2, 1874, thus leaving outstanding any property acquired by a society between that date and the date of its incorporation. The amendment above mentioned rendered s. 27 of the Act of 1874 applicable to all property possessed by a society at the date of its incorporation. S. 4 of the Act of 1877 operated to transfer, with the exceptions above mentioned, the outstanding property of societies incorporated before its passing.

(*a*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16 (1).

(*b*) *Ibid.*, s. 9.

(*c*) *Ibid.*, s. 17. This provision is similar to that contained in s. 20 of the Companies Act, 1862 (25 & 26 Vict. c. 89), and it is conceived that cases decided on that section apply to building societies. See title COMPANIES.

(*d*) Building Society Regulations, 1895, r. 7.

(*e*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 9, 17.

SECT. 1. Name of Society.

summary conviction to a fine not exceeding £10 and, in the case of a continuing offence, to an additional fine not exceeding £10 for every week during which the offence continues (*f*).

The registered name of an incorporated society must appear on the seal (*g*).

SUB-SECT. 2.—*Change of Name.*

Mode of changing name.

687. An incorporated society may change its name by resolution of three-fourths of the members present at a meeting called for the purpose. The choice of a new name on alteration is subject to the same restrictions regarding identity or similarity with the names of subsisting societies as the choice of a name on the formation of a new society. The change of name does not affect any right or obligation of the society, or of any member or other person concerned (*h*).

Notice of change.

Notice (*i*) of the change of name must be sent to the Registrar for registration accompanied by a statutory declaration (*k*) of an officer of the society that the above provisions have been complied with. Thereupon the Registrar, if he finds the matter in order, gives a certificate of registration (*l*). He may, however, if he finds any identity or similarity with the name of any previously registered society, require further evidence that that society is not subsisting or is in course of being terminated or dissolved and consents to such registration (*m*). No change of name can be registered unless the new name ends with the words "Building Society" (*n*).

SECT. 2.—*Chief Office or Place of Meeting.*

688. The rules of a society, whether incorporated (*o*) or unincorporated (*p*), must specify the chief office or place of meeting.

Change of chief office or place of meeting.

An incorporated society may change its chief office in manner directed by its rules, or in default of such direction at a general meeting specially called for the purpose (*q*). No alteration of the rules is necessary on such change, but notice in duplicate of the change must be given by the secretary to the Registrar within seven days, and will be registered by him and a certificate given (*r*).

An unincorporated society may change its place of business to another place within the county in which the rules are enrolled

(*f*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 15.
(*g*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16 (10).
(*h*) *Ibid.*, s. 22.
(*i*) Building Society Regulations, 1895, r. 15, and Form O; Encyclopædia of Forms, Vol. III., p. 36.
(*k*) Building Society Regulations, 1895, r. 15 and Form P; Encyclopædia of Forms, Vol. III., p. 86.
(*l*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 22. The fee for the certificate is ten shillings (Building Society Regulations, 1906). For form of certificate, see Building Societies Act, 1894 (57 & 58 Vict. c. 47), Sched. III.
(*m*) Building Society Regulations, 1895, r. 15.
(*n*) *Ibid.* r. 7; and see p. 329, *ante*.
(*o*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16 (1).
(*p*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 10.
(*q*) Building Societies Act, 1877 (40 & 41 Vict. c. 63), s. 2.
(*r*) *Ibid.*; Building Society Regulations, 1895, r. 13, and Form M. A fee of two shillings and sixpence is payable for the certificate (*Ibid.* r. 41).

without apparently altering the rules, upon giving notice in writing to the Registrar within seven days before or after removal, such notice being signed by the secretary or other principal officer and three or more members (*s*). SECT. 2. Chief Office or Place of Meeting.

Part IV.—Rules of a Society.

SECT. 1.—*Incorporated Society.*

SUB-SECT. 1.—*In General.*

689. The rules of a society form the contract between the society and the members (*t*). This contract is to be found in the rules for the time being in force, having regard to any alterations duly made (*u*). They are binding on the members and officers of the society and on all persons claiming on account of a member, or under the rules, all of which persons are deemed to have full notice thereof (*a*). Rules contain contract between society and members.

A printed copy of the rules of an incorporated society, certified by the secretary or other officer of the society to be a true copy of its registered rules, is, in the absence of any evidence to the contrary, evidence of the rules (*b*). Copies of rules.

A society must supply to any person requiring the same a complete printed copy of the rules with a copy of the certificate of incorporation appended thereto at a charge not exceeding one shilling for each copy (*c*).

SUB-SECT. 2.—*Contents of Rules.*

690. The rules of any building society established after August 25, 1894, and of any incorporated society existing on that date which subsequently to that date substitutes a new set of rules for its existing rules, must set forth the name of the society and its chief office or place of meeting, the manner in which the stock or funds of the society is or are to be raised, the purposes to which they are to be applied, and the manner in which they are to be invested; the terms on which unadvanced subscription shares or paid-up shares (if any) are to be issued and withdrawn, with tables, where applicable in the opinion of the Necessary contents of rules.

(*s*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 10. See *R.* v. *Registrar of Friendly Societies* (1852), 16 J. P. 613. For form of notice, see Encyclopædia of Forms, Vol. III., p. 35.

(*t*) *Auld* v. *Glasgow Working Men's Building Society* (1887), 12 App. Cas. 197, *per* Lord MACNAGHTEN, at p. 205; *Re Doncaster Permanent Benefit Building and Investment Society* (1866), 14 L. T. 13; *Walton* v. *Edge* (1884), 10 App. Cas. 33; *Re West Riding of Yorkshire Permanent Benefit Building Society, Ex parte Pullman* (1890), 45 Ch. D. 463.

(*u*) *Barnard* v. *Tomson*, [1894] 1 Ch. 374, *per* NORTH, J., at p. 392; *Re Norfolk and Norwich Provident Permanent Benefit Building Society, Smith's Case* (1875), 1 Ch. D. 481, must be taken to have been decided on the special facts. See *Wilson* v. *Miles Platting Building Society* (1887), 22 Q. B. D. 381, n. As to the alterations that may be made, see p. 333, *post*.

(*a*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 21.

(*b*) *Ibid.*, s. 20.

(*c*) *Ibid.*, s 17.

Incorporated Society.

Registrar, showing the amount due by the society for principal and interest separately; whether any, and what, preferential shares are to be issued; the manner in which and terms upon which advances are to be made and redeemed, with tables, where applicable in the opinion of the Registrar, showing the amount due from the borrower after each stipulated payment; the manner in which losses are to be ascertained and provided for, and in which membership is to cease; whether the society intends to borrow money, and if so, within what limits; the manner of altering and rescinding the rules of the society and of making additional rules; the manner of appointing, remunerating, and removing the board of directors or committee of management, auditors, and other officers, and their powers and duties; the manner of calling general and special meetings of the members; provisions regulating the audit of the accounts, the settlement of disputes (*d*), the device, custody, and use of the seal, the custody of the mortgage deeds and other securities belonging to the society, the fines and forfeitures to be imposed on members of the society, and the manner in which the society, whether terminating or permanent, shall be terminated or dissolved (*e*).

Schedule of forms optional.

A society may describe in a schedule to its rules the forms of conveyance, mortgage, transfer, agreement, bond, security for deposit or loan or other instrument necessary for carrying its purposes into execution (*f*).

General powers as to making rules.

Beyond those already mentioned there are no statutory provisions expressly dealing with the rules of building societies. A building society may make such rules as it pleases, provided that the rules do not conflict with the general law of the realm or the express provisions of the Building Societies Acts, and do not make the society a thing different from a building society (*g*).

SUB-SECT. 3.—*Alteration of Rules.*

Method of changing rules.

691. The rules can only be altered in the manner authorised by statute (*h*). A different procedure is authorised with regard to societies certified before the Act of 1874, and subsequently incorporated thereunder, from that authorised with regard to societies first established after the passing of that Act (*i*).

Any of the first-mentioned class of societies may alter or rescind any rule or make any additional rule by the vote of three-fourths of the members present at a special meeting called for the purpose,

(*d*) See p. 381, *post*. Provision for settlement by general meeting or the board of directors will not be sanctioned by the Registrar.

(*e*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16; Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 1.

(*f*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 19.

(*g*) *Murray* v. *Scott* (1884), 9 App. Cas. 519, *per* Lord SELBORNE, L.C., at p. 538. For specimen forms of rules of building societies, see Encyclopædia of Forms, Vol. III., pp. 13, 21.

(*h*) *Auld* v. *Glasgow Working Men's Building Society* (1887), 12 App. Cas. 197, *per* Lord MACNAGHTEN, at p. 205, where it was held that the rights of withdrawing members under the rules could not be altered by an ordinary resolution.

(*i*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 18.

of which notice specifying the proposed alteration, rescission, or addition shall have been given to the members in the manner provided by the rules of the society, or in the absence of such rules by letter sent through the post seven days previous to such meeting (*k*).

Any of the second-mentioned class may alter or rescind any rule or make an additional rule in the manner its rules direct (*k*).

Registration of alteration.

692. In both cases a society altering or rescinding any of its rules or making an additional rule must forward to the Registrar an application for registration of the alteration signed by three members and the secretary, accompanied in case of partial alteration (*l*) by two copies of every alteration or addition signed in the same way, or in case of rescission by two copies of the resolution passed for that purpose similarly signed, or in case of complete alteration by a printed copy of the existing rules and two printed copies of the new rules similarly signed, and also in each case by a statutory declaration by an officer of the society that the provisions above mentioned with regard to the procedure to be adopted have been complied with (*m*). The Registrar, if he finds that the alteration, addition, or rescission is in conformity with the Building Societies Acts, returns one of such copies to the secretary or other officer of the society with a certificate of registration, and retains and registers the other (*n*).

Effect of registration.

693. The certificate of the Registrar is conclusive that the necessary preliminary steps have been taken to make the alteration binding on the society and members (*o*), but the fact that a rule has been registered is not conclusive as to its legality or validity (*p*). His duties, when rules are presented for registration, are merely to consider whether or not the proposed rules are in conformity with the Acts (*q*). If the Registrar refuses to register a rule or alteration, the proper remedy is by mandamus (*r*).

Extent of power to change rules.

694. No limit has been placed by statute upon the power to alter rules, and the power is very extensive. Thus, alterations may be made whereby the rights of members who have given notice of withdrawal are altered to their detriment (*s*), whereby the

(*k*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 18.

(*l*) As to what constitutes a partial alteration, see Building Society Regulations, 1895, r. 3 (a).

(*m*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 18; Building Society Regulations, 1895, rr. 4, 5, and Forms D, E, F; Encyclopædia of Forms, Vol. III., pp. 30—33.

(*n*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 18; Building Society Regulations, 1895, r. 6. A fee of £1 is payable for the certificate (Building Society Regulations, 1900).

(*o*) *Rosenberg* v. *Northumberland Building Society* (1889), 22 Q. B. D. 373; *Dewhurst* v. *Clarkson* (1854), 3 E. & B. 194.

(*p*) *Laing* v. *Reed* (1869), 5 Ch. App. 4. The certificate expressly states that the registration of rules and alterations does not imply approval of them by the Registrar, or any guarantee of the good management or financial stability of the society. See form of certificate in Building Societies Act, 1894 (57 & 58 Vict. c. 47), Sched. III.

(*q*) *R.* v. *Brabrook* (1893), 69 L. T. 718.

(*r*) *Ibid.* See as to mandamus generally, title CROWN PRACTICE.

(*s*) *Pepe* v. *City and Suburban Permanent Building Society*, [1893] 2 Ch. 311; *Davies* v. *Second Chatham Permanent Benefit Building Society* (1889), 61 L. T. 660.

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sums standing to the credit of unadvanced members are diminished (*t*), and whereby sums payable by advanced members in respect of their mortgages are increased (*a*). It is no objection that the alteration affects members who have an existing claim on the society (*b*).

Alterations not permitted.

But though the limits of the power of altering rules are not defined, the alterations must relate only to the internal rights of the members of the society (*c*), and there are certain classes of alterations which are clearly invalid. No alteration of a rule can be valid which is not made in good faith or which purports to affect the rights of outside creditors or to change the nature of the constitution of the society or which is directed against a particular individual (*d*). A society which is recognised to be in a state of insolvency cannot make alterations in its rules the effect of which would be to alter the rights of the members in a winding-up (*e*), although it may make such alterations as will facilitate the realisation of assets and the discharge of obligations (*f*).

Alteration may be partial or complete.

An alteration of rules may be either partial, consisting of alterations of or additions to the existing rules, or complete, consisting of the substitution of an entire set of rules for the existing rules (*g*).

Change of name and chief office.

Although the name and chief office of the society must be stated in the rules, either may be changed without an alteration of rules (*h*).

Discontinuance of ballot for advances.

695. Special provision is made by statute for altering rules in the case of building societies established before August 25, 1894, whose rules provide that advances may be balloted for. In such case a society may, notwithstanding anything in its rules, resolve by a majority of its members present or voting by voting papers at a meeting called for the purpose upon a scheme for the discontinuance of advances by ballot and for making other provision in lieu thereof. The scheme must be supported by a majority of the members present at the meeting or voting by voting papers who have not at the date of the meeting received their advances by

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(*t*) *Strohmenger* v. *Finsbury Permanent Investment Building Society*, [1897] 2 Ch. 469, C. A. Such a result cannot be effected by an ordinary resolution (*Aubl* v. *Glasgow Working Men's Building Society* (1887), 12 App. Cas. 197, *per* Lord HALSBURY, L.C., at p. 201).

(*a*) *Rosenberg* v. *Northumberland Building Society* (1889), 22 Q. B. D. 373; *Wilson* v. *Miles Platting Building Society* (1887), 22 Q. B. D. 381, n.; *Bradbury* v. *Wild*, [1893] 1 Ch. 377. In these cases the securities were framed so as to secure the payment of sums payable under the rules for the time being of the society. If a mortgagee has made a special contract with the society, such contract cannot be altered by an alteration of rules (*Re Norwich and Norfolk Provident Permanent Benefit Building Society, Smith's Case* (1875), 1 Ch. D. 481; *Wilson* v. *Miles Platting Building Society*, *supra*).

(*b*) *R.* v. *Brabrook* (1893), 69 L. T. 718.

(*c*) *Strohmenger* v. *Finsbury Permanent Investment Building Society*, *supra*, *per* CHITTY, L.J., at p. 480; *Sixth West Kent Mutual Building Society* v. *Hills* [1899] 2 Ch. 60, *per* BYRNE, J., at p. 69.

(*d*) *Strohmenger* v. *Finsbury Permanent Investment Building Society*, *supra*.

(*e*) *Sixth West Kent Mutual Building Society* v. *Shove* (1895), reported [1899] 2 Ch. 64, n.

(*f*) *Sixth West Kent Mutual Building Society* v. *Hills*, *supra*.

(*g*) Building Society Regulations, 1895, r. 3.

(*h*) Building Societies Act, 1877 (40 & 41 Vict. c. 63), s. 2. See p. 330, *ante*.

ballot. The scheme and every alteration must be registered in the same manner as rules. Notice of the meeting and a copy of the proposed scheme together with a voting paper must be sent to every member fourteen days before the date of the meeting (*i*).

SECT. 2.—*Unincorporated Society.*

SUB-SECT. 1.—*In General.*

General provisions as to rules.

696. As it is now impossible to form a new unincorporated society, the only matter of importance in connection with the rules of such societies is the method of alteration.

The rules of an unincorporated society must be proper and wholesome for the government and guidance of the society, not repugnant to the provisions of the Act of 1836 or the general laws of the realm (*j*).

Schedule of forms.

A schedule to the rules may contain forms of conveyance, mortgage, transfer, agreement, bond, and other instruments necessary for the purposes of the society (*k*).

Rules must be certified and entered.

The rules had to be certified by the barrister appointed to certify the rules of friendly societies (*l*), and entered in a book kept by an officer of the society appointed for the purpose, which book must be open at all reasonable times for the inspection of the members (*m*). The rules so confirmed and entered are binding on the members, officers and contributors, and their representatives, all of whom are deemed to have full notice thereof (*n*).

Evidence.

The entry of such rules or the transcript deposited with the clerk of the peace or an examined copy of the transcript is evidence of the rules (*o*).

SUB-SECT. 2.—*Alteration of Rules.*

Requisition for meeting.

697. The first step to be taken in altering the rules of an unincorporated society is for a requisition to be made by seven or more members of the society requiring a general meeting of the society to be called for the purpose.

Meeting.

Thereupon a written or printed notice, signed by the president or other principal officer or by the clerk of the society, convening such general meeting must (*p*) be issued and publicly read with the requisition at the two usual meetings of the society next before the meeting convened by the notice. The alteration may be made at the general meeting thus convened, and must be carried by a three-fourths majority of the members present (*q*).

(*i*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 12, which also prohibits balloting for advances in the case of societies established after the passing of the Act.

(*j*) Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 1.

(*k*) *Ibid.*, s. 3.

(*l*) Now the Registrar (Building Societies Act, 1874 (37 & 38 Vict. c. 42)), s. 7.

(*m*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 7.

(*n*) *Ibid.*, s. 8.

(*o*) *Ibid.* To make a copy evidence, all the rules must be examined (*R.* v. *Boynes* (1843), 1 Car. & Kir. 65). As to the transcript, see p. 328, *ante*.

(*p*) *R.* v. *Aldham and United Parishes Insurance Society* (1851), 21 L. J. (Q. B.) 1, disapproving *R.* v. *Bannatyne* (1851), 2 L. M. & P. 213.

(*q*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 9.

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As an alternative, alterations may be made by a committee of members chosen for the purpose at a meeting convened in manner above described. Three-fourths of the members of the committee must concur in each alteration (*r*).

Alteration by committee. Submission to Registrar.

698. Two copies of the alterations agreed upon, signed by three members and countersigned by the clerk or secretary and accompanied by a statutory declaration (*s*) of the clerk or secretary or one of the officers of the society that the provisions of the Acts have been complied with must as soon as possible be submitted to the Registrar (*a*).

Registrar's certificate.

The Registrar must consider, if required, in consultation with the clerk or secretary of the society, whether the alterations are calculated to carry into effect the intention of the framers and whether they are in conformity to law, and if he sees no objection to the suggested alterations he must indorse a certificate on each of the copies to the effect that the rules are in conformity to law (*b*). One of the certified copies is returned to the society, and the other retained by the Registrar (*c*). The alterations become binding on the members and officers of the society and other persons interested therein on the date on which they are certified by the Registrar (*d*).

Submission to quarter sessions.

If the Registrar considers the alterations improper, he must point out which part or parts are repugnant to law (*e*). The society may then submit the alterations with the Registrar's objections to a court of quarter sessions; and the justices may, if they think fit, confirm the alterations notwithstanding the Registrar's objection (*f*).

Alterations permissible.

The same principles with regard to what alterations of rules are permissible apply in the case of an unincorporated as in the case of an incorporated society (*g*).

Part V.—Officers of a Society.

SECT. 1.—*Incorporated Society.*

SUB-SECT. 1.—*Officers generally.*

Necessary and usual officers.

699. The business of a building society is managed through its officers, who must, in order to permit of proper compliance with the provisions of the Building Societies Acts, include a board of directors or committee of management, a secretary or manager, and at least

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(*r*) Friendly Societies Act, 1929 (10 Geo. 4, c. 56), s. 9.
(*s*) For form, see Encyclopædia of Forms, Vol. III., p. 34.
(*a*) Friendly Societies Act, 1834 (4 & 5 Will. 4, c. 40), s. 4.
(*b*) *Ibid.* The fee of one guinea is payable for the certificate of alteration, unless a fee has been paid upon an alteration of the rules within three years, or there is sent with the new or altered rules an affidavit that they are copies of rules already enrolled under the Acts (*ibid.*, s. 5).
(*c*) *Ibid.*, s. 4.
(*d*) *Ibid.*
(*e*) *Ibid.*
(*f*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), ss. 5, 10.
(*g*) See p. 333, *ante*.

two auditors. Other officers very commonly appointed are a treasurer, a surveyor, and a solicitor (*h*). A solicitor does not, however, become an officer merely because he is appointed solicitor to the society, and *primâ facie* is not an officer (*i*).

An infant is not competent to hold any office in a society (*k*), and it seems doubtful whether a corporation can be an officer (*l*). Infants and corporations.

All officers are bound by the rules, and are taken to have full notice thereof (*m*).

700. The rules must set forth the manner of appointing, remunerating, and removing the board of directors or committee of management, auditors, and other officers (*n*), and the powers and duties of the board of directors or committee of management and other officers (*o*). Appointment etc. of officers.

701. Every officer of a society having the receipt or charge of any money belonging to the society must, before entering on his office, enter into a bond (*p*) with at least one surety, or give the security of a guarantee society or other security, in such sums as the society requires, to secure the rendering of a true account of all money received and paid by him on account of the society and the payment of all sums due from him to the society whenever the rules appoint or the society requires him to do so (*q*). Giving of security.

702. Every officer, his executors or administrators, must upon demand made or notice in writing given or left at his last or usual place of business—(1) give in his account, as may be required by the board of directors or committee of management, to be examined Duty to account.

(*h*) The two latter are enumerated as officers in s. 23 of the Building Societies Act, 1894 (57 & 58 Vict. c. 47).

(*i*) *Re Liberator Permanent Benefit Building Society* (1894), 71 L. T. 406, *per* CAVE and COLLINS, JJ., at pp. 407, 408. As to the circumstances in which a solicitor may be held to be an officer within s. 10 of the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), see *ibid.* Presumably the position of a surveyor is similar. It is apprehended that trustees appointed for the purpose of investments of surplus funds in the public funds or upon security of copyhold or customary estate (as to which see Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 25, 28; and pp. 365, 378, *post*) are not *primâ facie* and as such trustees officers of the society.

(*k*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 38.

(*l*) See *Re West of England and South Wales District Bank, Ex parte Swansea Friendly Society* (1879), 11 Ch. D. 768, decided on the provisions of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 15 (7).

(*m*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 21.

(*n*) *Ibid.*, s. 16 (6). Appointments must be made honestly, and an agreement by a person, in consideration of his appointment, to pay money to the person whose duty it is to appoint is corrupt and unenforceable (*Starr* v. *Wall* (1889), 6 T. L. R. 108). Care should be taken that the rules are strictly complied with. See *Roberts* v. *Price* (1847), 4 C. B. 231.

(*o*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16 (12).

(*p*) For the form, see *ibid.*, Schedule; Encyclopædia of Forms, Vol. III., p. 68. It is conditioned, not only for rendering accounts of payments and receipts and payment of all moneys in his hands, but also for the assignment and transfer or delivery of all securities and effects, books, papers, and property of the society in his hands or custody. For such bonds generally, see title GUARANTEE.

(*q*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 23.

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and allowed or disallowed by them; (2) pay over all the moneys remaining in his hands, and deliver all securities and effects, books, papers, and property of the society in his hands or custody, to such person as the society may appoint (*r*).

Effect of failure to account.

In the event of any neglect or refusal by an officer to perform these obligations, the society may either sue upon the bond which the officer has entered into (*s*), or apply to the county court (*t*) of the district in which the chief office or place of meeting of the society is situate (*u*). Upon such an application the court may proceed in a summary way and make such order as it thinks just; and an order so made is not subject to any appeal (*w*). Such an application, whether any bond be put in suit or not, must be by action, commenced by plaint and summons in the ordinary way, in which the society are plaintiffs and the officer against whom the application is made is defendant (*x*).

Criminal proceedings for misappropriation.

703. Any person (*a*) who by false representation or imposition obtains possession of any moneys, securities, books, papers, or other effects of a society, or, having the same in his possession, withholds or misapplies the same, or wilfully applies any part thereof to purposes other than those expressed or directed in the rules and authorised by the Building Societies Act, 1874, is liable on summary conviction to a penalty not exceeding £20, with costs not exceeding twenty shillings, and to be ordered to deliver up to the society all such moneys, securities, books, papers, and other effects, and to repay the amount of money applied improperly (*b*). In default of payment of such penalty and costs, or of such delivery of effects, or of such repayment, he may be

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(*r*) *Ibid.*, s. 24. When an officer whom the society alleged to have been dismissed was required to account and to deliver up all books and other property of the society in his hands, it was held immaterial whether he had been legally dismissed or not (*First Edinburgh and Leith 415th Starr Bowkett Building Society* v. *Munro* (1883), 11 R. (Ct. of Sess.) 5).

(*s*) See p. 337, *ante*.

(*t*) *I.e.*, in England. As to this, and as to the appropriate courts in Scotland and Ireland, see Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 4.

(*u*) *Ibid.*, s. 24. Independently of these provisions the society can sue its officers in the High Court, claiming, *e.g.*, an account of moneys misappropriated or retained, payment, and damages for breach of trust (*Municipal Permanent Investment Building Society* v. *Richards* (1888), 39 Ch. D. 372, C. A.). Such a claim, even where the officers are members of the society, is not a "dispute" between the society and a member thereof "in his capacity of a member" within s. 2 of the Building Societies Act, 1884 (47 & 48 Vict. c. 41), and need not be referred to arbitration under a rule requiring disputes between the society and any members thereof to be referred to arbitration (*Municipal Permanent Investment Building Society* v. *Richards, supra*); see pp. 387, 388, *post*.

(*w*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 24; and see *First Edinburgh and Leith 415th Starr-Bowkett Building Society* v. *Munro, supra*.

(*x*) County Court Rules, 1903, Ord. 41, r. 7. Particulars must be filed stating, when the bond is not in suit, the nature of the thing required to be done, or the neglect complained of, or the property required to be given up (*ibid.*, rr. 8—10); otherwise the general practice applies (*ibid.*, Ord. 50, r. 36). See title COUNTY COURTS.

(*a*) Including, of course, officers whose position obviously provides special opportunities for fraud.

(*b*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 31.

imprisoned, with or without hard labour, for any time not exceeding three months (*c*). These provisions, however, do not prevent any such person from being proceeded against by indictment if a conviction has not previously been obtained against him for the same offence under the Building Societies Act, 1874 (*d*).

Who may prosecute.

Proceedings under these provisions may be taken by or at the instance of (1) the society, or (2) any member authorised by the society, or by its board of directors or committee of management, or by the Registrar, or (3) the Registrar (*e*).

Receipt of commissions etc.

704. No officer may, in addition to the remuneration allowed by the rules, receive from any other person any gift, bonus, commission, or benefit, for or in connection with any loan made by the society (*f*). Any person paying or accepting any such gift, bonus, commission, or benefit is liable on summary conviction to a fine not exceeding £50, and in default of payment may be imprisoned, with or without hard labour, for any time not exceeding six months; and the person accepting any such gift, bonus, commission, or benefit must, at the direction of the court by whom he is convicted, pay over to the society the amount or value thereof, and in default of such payment may be imprisoned, with or without hard labour, for any time not exceeding six months (*g*).

Purchase by officer of mortgaged property.

A purchase by an officer of property sold by the society as mortgagees under a power of sale will be declared void as against the mortgagor, even though the sale is by auction and there is no evidence that it was at an undervalue (*h*).

Liabilities of officers for defaults of society.

705. If any society neglects or refuses to give any notice, send any return or document, or do or allow to be done anything required by the Building Societies Acts, or to do any act or furnish any information required for the purposes of those Acts by the

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(*c*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 31 Such an order for repayment, followed by imprisonment in default, is a bar to an action brought by the society for recovery of the same moneys. See *Vernon* v. *Watson*, [1891] 2 Q. B. 288, C. A., *per* Lord HALSBURY, L.C., at p. 290 (a decision upon an almost identical provision in the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 16 (9)).

(*d*) 37 & 38 Vict. c. 42, s. 31. If any arrangement is made with a defaulting officer, care should be taken to avoid anything which might be an agreement to stifle a prosecution. See *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173, C. A.

(*e*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 18.

(*f*) *Ibid.*, s. 23.

(*g*) *Ibid.* Even apart from this statutory provision, the society may enforce payment to itself of bonuses so received (*Municipal Permanent Investment Building Society* v. *Richards*, [1889] W. N. 103); but it is conceived, on the analogy of the decision in *Vernon* v. *Watson*, *supra*, that an order under s. 23 for payment over, followed by imprisonment in default, would be a bar to such an action. It should be observed, however, that the reasoning of Lord HALSBURY, L.C., in *Vernon* v. *Watson*, *supra*, at p. 290, founded upon the saving of the right to indict, is not here applicable. An officer may also be liable to indictment under the Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34); see title CRIMINAL LAW AND PROCEDURE.

(*h*) *Martinson* v. *Clowes* (1882), 21 Ch. D. 857.

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Registrar or by an inspector (*i*), every officer bound by the rules to fulfil the duty of which a breach has been committed, and if there is no such officer, then every member of the committee of management or board of directors, unless it appears that he was ignorant of, or attempted to prevent the breach (*j*), is liable on summary conviction to a fine not exceeding £20 for each offence, and, in the case of a continuing offence, to an additional fine not exceeding £5 a week during the continuance of the offence (*k*).

False statements in documents sent to Registrar.

706. Any person who wilfully makes, orders, or allows to be made any false statement in any document required by the Building Societies Acts to be sent to the Registrar, or by erasure, omission, or otherwise wilfully falsifies any such document, is liable on summary conviction to a fine not exceeding £50 (*l*).

Defendant and wife competent witnesses.

707. Upon the hearing of any charge involving the infliction of fine or imprisonment on summary conviction under the Building Societies Act, 1894, the defendant and his wife are admissible as competent witnesses (*m*).

Liability of officers on bills of exchange etc.

708. When a bill or note is drawn or accepted by an officer on behalf of the society, he will be personally responsible, unless he uses clear and explicit words to show that this is not the intention (*n*); but the giving of a promissory note on which the directors and not the society are liable does not affect the liability of the society for money which has, in fact, been lent to, or deposited with, it (*o*).

(*i*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 21. As to inspectors, see p. 390, *post*.

(*j*) *Ibid.*

(*k*) *Ibid.* It may be here remarked that, where liability is incurred to the penalties imposed in the case of a society commencing business without a certificate of incorporation, or making default in inserting in any deposit book, or acknowledgment, or security for loan certain matters required to be inserted, the persons incurring such liability will naturally, in the great majority of cases, be the officers, or some of them. See Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 43, amended by Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 28, and Sched. II.; and p. 327, *ante*, p. 374, *post*.

(*l*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 22.

(*m*) *Ibid.*, s. 24.

(*n*) *Price* v. *Taylor* (1860), 5 H. & N. 540, *per* MARTIN, B., and BRAMWELL, B., at p. 545; *Allan* v. *Miller* (1870), 22 L. T. 825, *per* CHANNELL, B., at p. 827. The mere circumstance of his adding "secretary," "director," or other description of his official position, to his name will not relieve him of personal liability (*Bottomley* v. *Fisher* (1862), 1 H. & C. 211, *per* BRAMWELL, B., at p. 217; *Allan* v. *Miller*, *supra*); nor will the circumstance that the promise is to pay money as "value received for the society" (*ibid.*). For the general rule in case of agents, see titles AGENCY, Vol. I., p. 221; BILLS OF EXCHANGE ETC., Vol. II., p. 495.

(*o*) *Heath* v. *Kidsgrove Permanent Building Society* (1887), 82 L. T. Jo. 449 (county court case). See also *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696, C. A., where the society appears to have escaped liability only because its borrowing powers had been exhausted when the loan was made. Both these cases, as also *Price* v. *Taylor*, *supra*, *Allan* v. *Miller*, *supra*, and *Bottomley* v. *Fisher*, *supra*, were decisions relating to unincorporated societies, but it is conceived that they apply equally to incorporated ones. See Lindley, Company Law, 6th ed. p. 281.

SUB-SECT. 2.—*Directors.*

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709. The general (*p*) powers and duties of the board of directors or committee of management (*a*) of building societies seem to be regulated by the same principles as those of the directors of limited companies (*b*). Their position is not the same as that of ordinary trustees, and, in particular, they may, in the exercise of their discretion, properly make advances upon securities of a speculative nature forbidden to ordinary trustees (*c*). And, so long as they act honestly and within their powers, they will not be liable for any loss, even though caused by an error of judgment on their part (*d*).

Principles regulating position of directors.

If the rules declare that when the directors or managers exercise certain powers the minutes signed by the directors or managers concurring shall be sufficient authority for such exercise, omission to sign will not invalidate an exercise of the powers otherwise duly authorised (*e*). If, however, the directors or managers exceed their powers by doing acts which are neither authorised by the rules (*f*), nor for which there is such a potential necessity as to confer an implied power (*g*), such acts will not be binding on the society, though the directors or managers may incur personal liability.

Acts authorised under rules.

They will be personally liable to the society for any loss caused to it by their *ultra vires* acts (*h*), and may be liable to third parties in damages for breach of a warranty of authority (*i*).

Liability for unauthorised acts.

An indemnity given to the directors or managers by the rules does not extend to acts which are *ultra vires* and beyond the powers which the society itself could confer upon them (*k*).

(*p*) As to special statutory provisions relating thereto, see p. 342, *post*.

(*a*) This alternative description is used throughout the Building Societies Acts, except in s. 13 (3) of the Building Societies Act, 1894 (57 & 58 Vict. c. 47). It is conceived that the only difference between a board of directors and a committee of management is that of name.

(*b*) *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (1889), 44 Ch. D. 412, *per* STIRLING, J., at p. 453. As to what are the powers and duties of directors of limited companies, see title COMPANIES.

(*c*) *Ibid.*, *per* STIRLING, J., at pp. 454, 459.

(*d*) *Cullerne* v. *London and Suburban General Permanent Building Society* (1890), 25 Q. B. D. 485, C. A.

(*e*) *Priestley* v. *Hopwood* (1864), 12 W. R. 1031.

(*f*) *Portsea Island Building Society* v. *Barclay*, [1895] 2 Ch. 298, C. A.; *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696, C. A.

(*g*) *Small* v. *Smith* (1884), 10 App. Cas. 119, where a guarantee of a prior mortgage debt in consideration of the prior mortgagee forbearing to exercise his power of sale was held *ultra vires*, though the society was not forbidden by its rules to lend on equity of redemption.

(*h*) *E.g.*, if they make advances to members on the security of their shares, though not if they merely authorise such advances (*Cullerne* v. *London and Suburban General Permanent Building Society*, *supra*), or if they remit fines imposed on members by the rules (*Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102, *per* WRIGHT, J., at p. 110).

(*i*) *Richardson* v. *Williamson* (1871), L. R. 6 Q. B. 276; *Chapleo* v. *Brunswick Building Society*, *supra*, where a secretary embezzled money which he was authorised by the directors to receive on loan in excess of the borrowing powers of the society. As to circumstances in which directors may be held to be pledging their personal credit, see *Re National Permanent Benefit Building Society*, *Ex parte Williamson* (1869), 5 Ch. App. 309, *per* GIFFARD, L.J., at p. 312.

(*k*) *Cullerne* v. *London and Suburban General Permanent Building Society*, *supra*, *per* LINDLEY, L.J., at p. 488.

SECT. 1. Incorporated Society.

Statutory powers and duties.

710. The board of directors or committee of management have certain special statutory powers, duties, and liabilities. They may require certain accounts of officers to be given in to be examined and allowed or disallowed by them (*l*); they may appoint and remove trustees for the purpose of certain investments (*m*); on the death intestate of a member or depositor who has not more than £50 in the funds of the society they may, on certain conditions, decide to whom the amount due may be paid without letters of administration being taken out (*n*); they may order the sealing of the statutory receipt indorsed upon or annexed to a mortgage or further charge (*o*); and they may authorise certain proceedings to be taken against persons guilty of fraud (*p*); and three of their number, together with the secretary or other officer, must sign the application for a direction to transfer stock standing in the names of trustees for the society (*q*).

Statutory liabilities.

711. If the society receives loans or deposits in excess of its borrowing powers, the whole of the directors or committee of management when such loans or deposits were received will be liable for the amount so received in excess (*r*), even though they were, through the secretary's fraud, unaware that the limit of borrowing powers had been reached (*s*). The directors authorising an advance on second mortgage, where the society is not first mortgagee, are jointly and severally liable for any loss on the advance occasioned to the society (*t*). If the society contravenes the provisions forbidding it to use any name or title other than its registered name, or to accept any deposit except on certain terms as to repayment or withdrawal (*a*), every director or member of the committee of management who is a party to the contravention will be liable on summary conviction to a fine not exceeding £10 and in case of a continuing offence an additional fine not exceeding £10 per week during the continuance of the offence (*b*).

SUB-SECT. 3.—*The Secretary.*

Duties of secretary.

712. The following are some of the special powers and duties of the secretary (*c*). He must give notice of every change of the chief office

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(*l*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 24; and see p. 837, *ante*.
(*m*) *Ibid.*, s. 25; and see p. 378, *post*.
(*n*) *Ibid.*, s. 29; and see p. 353, *post*.
(*o*) *Ibid.*, s. 42, Schedule; and see p. 371, *post*.
(*p*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 18; and see p. 338, *ante*.
(*q*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 26; and see p. 380, *post*.
(*r*) *Ibid.*, s. 43. As to the limits of a society's borrowing powers, see pp. 373, *et seq.*, *post*.
(*s*) *Cross* v. *Fisher*, [1892] 1 Q. B. 467.
(*t*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 13; and see p. 364, *post*. The section does not mention a committee of management, but it is conceived that this omission would not be held to confer any exemption on such a committee, see note (*a*), p. 341, *ante*.
(*a*) See p. 374, *post*.
(*b*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 15. For the consequences of neglect or refusal to give any notice etc. required by the Building Societies Acts, see *ibid.*, s. 21; and pp. 339, 340, *ante*.
(*c*) See as to duties of officers generally, p. 337, *ante*.

of the society to the Registrar within seven days after such change (*d*), and must sign the request to cancel the registry of the society (*e*). He or the manager must countersign the statutory receipt indorsed upon or annexed to a mortgage or further charge (*f*). He or some other officer may make a printed copy of the rules evidence by certifying it to be a true copy of the registered rules (*g*), must prepare and countersign the annual account and statement of the society (*h*), and must sign the statutory declaration accompanying an application for a direction to transfer stock (*i*). His signature, together with those of three members of the society, must be attached to the application for a certificate of incorporation (*k*), to the two printed copies of the rules accompanying such application (*l*), to an application to register a partial or complete alteration of rules (*m*), to a notice of change of name (*n*), and to a notice of termination of dissolution when the dissolution is not by instrument (*o*); and his signature, together with those of three members of the board of directors or committee of management, must be attached to an application for a direction to transfer stock (*p*).

How far agent for society.

713. Even without having been formally appointed agent of the society, he may become its general agent, so as to bind it, with regard to certain matters arising in the ordinary course of its business (*q*). If he employs a private clerk to assist him, he will be responsible to the society for the acts of the clerk, notwithstanding that the society knew and approved of such employment (*r*).

For directors

The secretary may also be the general agent of the directors to do acts *ultra vires* the society (*s*).

SUB-SECT. 4.—*Auditors.*

One auditor accountant.

714. Notwithstanding anything in the rules, one at least of the auditors must be a person who publicly carries on the business of an accountant (*a*).

(*d*) Building Societies Act, 1877 (40 & 41 Vict. c. 63), s. 2; Building Society Regulations, 1895, r. 13, and Form M.

(*e*) *Ibid.*, r. 8, and Form G.

(*f*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 42; and see p. 371, *post*.

(*g*) *Ibid.*, s. 20; and see p. 331, *ante*.

(*h*) *Ibid.*, s. 40; and see p. 389, *post*.

(*i*) Building Society Regulations, 1895, r. 16, and Form R; and see p. 380, *post*.

(*k*) *Ibid.*, r. 2, and Form C.

(*l*) *Ibid.*; Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 17.

(*m*) *Ibid.*, s. 18; Building Society Regulations, 1895, rr. 4, 5, and Forms D and F.

(*n*) *Ibid.*, r. 15, and Form O.

(*o*) *Ibid.*, r. 28; and see p. 394, *post*.

(*p*) *Ibid.*, r. 16, and Form Q; Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 26; and see p. 380, *post*.

(*q*) *Allard* v. *Bourne* (1863), 15 C. B. (N. S.) 468 (repairs to property mortgaged to the society); *Cross* v. *Fisher*, [1892] 1 Q. B. 467, C. A., *per* Lord HALSBURY, L.C., at p. 475 (receipt of money on deposit which he embezzled).

(*r*) *Re Mutual Aid Permanent Benefit Building Society, Ex parte James* (1883), 48 J. P. 54.

(*s*) *Cross* v. *Fisher*, *supra*.

(*a*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 3.

SECT. 1. Incorporated Society.

The rules must provide for an annual or more frequent audit of the accounts and inspection by the auditors of the mortgages and other securities belonging to the society (*b*).

Attestation of account by auditors.

The annual account and statement of the society must be attested by the auditors, to whom the mortgage deeds and other securities belonging to the society must be produced (*c*). In attesting such annual account or statement, each auditor must either certify that it is correct, duly vouched, and in accordance with law, or specially report to the society in what respect he finds it incorrect, unvouched, or not in accordance with law (*d*). He must also certify that he has at that audit actually inspected the mortgage deeds and other securities belonging to the society, and state the number of properties with respect to which deeds have been produced to and actually inspected by him (*e*).

SECT. 2.—*Unincorporated Society.*

SUB-SECT. 1.—*Officers Generally.*

Usual and necessary officers.

715. The management of an unincorporated building society is usually vested in a committee of management, sometimes called the board of directors (*f*), and a secretary. In addition to any other officers, there must be a treasurer or trustee or trustees in whom the property of the society is vested (*g*).

The application of the general principles regulating the powers, duties, and liabilities of officers appears to be the same whether the society is or is not incorporated. The special statutory provisions, however, which govern unincorporated societies differ considerably in many respects from those which apply when the society is an incorporated one.

Appointment.

716. The society may at any meeting, or by its committee, elect any person to be steward, president, warden, treasurer, or trustee, and may also elect and appoint such clerks and other officers as may be deemed necessary for the execution of the purposes of the society for such space of time and for such purposes as the rules direct (*h*).

Effect of rules.

717. All officers are bound by the rules, of which they are deemed to have full notice (*i*).

The rules must contain provisions with respect to the powers and duties of the members at large and of the committees or

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(*b*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16 (8). As to the account, see further p. 389, *post*.

(*c*) *Ibid.*, s. 40.

(*d*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 2 (2). For forms of certificate and special report, see Encyclopædia of Forms, Vol. III., p. 78.

(*e*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 2 (2).

(*f*) See p. 347, *post*.

(*g*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 21; and see p. 347, *post*.

(*h*) *Ibid.*, s. 11. The auditors who attest the annual statement must be members of the society (*ibid.*, s. 33).

(*i*) *Ibid.*, s. 8.

officers (*k*). Where, however, the rules provide that certain formalities shall be sufficient authority for the execution of powers, the omission to observe such formalities will not necessarily invalidate the exercise of such powers (*l*).

Giving of security.

718. Every officer who is in any way concerned with the receipt, management, or expenditure of any of the society's money must, if required by the rules, before taking upon himself the execution of his office, enter into a bond in a statutory form with two sureties, in such sum as the society may think fit, conditioned for the just and faithful execution of his office, the rendering of accounts, and paying obedience to the society (*m*). Such bond is to be given to the Registrar (*n*), and in case of forfeiture the society may sue upon it in his name on giving him full indemnity against costs (*o*).

Duty to account.

719. Every person having or receiving any of the moneys, effects, or funds of the society, or intrusted with the disposal, management, or custody thereof, or of any securities, books, papers, or property relating to the same, his executors, administrators, and assigns, is under obligations as to the rendering of accounts, payment over of moneys, and delivery of securities etc. identical in effect with those imposed on officers of incorporated societies (*p*). In case of any neglect or refusal to perform any of such obligations, the society may proceed by petition and obtain a summary order which will be final and conclusive (*q*).

Liability to make good deficiency.

720. No officer is liable to make good any deficiency that may arise in the society's funds unless he has made a written declaration, deposited and registered in like manner with the rules, that he is willing so to be answerable; and he may limit his responsibility to

(*k*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 10. As to the powers of committees, see p. 347, *post*. As to certain special statutory powers and duties of officers, see Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 5 (indorsing of receipt on mortgage); Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 9, and *R.* v. *Aldham and United Parishes Insurance Society* (1851), 21 L. J. (Q. B.) 1 (signing of certain notices of general meetings); Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 10 (notice of removal of place of meeting); *ibid.*, s. 12 (entries of powers of special committees); *ibid.*, s. 24 (payments on death intestate of members); *ibid.*, s. 33, Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 40, and Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 25 (annual audit and statement). As to the remuneration of officers, see *Alexander* v. *Worman* (1860), 6 H. & N. 100, *per* POLLOCK, C.B., MARTIN, B., and CHANNELL, B., at p. 113.

(*l*) *Priestley* v. *Hopwood* (1864), 12 W. R. 1031. See also *Grimes* v. *Harrison* (1859), 26 Beav. 435.

(*m*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 12 and Schedule. For form of bond, see Encyclopædia of Forms, Vol. III., p. 69.

(*n*) Originally to the clerk of the peace for the time being, but it is apprehended that, having regard to the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 7, the above statement is correct. The use of the statutory form is not compulsory, and it is more convenient to have the bond given in favour of the trustees of the society or to take the security of a guarantee society.

(*o*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 11.

(*p*) *Ibid.*, s. 14; Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 24.

(*q*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 14; and see *Re Briton Friendly Society* (1852), 1 W. R. 50.

any sum specified in such declaration (*r*). He is, however, personally responsible and liable for all moneys actually received by him on account of or for the society (*s*). But where an officer holds money as bailee for the society this last provision does not increase his responsibility beyond that of a bailee; *e.g.*, he will not be liable for moneys of which without negligence he has been robbed immediately after the receipt thereof (*t*).

Nor will trustees, who have signed cheques, acting ministerially and simply under the direction of the directors, be liable for loss incurred through the misapplication by the directors of the moneys so obtained (*a*).

Criminal proceedings for misappropriation.

721. Any person who by any false representation or imposition fraudulently obtains possession of any part of the moneys of the society, or who fraudulently withholds any money belonging to the society which he has in his possession, may, if no special provision for such offence is made in the rules (*b*), be summoned before two justices of the peace residing within the county within which the society is held. Such justices must determine the complaint according to the rules of the society, and on conviction may award double the amount of the money fraudulently obtained or withheld to be paid to the treasurer for the purposes of the society, together with costs not exceeding ten shillings. If the sum awarded is not duly paid it may be levied by distress, and in default of distress the offender may be imprisoned with hard labour for not more than three months. These provisions do not prevent the society from proceeding by indictment or complaint, save that no person may be proceeded against by indictment or complaint if a previous conviction has been obtained for the same offence under the provisions of the Act (*c*).

Liabilities on dissolution.

722. Any trustee or other officer or person aiding or abetting in a division or misappropriation of the funds of the society on a dissolution without the requisite consent, is liable to the like penalties as in cases of fraud (*d*).

Effect of death, bankruptcy etc.

723. If any officer intrusted with the keeping of the accounts, or having in his hands or possession by virtue of his office any moneys or effects belonging to the society, or any deeds or securities relating to the same, dies, or has any execution issued against his property or makes any assignment for the benefit of his creditors (*e*),

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(*r*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 22.

(*s*) *Ibid.*; and see also *ibid.*, s. 3, as to penalties for misapplication of the funds.

(*t*) *Walker* v. *British Guarantee Association* (1852), 21 L. J. (Q. B.) 257. See further, title BAILMENT, Vol. I., p. 544.

(*a*) *Grimes* v. *Harrison* (1859), 26 Beav. 435, *per* ROMILLY, M.R., at p. 447.

(*b*) See Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 3.

(*c*) *Ibid.*, s. 25. It is apprehended that if an offender had been imprisoned on non-payment of the sum awarded, and in default of distress, the society could not afterwards sue him for the sum fraudulently obtained or withheld. See *Vernon* v. *Watson*, [1891] 2 Q. B. 288; and p. 339, *ante*.

(*d*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 26.

(*e*) Originally also if he became a bankrupt, but the priority in that event has long been abolished as regards building societies, though it still exists

Powers of committee.

724. The society may elect any number of its members, such number to be declared in the rules, to be a committee, and may delegate to such committee all or any of its powers. In the case of a committee acting for general purposes, its powers must be declared in the rules. When a committee is appointed for any particular purpose its powers must be reduced into writing and entered in a book by the secretary or clerk of the society, and a majority of its members must always concur in its acts. A committee must, in all things delegated to it, act for and in the name of the society; and all its acts within its powers have force and effect as the acts of the society. The transactions of a committee must be entered in a book belonging to the society, and are subject to the review, allowance or disallowance, and control of the society (*g*).

Investments in name of treasurer.

725. The society's power to lay out or invest surplus funds is exercisable by the treasurer or trustee for the time being, with the consent of the society testified in accordance with the rules. All securities and investments so taken or made are to be in his name, and he has power, with the consent of the society, to alter, transfer, or sell the same. He must account for all dividends, interest, and proceeds arising from funds so laid out or invested (*h*).

Vesting of property in treasurer or trustee for time being.

726. All property of the society, real or personal, is vested in the treasurer or trustee for the time being (*i*). Upon the death or removal of any treasurer or trustee all such property vests in the succeeding treasurer or trustee (*k*), or where there is a continuing treasurer or trustee in him jointly with the succeeding treasurer or

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in favour of friendly societies: see *Re Barrell, Ex parte Bailey* (1854), 5 De G. M. & G. 380, and Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40 (4); Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 2; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 215, 216. *Re Williams* (1887), 36 Ch. D. 573, appears to be a decision in favour of its survival in the case of the insolvent estate of a deceased officer being administered in the Chancery Division; but since *Re Maggi* (1882), 20 Ch. D. 545, the case on which the decision in *Re Williams, supra*, was based, has been disapproved in *Re Whitaker*, [1901] 1 Ch. 9, C. A., it is apprehended that *Re Williams, supra*, can on this point no longer be regarded as of any authority.

(*f*) Friendly Societies Act, 1834 (4 & 5 Will. 4, c. 40), s. 12. The section has been held to apply even though the officer at the time of his death had no money of the society in his hands because he had spent it all (*Moore* v. *Marriott* (1878), 7 Ch. D. 543); and the society will not lose its priority through not having used due diligence in examining the officer's accounts (*ibid.*). See further, as to this priority, titles EXECUTORS AND ADMINISTRATORS; FRIENDLY SOCIETIES.

(*g*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 12.

(*h*) *Ibid.*, s. 13.

(*i*) *Ibid.*, s. 21.

(*k*) But see *Deakhurst* v. *Clarkson* (1854), 3 E. & B. 194, 217, as to the effect of an appointment not in accordance with the rules.

SECT. 2. Unincorporated Society.

trustee (*l*), without any assignment or conveyance except the transfer of stocks and securities in the public funds of Great Britain and Ireland (*m*). Such property for the purpose of legal proceedings is to be deemed to be the property of the person who is treasurer or trustee for the time being (*n*). He may in his own name as treasurer or trustee bring or defend any action concerning such property provided he has been authorised by the society or committee, and no action is to be discontinued by his death or removal, but may be continued by the succeeding treasurer or trustee in the name of the person commencing the same, with the same consequences as to costs as if it had been commenced in his name (*o*).

Transfer of property by person appointed by court.

727. The High Court may appoint a person to assure property vested in a trustee of a society when such trustee is out of the jurisdiction, or is idiot, lunatic, or of unsound mind, or when it is uncertain whether he is living or dead, or when he refuses to assure such property to the trustee duly nominated in his stead; or may order a transfer of stock and payment of dividends when a trustee in whose name such stock is standing is absent or out of the jurisdiction, or is bankrupt, insolvent, or lunatic, or when it is uncertain whether he is living or dead (*p*).

Part VI.—Members.

SECT. 1.—*Membership.*

Number of members.

728. No restrictions are placed on the membership of building societies either by the Building Societies Act, 1836 (*q*), or by the Building Societies Acts, 1874 to 1894 (*r*). Any three or more persons could up to 1874 have combined to form a building society under the Building Societies Act, 1836 (*s*), and may now establish an incorporated society (*t*).

Test of membership.

729. Neither for unincorporated societies nor for incorporated societies has the legislature formulated any definite test of membership. It would seem that, in the case of unincorporated societies,

(*l*) *Walker* v. *Giles* (1848), 6 C. B. 662, *per* MAULE, J., at p. 692.
(*m*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 21.
(*n*) *Ibid.*, even though the rules provide for an assignment, and no assignment has in fact been made (*Morrison* v. *Glover* (1849), 4 Exch. 430). See also *R.* v. *Redford* (1869), 11 COX, C. C. 367.
(*o*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 21.
(*p*) *Ibid.*, ss. 15—19. A petition presented under s. 15 should not be served on the trustee refusing to convey (*Re Third Burnt-Tree Building Society, Ex parte Armstrong* (1848), 16 Sim. 296); and no petition under these sections can be presented after the dissolution of the society (*Re Eclipse Mutual Benefit Association* (1854), 23 L. J. (CH.) 280). It is believed, however, that this procedure is now seldom, if ever, employed, recourse being usually had to the provisions of the Trustee Act, 1893 (56 & 57 Vict. c. 53). See title TRUSTEES.
(*q*) 6 & 7 Will. 4, c. 32.
(*r*) 37 & 38 Vict. c. 42; 38 & 39 Vict. c. 9; 40 & 41 Vict. c. 63; 47 & 48 Vict. c. 41; 57 & 58 Vict. c. 47.
(*s*) 6 & 7 Will. 4, c. 32, s. 1.
(*t*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 13. But the number of members must be at least three (*ibid.*, s. 17).

it is competent for each society to prescribe by its rules what shall be considered primary, if not conclusive, evidence of membership, and such rules will be enforced by the court (*a*).

No formalities for joining a society are prescribed by any of the Acts. In unincorporated societies it would appear that the payment of a subscription to the society is sufficient to constitute anyone a member (*b*); and this seems true of incorporated societies also (*c*). But it depends on the rules of the society (*d*), which are binding on members, and on all persons claiming under them or under the rules (*e*).

For the purpose of liquidation, the question whether a person is or is not a member must be fixed as at the date of the liquidation and as if the society were a going concern; and when it has once been established that a person has been a member of the society in liquidation, it lies with him to show that he has ceased to be a member (*f*).

Cessation of membership.

730. In the case of an incorporated society the rules must provide when membership is to cease (*g*). Speaking generally, membership both of incorporated and unincorporated societies comes to an end upon the complete performance of the contract between the member and the society (*h*), upon the dissolution of the society (*i*), upon the termination of the society if a terminating society (*k*), upon the discharge of all liabilities in the winding up of a society, upon withdrawal (*l*), upon forfeiture (*m*), or upon death (*n*).

Expulsion.

Although power to expel members is not expressly given in any of the Acts relating to building societies, it is impliedly given in

(*a*) Such as signing the share-book (*Dobinson* v. *Hawks* (1848), 16 Sim. 407; *Re St. George's Benefit Building Society, Ex parte Foote* (1858), 6 W. R. 766); or being appointed a director (*ibid.*). It is probable that a similar view would be taken by the court in the case of incorporated societies. See *Knox* v. *Shepherd* (1860), 2 L. T. 351; *Re Victoria Permanent Benefit Building, Investment, and Freehold Land Society, Empson's Case* (1870), L. R. 9 Eq. 597.

(*b*) Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 1.

(*c*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 13.

(*d*) *Re Bowling and Welby*, [1895] 1 Ch. 663, C. A., *per* LINDLEY, L.J., at pp. 669, 670.

(*e*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 21; *Grimes* v. *Harrison* (1859), 26 Beav. 435, *per* ROMILLY, M.R., at p. 442; *Re Bowling and Welby, supra.*

(*f*) *Irvine and Fullerton Property Investment and Building Society* v. *Cuthbertson* (1905), 8 F. (Ct. of Sess.) 1. See also *Re West Riding of Yorkshire Permanent Building Society, Ex parte Pullman* (1890), 45 Ch. D. 463.

(*g*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 1.

(*h*) That is, in the case of an unadvanced member, by his paying all his subscriptions, fines etc. and receiving his share of the funds; in the case of an advanced member, by paying all his subscriptions (if any), fines etc. and having a reconveyance or a receipt indorsed on his mortgage deed (*Re West Riding of Yorkshire Permanent Benefit Building Society, Ex parte Pullman, supra*).

(*i*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 26, incorporated in Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4; Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32.

(*k*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 5, 32.

(*l*) *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society No.* 2 (1885), 53 L. T. 203. As to withdrawal and the effect of winding-up on withdrawing members, see pp. 358 *et seq.*, *post.*

(*m*) See p. 362, *post.*

(*n*) As to the position of the representatives of deceased members, see *Re Bowling and Welby, supra*; *Knox* v. *Shepherd, supra*; and p. 350, *post.*

SECT. 1. Membership.

the case of unincorporated societies, by the provision that if a member shall have been expelled, and the arbitrators or justices shall order him to be reinstated, they may, in default of reinstatement, award him a reasonable sum of money (*o*). In the case of incorporated societies such a power can, it is conceived, be exercised if the rules of the society so provide.

Infants.

731. An infant may be admitted a member of an unincorporated society provided he obtain the consent of his parents, masters, or guardians (*p*), and will have the same powers, rights, and liabilities as an adult member. An infant may also be admitted into an incorporated society if the rules of the society do not prohibit such admission (*q*), and this, it seems, without the necessity of obtaining any consent. He can give all necessary acquittances, but during minority cannot vote or hold any office in the society (*r*).

Married women.

732. A married woman may be a member of a building society. All shares in any such society standing in the sole name of a married woman on January 1, 1883, or made to stand in the sole name of a married woman after that date, and the interest of a married woman in all shares in any such society so standing or made to stand in her name jointly with any person other than her husband, are to be deemed, until the contrary be shown, to be her separate property (*s*).

Certain persons who are not members.

733. Persons depositing money with a building society by way of loan (*t*), personal representatives of deceased members (*a*), and (for the purpose of winding up) past members (*b*), are not members; but the rules of a society may admit the personal representatives of deceased members to all the privileges of the deceased members whom they represent, and if they avail themselves of this right they will be liable to all the incidents of membership (*c*). The trustee in bankruptcy of a member is not a member (*d*).

Corporations.

734. A corporation cannot be a member of an unincorporated society (*e*); but a corporation (at least if a limited liability com-

(*o*) Friendly Societies Act, 1834 (4 & 5 Will. 4, c. 40), s. 8, incorporated in Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*p*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 32, incorporated in Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*q*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 38.

(*r*) *Ibid.* An infant member also can consent to the dissolution of a society (*Dennison* v. *Jeffs*, [1896] 1 Ch. 611), but cannot execute a mortgage in favour of the society (*Nottingham Permanent Benefit Building Society* v. *Thurston*, [1903] A. C. 6). See, generally, title INFANTS.

(*s*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 6—8. As to investments with husband's money, see *ibid.*, s. 10; and as to deciding questions of title between husband and wife, see *ibid.*, s. 17, and title HUSBAND AND WIFE.

(*t*) *Re Mutual Aid Permanent Benefit Building Society* (1885), 30 Ch. D. 434, C. A.

(*a*) *Re Bowling and Welby*, [1905] 1 Ch. 663, C. A.

(*b*) See pp. 396, 399, *post*.

(*c*) *Knox* v. *Shepherd* (1860), 2 L. T. 351. An executor is not entitled on behalf of his testator's estate to take shares in a building society (*Thorne* v. *Thorne*, [1893] 3 Ch. 196). As to his borrowing money from the society, see *Cruikshank* v. *Duffin* (1872), L. R. 13 Eq. 555; *Thorne* v. *Thorne*, *supra*; and p. 363, *post*.

(*d*) *Re Bowling and Welby*, *supra*.

(*e*) *Dobinson* v. *Hawke* (1848), 12 Jur. 1037; *Bristol and Clifton Permanent Benefit Building Society* v. *Harbour* (1886), 81 L. T. Jo. 171.

pany) can be a member of an incorporated society (*f*), as also can a society registered under the Industrial and Provident Societies Act, 1893 (*g*), unless the rules provide to the contrary.

SECT. 2.—*Rights and Liabilities of Members.*

Classes of members.

735. Members in a permanent society are practically of two classes, "advanced" or "borrowing" and "unadvanced" or "investing." The former comprise those who have received their shares in advance, and the latter those who for the time being have not received their shares in advance but stand to receive the amount of those shares hereafter or ultimately and in the end (*h*).

Advanced members.

An advanced member receives the present payment of a sum not exceeding the nominal value of his shares, and gives a mortgage to secure certain periodical and other payments to the society (*i*). In respect of such mortgage the member may sue and be sued as mortgagor (*j*). An advanced member may or may not (according to the rules of the particular society) be entitled to share in the profits and be liable for the losses; but he will not be liable for losses in the absence of provision in the rules to that effect (*k*), and is not made subject to such liability by reason only of his being entitled to share in profits (*l*).

Unadvanced members.

An unadvanced member is one who, in consideration of paying his subscriptions (and all other moneys due under the rules) at specified times until the total value of his shares has been paid, has then a claim on the assets of the society for the amount of his shares, subject to any losses incurred by the society, but with a right to participate in any profits.

Status of members.

736. The status of the members of building societies in relation to non-members is different according as the society is unincorporated or incorporated. If the former, the society has no existence apart from its members (*m*); if the latter, they are members of a corporation (*n*), and then, for instance, creditors must look to the society, and not to the individual members (*o*). But societies,

(*f*) *Bristol and Clifton Permanent Benefit Building Society* v. *Harbour* (1886), 81 L. T. Jo. 171.

(*g*) 56 & 57 Vict. c. 39, s. 38. See title INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.

(*h*) *Tosh* v. *North British Building Society* (1886), 11 App. Cas. 489, *per* Lord HERSCHELL, L.C., at p. 502. As to "withdrawing" members, see pp. 358 *et seq.*

(*i*) See p. 366, *post*. In the case of those societies called "Starr-Bowkett" (which have ceased to be established since the Act of 1894), the amount of each share is much smaller than the amount of the advance to which the member may become entitled in respect of it.

(*j*) See p. 388, *post*.

(*k*) See *Brownlie* v. *Russell* (1883), 8 App. Cas. 235, *per* Lord BRAMWELL, at p. 260; *Tosh* v. *North British Building Society*, *supra*. Such a liability was imposed by the rules in *Re Albion Mutual Permanent Benefit Building Society* (1888), 43 Ch. D. 410, n.; *Re West Riding of Yorkshire Permanent Benefit Building Society* (1890), 43 Ch. D. 407.

(*l*) *Brownlie* v. *Russell*, *supra*.

(*m*) *Re Kent Benefit Building Society* (1861), 1 Drew. & Sm. 417.

(*n*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 9.

(*o*) *Re Sheffield and South Yorkshire Permanent Building Society* (1889), 22 Q. B. D. 470.

SECT. 2. Rights and Liabilities of Members.

whether unincorporated or incorporated, are not joint stock companies, still less ordinary partnerships, but are societies of a special kind formed and regulated under Acts of Parliament for special purposes, and the relation of their members to non-members is controlled by those Acts (*p*).

Liability to outside creditors.

737. The result as regards liability to outside creditors is that in the case of an unincorporated society the individual members, whether advanced or unadvanced, are personally liable for all ordinary debts properly incurred by the directors or committee for the ordinary purposes of the society while they are members (*q*), but are not personally liable for money borrowed on deposit, and any rule purporting to impose such liability would be *ultra vires* (*r*). In the case of incorporated societies, creditors can only enforce payment against the society, and the liability of members to contribute to the funds of the society is in the case of unadvanced members limited to the amount already actually paid on their shares and any sums payable in respect of such shares which have become due and are in arrear at the time when the liability is to be enforced (*s*), and in the case of advanced members is limited to the amount payable in respect of their shares under any mortgage or other security or under the rules of the society (*a*).

Rights and liabilities *inter se*.

738. The rights and liabilities of members *inter se*, whether the society be unincorporated or incorporated, are regulated by the rules, which constitute a contract between the members (*b*). Furthermore, the contract is one which is not put an end to by the winding up of the society (*c*). Nor can members escape from the incidents of membership even when the incidents are such as were not anticipated at the time they joined (*d*). In cases for which the rules do not expressly provide (where, that is, the contract is not explicit) the rules are to be applied as nearly as possible (*e*).

(*p*) *Brownlie* v. *Russell* (1883), 8 App. Cas. 235, *per* Lord SELBORNE, L.C., at p. 248; *Tosh* v. *North British Building Society* (1886), 11 App. Cas. 489; *Auld* v. *Glasgow Working Men's Building Society* (1887), 12 App. Cas. 197; *Irvine and Fullerton Property Investment and Building Society* v. *Cuthbertson* (1905), 8 F. (Ct. of Sess.) 1.

(*q*) Applying the doctrine of principal and agent (*Murray* v. *Scott* (1884), 9 App. Cas. 519, *per* Lord BLACKBURN, at pp. 546—548; *Re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. 352).

(*r*) *Ibid.*

(*s*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 14; *Brownlie* v. *Russell*, *supra*, *per* Lord SELBORNE, L.C., and Lord WATSON, at pp. 250, 256. See a different view expressed by CAVE, J., in *Re Sheffield and South Yorkshire Building Society* (1889), 22 Q. B. D. 470, and LINDLEY, L.J., in *Sibun* v. *Pearce* (1890), 44 Ch. D. 354, C. A., at p. 372.

(*a*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 14; *Brownlie* v. *Russell*, *supra*. See further, as to the liability of members on dissolution, pp. 393, 396, 399, *post*.

(*b*) See p. 331, *ante*.

(*c*) *Walton* v. *Edge* (1884), 10 App. Cas. 33.

(*d*) *London Provident Building Society* v. *Morgan*, [1893] 2 Q. B. 266, *per* KENNEDY, J., at p. 272.

(*e*) *Re Middlesbrough etc. Building Society* (1889), 58 L. J. (CH.) 771.

SECT. 2. Rights and Liabilities of Members.

739. Building societies have in certain circumstances special privileges in relation to the estates of deceased members. In unincorporated societies whenever the trustees of the society have made any payment to any person or persons who at the time of such payment appear to the trustees to be entitled to the effects of any deceased intestate member, such payment is valid as against any other person or persons claiming as next of kin (*f*); and if any member die entitled to any sum not exceeding twenty pounds, the trustees or the treasurer, if satisfied that no will was made and that letters of administration will not be taken out, may pay such sum according to the rules of the society dealing with such cases, or if there be no such rules, then to the persons entitled to the effects of the deceased intestate, and this without administration (*g*).

Privileges as regards estates of deceased members.

There is a similar provision in the case of incorporated societies, save that the limit is fifty pounds, that the power extends to the property of deceased depositors as well as to that of deceased members, and that the society must receive satisfactory evidence of death and a statutory declaration that the member or the depositor died intestate, and that the person claiming is the person entitled under the Statutes of Distribution (*h*).

740. Special provisions are made in the case of both unincorporated societies and of incorporated societies for the punishment of members who by false representation obtain possession of any money, securities, books, papers, or other effects of the society, or who, having them in their possession, wrongfully withhold or misapply them (*i*).

Punishment of members misappropriating property.

SECT. 3.—*Meetings.*

741. The conduct of building societies resides in the members in meeting (*k*) assembled, or in officers and agents duly appointed at such meeting.

Meetings.

(*f*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 23, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*g*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 24, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*h*) Building Societies Act, 1874 (37 & 38 Vict c. 42), s. 29; Statutes of Distribution (22 & 23 Car. 2, c. 10, and 1 Jac. 2, c. 17, s. 7); see further, title DESCENT AND DISTRIBUTION. As to the special provision on a sale when the heir of a deceased member is an infant, see p. 369, *post*.

(*i*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 25, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s 4; Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 31. See pp. 338, 346, *ante*.

(*k*) Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), and Building Societies Acts, 1874 to 1894, contemplate the holding by building societies of several types of meetings, of varying importance, and endowed with different powers. For example, the ordinary monthly or other meetings of a society are in general occupied only with the receipt of contributions and such like matters of routine. The annual meeting has to receive the report of the directors and the statement of accounts, and to appoint the officers. Meetings for other purposes are special meetings. But the provisions are confused, and the Acts do not use uniform language in respect of these meetings, so that it is difficult to form a clear idea as to the effect of the legislation. Such terms as "special meeting" (which at any rate in some circumstances may be a "special general meeting" (*Cutbill* v. *Kingdom* (1847), 1 Exch. 494)), "general meeting," "general meeting specially called," "usual meeting," "annual meeting," and others,

SECT. 3. Meetings.

Powers where society unincorporated.

In unincorporated societies "members" may alter, amend, annul, or repeal rules, and may impose fines and forfeitures (*l*). General meetings may appoint committees (*m*), and may, on the observance of required formalities, dissolve the society (*n*). The "usual" meeting (*o*) may appoint officers (*p*).

A "general meeting specially called for the purpose" may make an application to the Registrar to issue a certificate incorporating the society under the Building Societies Act, 1874 (*q*). Any unincorporated society which has become incorporated may alter or rescind any rule or make any additional rule at a "special meeting called for the purpose" (*a*).

Powers where society incorporated.

742. In the case of incorporated societies, a "meeting called for the purpose" may change the name of the society (*b*); a "general meeting specially called" may wind up the society (*c*); two or more societies may unite or one society may transfer its engagements to another by resolution passed at a general meeting of each society convened for the purpose (*d*); in certain circumstances the first general meeting of a society may appoint arbitrators, and at subsequent general meetings substitutes may be appointed in the place of arbitrators dying or refusing or neglecting to act (*e*); and if the rules of any society do not provide for changing the chief office of the society, a change can be made by "a general meeting specially called for the purpose" (*f*).

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occur with great frequency. Not seldom different titles are used for meetings that appear to be identical. No doubt in many cases the difficulties are solved in the rules of the society; and the scope of the rules on this subject would not be confined to the subjects mentioned in the various Acts. "Meeting" implies a meeting of the members, whether qualified by the expression "general" or not. It should be noted that some things which in incorporated societies require a meeting of the members can in unincorporated societies be done by the general committee of management, or by a committee appointed by a meeting of members.

(*l*) Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 1. The rules in the first instance are made by the "persons" forming the society, but, inasmuch as the society is not formed until the rules are confirmed (Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 7; Friendly Societies Act, 1834 (4 & 5 Will. 4, c. 40), s. 4, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4; Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 8), it cannot be said that these persons form a "meeting."

(*m*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 12, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*n*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56) s. 26, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4; *Re Middlesbrough etc. Building Society* (1889), 58 L. J. (CH.) 771; and see p. 397, *post*.

(*o*) That is, no doubt, a meeting held at short and regular intervals, such as weekly.

(*p*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 11, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*q*) 37 & 38 Vict. c. 42, s. 12. The section seems to mean that the power of making the application is reserved exclusively to "general meetings specially called for the purpose."

(*a*) As to the meaning of the term "meeting," see note (*k*), p. 353, *ante*.

(*b*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 22; see p. 330, *ante*.

(*c*) *Ibid.*, s. 32; and see p. 395, *post*.

(*d*) *Ibid.*, s. 33; and see p. 391, *post*.

(*e*) *Ibid.*, s. 34; and see p. 381, *post*.

(*f*) Building Societies Act, 1877 (40 & 41 Vict. c. 63), s. 2; and see p. 330, *ante*.

SECT. 3. Meetings.

Place of meeting.

743. Unincorporated societies must state in their rules the place or places at which it is intended that the society shall hold its meetings. Such place or places, however, may be altered without altering the rules on the giving of a prescribed notice, but only to another place or other places in the same county (*g*). Similarly, in incorporated societies the rules must set forth the place of meeting for the business of the society (*h*), and they must prescribe the manner of calling general and special meetings (*i*).

Presenting annual account.

744. Societies, whether incorporated (*k*) or unincorporated (*l*), must present an annual account to the annual or other general meeting.

Special meeting called by Registrar.

745. The Registrar may (1) on the application of one-tenth of the members of an incorporated society or of one hundred members if there are more than one thousand, or (2) upon evidence being furnished by a statutory declaration of not less than three members of facts which in his opinion call for recourse to the judgment of a meeting, or (3) upon failure of a society to make or to correct or complete any return required by the Building Societies Acts, and in each case with the consent of the Secretary of State, call a special meeting of the society (*m*). The Registrar may determine the time and place of the meeting and the matters to be discussed, and the meeting will have all the powers of a meeting called under the rules and may appoint its own chairman (*n*).

Part VII.—Shares.

SECT. 1.—*In General.*

Nature of shares.

746. The fund which it is the object of building societies to form is divided into shares (*o*). Shares in building societies differ in essence from shares in limited liability companies in that the latter constitute definite portions of the capital of the company, and are strictly limited in number, whereas the former represent no proportionate quota of the capital of the society, and are unlimited in number. There may be as many shares in a building society as people like to apply for (*p*).

(*g*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 10, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4. As to notices, see Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 7.

(*h*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16 (1). But apparently this place must be the chief office (*ibid.*).

(*i*) *Ibid.*, s. 16 (7).

(*k*) *Ibid.*, s. 40.

(*l*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 25 (1).

(*m*) *Ibid.*, s. 5 (1) (5).

(*n*) *Ibid.*, s. 5 (4). Other regulations as to such meetings are set out in the above section and in the Building Society Regulations, 1895, rr., 36—40.

(*o*) Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 1; Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 13.

(*p*) *Irvine and Fullerton Property Investment and Building Society* v. *Cuthbertson* (1905), 8 F. (Ct. of Sess.) 1.

SECT. 1. In General.

Restrictions as to shares in unincorporated societies.

Shares in unincorporated societies must not exceed in value one hundred and fifty pounds each, and the subscriptions must not exceed twenty shillings per month for each share (*q*), but a member may hold two or more shares exceeding in all the above-mentioned limit (*r*). Except on withdrawal, no member can receive any interest or dividend on his shares until the whole value has been realised (*s*).

There is no limitation on the value of shares in incorporated societies or the amount of the subscriptions (*t*). Shares to be paid up in full in one payment may be issued (*u*).

Kinds of shares.

747. The Building Societies Act, 1836 (*w*), makes no attempt to distinguish between shares of different kinds. The widest powers are given, subject only to the condition that the rules of the society shall state in what shares the funds of the society shall belong to the members (*a*); and although the Building Societies Act, 1874 (*b*), and the Building Societies Act, 1894 (*c*), for societies established after, or adopting new rules after, the passing of the Act of 1874, in terms mention different classes of shares, they in no way fetter the right of societies to determine which of these classes will be created, or prevent them from creating other classes. In the case of incorporated societies the rules must indicate the various classes of shares that the society proposes to issue, and the terms on which they are to be issued, repaid and withdrawn (*d*). The question is always one of the rules; these are omnipotent and decisive. It follows from this that practically all the decisions in building society cases turn on the construction of particular rules.

Preferential shares.

In practice most societies limit themselves to creating advanced and unadvanced shares (*e*), but some have preferential shares also. These carry a guaranteed rate of interest, and the holders are not liable to contribute to losses or entitled to share in profits. The rights of the holders of such shares depend on the rules of the particular society, but usually such shares have a preference as to payment of capital, and any deficiency in a winding-up must be made up by the other members (*f*), and the liability of the preferential shareholders to outside creditors (*g*) would only arise after

(*q*) Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 1.

(*r*) *Morrison* v. *Glover* (1849), 4 Exch. 430; but see *Cutbill* v. *Kingdom* (1847), 1 Exch. 494.

(*s*) Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 1. The value of a share will be realised when the instalments and accumulated interest reach the amount of the share (*Auld* v. *Glasgow Working Men's Building Society* (1887), 12 App. Cas. 197, *per* Lord HERSCHELL, at p. 200).

(*t*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 13, 16 (2), (4); Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 1 (b), (c), (d).

(*u*) *Ibid.*

(*w*) 6 & 7 Will. 4, c. 32.

(*a*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 3, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 4.

(*b*) 37 & 38 Vict. c. 42, s. 16 (2), (4).

(*c*) 57 & 58 Vict. c. 47, s. 1 (b), (c), (d)

(*d*) *Ibid.*

(*e*) See p. 351, *ante*.

(*f*) *Re Reliance Permanent Benefit Building Society* (1892), 61 L. J. (CH.) 453.

(*g*) See p. 352, *ante*.

the funds belonging to such other members have been exhausted. The right of preferential payment of capital sometimes depends on notice of withdrawal having been given (*k*). In the case of newly incorporated societies or incorporated societies adopting new rules, the rules must state whether preference shares are to be issued, and must give a limit to such issue (*l*).

Bequests etc. of shares.

748. Shares in building societies may be bequeathed, as such, to a charity (*j*). They will not pass by a bequest of "moneys" (*k*) unless there is a context to aid such a construction, and they cannot be the subject of *donatio mortis causâ* (*l*).

Title to shares.

749. Registration in the books of the society constitutes *primâ facie* legal title to shares (*m*). A payment to the person legally, though not equitably, entitled to shares, without notice of the equitable title, is good, even if some of the special provisions of the rules with regard to payment have not been complied with (*n*).

Joint holders.

750. In the case of unincorporated societies all shares held jointly in any society existing at the commencement of the Building Societies Act, 1874, the rules of which do not prohibit joint holding, are to be deemed to be lawfully so held (*o*). In every incorporated society shares can be held jointly (*p*).

For the purpose of consenting to a dissolution of the society, joint holders are to be considered as one member, and must all sign the instrument of dissolution, though, if one of the joint holders be really acting as the agent of the others, he may sign for them provided that he does so in the proper way (*q*). A member may hold some shares jointly and others severally, and such a shareholder can indicate his consent to a dissolution in respect of all his shares by signing the instrument in one place only (*r*).

SECT. 2.—*Transfer.*

Right to transfer.

751. Shares in building societies are subject to transfer (*s*). The motive of the transfer cannot be inquired into (*t*).

(*k*) See *Murray* v. *Scott* (1884), 9 App. Cas. 519; *Sixth West Kent Mutual Building Society* v. *Shove*, (1895), reported, [1899] 2 Ch. 64, n.

(*l*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 1 (d).

(*j*) *Enturistle* v. *Davis* (1867), 36 L. J. (CH.) 825, holding that such shares did not fall within the provisions of the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), now mostly repealed, but substantially re-enacted in the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), the question being whether the share is such that it might result to the owner as land, or whether nothing can come to him but in the shape of money. See generally, title CHARITIES.

(*k*) *Collins* v. *Collins* (1871), 40 L. J. (CH.) 541. See title WILLS.

(*l*) *Re Weston*, [1902] 1 Ch. 680. See title GIFTS.

(*m*) *Nolloth* v. *Simplified Permanent Benefit Building Society* (1885), 53 L. T. 859.

(*n*) *Ibid.*

(*o*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 39.

(*p*) *Ibid.*

(*q*) *Dennison* v. *Jeffs*, [1896] 1 Ch. 611.

(*r*) *Ibid.*; *Re Stranton Iron and Steel Co.* (1873), L. R. 16 Eq. 559; *Pender* v. *Lushington* (1877), 6 Ch. D. 70; *Moffatt* v. *Farquhar* (1878), 7 Ch. D. 591.

(*s*) See *Allan* v. *Urquhart* (1887), 25 Sc. L. R. 47, shares being a class of property of which the right to transfer is a necessary incident.

(*t*) *Pender* v. *Lushington*, *supra*; *Moffatt* v. *Farquhar*, *supra*, both cases relating to limited companies, the principle of which, however, seems applicable.

SECT. 2. Transfer.

Where rules regulating the method of transfer exist they must be strictly complied with (*u*).

Liquidation.

On the sale and transfer of shares after an order for compulsory winding-up the transferee is not entitled to be registered as owner without the sanction of the court (*w*).

Married women.

Shares standing in the name of a married woman either solely or jointly with any person other than her husband can be transferred by her, so far as her interest is concerned, without the concurrence of her husband (*a*).

Advanced members.

Advanced shareholders may, without assigning their shares, transfer the property secured by mortgage subject to a covenant to pay all sums due in respect of the shares, and in such cases the effect of redemption may be to extinguish liability on the shares so far as the transferee is concerned, although liabilities in connection with them may continue as against the transferor (*b*).

SECT. 3.—*Withdrawals.*

Right of withdrawal.

752. Shares can be withdrawn before becoming "realised" (*c*), the withdrawing shareholder getting present payment of the amount of his subscriptions less any deductions under the rules, and foregoing any right to a share of the ultimate profits (*d*).

The rights of "withdrawing," of "matured," and of "withdrawn" members (*e*), both *inter se* and in relation to continuing members, are absolutely determined by the contract between them, that is, by the rules (*f*).

Necessity of notice.

Notice of withdrawal must in all cases be given, the period

(*u*) *Allan* v. *Urquhart* (1887), 25 Sc. L. R. 47.

(*w*) *Re Onward Building Society*, [1891] 2 Q. B. 463, C. A.

(*a*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 9.

(*b*) *Priestley* v. *Hopwood* (1864), 10 L. T. 646.

(*c*) By a "realised" share is meant one which has by due payment of all necessary subscriptions become fully paid up.

(*d*) The right to withdraw is not expressly given by statute, but depends on the rules of each society; but it is so far recognised in the Building Societies Acts that the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 1, impliedly, and the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16 (4), and the Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 1 (b), (c), expressly, make it obligatory on all societies under the Acts to state in their rules the terms on which shares can be withdrawn. A rule forbidding withdrawal will not, it is believed, be accepted by the Registrar.

(*e*) A member withdrawing passes through two stages: first, from the date the notice is given to that of its expiration; secondly, from the date of the expiration of the notice to that of payment. Such a member, therefore, occupies in turn three different positions.

It will tend to clearness if a different title be used for each position, *i.e.*, for a member to be called during the currency of the notice a "withdrawing" member, after the expiration of the notice and before payment a "matured" member, after payment a "withdrawn" member.

(*f*) *Walton* v. *Edge* (1884), 10 App. Cas. 33; *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society No. 2* (1885), 53 L. T. 203. Rules may be so framed as to give withdrawing members a charge on certain funds, thereby affecting the order of payment (*Re Alliance Society* (1885), 28 Ch. D. 559, C. A.; *Botten* v. *City and Suburban Permanent Building Society* (1895), 72 L. T. 375, C. A.).

varying according to the rules. An informal notice will be sufficient if accepted by the society, although a special form be provided by the rules (*g*). Notice is waived if the member subsequently accepts a loan from the society on the footing of his continuing a member, even if the loan is *ultra vires* (*h*).

Liability of withdrawing member.

753. A withdrawing member is not liable to make any further contribution after the date of his notice either while the society continues or, in the case of an incorporated society, in a winding-up (*i*). But if before the notice expires the stoppage of the business of the society is recognised as inevitable, or the society is wound up, the notice has no effect, and gives no priority for payment over members who have given no notice (*j*).

Position of matured member.

754. For certain purposes matured members are still members. Thus, they are subject to rules compelling disputes between members to be referred to arbitration (*k*), and they must be counted among the number of members when calculating the majority necessary to constitute a valid instrument of dissolution (*l*); and further they are liable to have the rules altered to their prejudice (*m*), and to have their notices postponed by rules made after the notices were given (*n*), but not so as to render the notices of no effect (*o*). Matured members are relatively to continuing members creditors of the society, and have priority in a winding-up (*p*).

Withdrawal "provided the funds permit."

If the rules provide that members may withdraw "provided the funds permit," and there are no funds when a notice of withdrawal matures, the member giving the notice acquires a right to receive payment when funds permit, and will have priority over non-withdrawing members in a winding-up (*q*).

(*g*) *Re Blackburn and District Benefit Building Society* (1883), 24 Ch. D. 421, affirmed (not appealed against on this point) (1884) 10 App. Cas. 33.

(*h*) *Re Counties Conservative Permanent Benefit Building Society, Davis* v. *Norton*, [1900] 2 Ch. 819.

(*i*) *Sibun* v. *Pearce* (1890), 44 Ch. D. 354, *per* LINDLEY, L.J., at p. 372.

(*j*) *Re Ambition Investment Building Society*, [1896] 1 Ch. 89; *Re Sunderland 36th Universal Building Society* (1890), 24 Q. B. D. 394.

(*k*) *Wright* v. *Deeley* (1866), 4 H. & C. 209; *Mitchell* v. *Caledonian Property Investment Building Society* (1886), 23 Sc. L. R. 651; *Walker* v. *General Mutual Building Society* (1887), 36 Ch. D. 777, C. A.; and this, too, even if incorporation has taken place after the notice of withdrawal has matured (*Davies* v. *Second Chatham Permanent Benefit Building Society* (1889), 61 L. T. 680).

(*l*) *Sibun* v. *Pearce, supra*; Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32 (3).

(*m*) *Pepe* v. *City and Suburban Permanent Building Society*, [1893] 2 Ch. 311.

(*n*) *R.* v. *Brabrook* (1893), 69 L. T. 718.

(*o*) *Walton* v. *Edge* (1884), 10 App. Cas. 33, *per* Lord SELBORNE, L.C., at p. 36.

(*p*) *Ibid.*; *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society No. 2* (1885), 53 L. T. 203; *Re Carrick (North British Building Society in Liquidation)* (1885), 22 Sc. L. R. 833; *Blair* v. *Broadfoot's Trustees* (1890), 27 Sc. L. R. 859. But they are not creditors within the fraudulent preference provisions of the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 164 (*Re Gwawr-y-Gweithwyr Industrial and Provident Society*, [1901] 2 K. B. 477).

(*q*) *Walton* v. *Edge, supra, per* Lord SELBORNE, L.C., at pp. 37, 38.

SECT. 8. Withdrawals.

Operation of notice.

755. Notice of withdrawal is self-operating (*r*), and at the expiration of the notice if all subscriptions, fines, and other liabilities to the society are paid, and the amount due under the rules paid to the member, the shares are withdrawn (*s*); and the withdrawn member ceases to be a member, and is under no liability on dissolution or winding-up (*t*).

Loss of right of withdrawal.

756. The right to withdraw is put an end to by a winding-up order, which acts as a compulsory withdrawal (*u*), by insolvency of the society, and by stoppage of business, or by a condition of things that renders stoppage of business inevitable (*a*). But a notice which has matured before any of those events is nevertheless effective (*b*).

Effect of winding-up order.

757. The rights of withdrawing, of matured, and even in some circumstances of withdrawn, members are liable as against the outside public to be modified by an order for winding-up, though the validity and force of the contract between them, that is of the rules, is not thereby impaired (*c*).

Priorities.

The rule as to priority of payment when a society is being wound up is as follows: outside creditors, including persons who have deposited moneys by way of loan (*d*), must be paid first; then realised (*e*) members and those matured members (*f*) whose notices had expired before the winding-up began; then withdrawing members and continuing members *pari passu* (*g*). The members of each class are entitled to be paid in full (*h*) before any payment is made to the classes behind them; priority between the members of each class depends on the rules of the society (*i*).

But this order of payment is subject to the qualification that whenever the rules contain (as they frequently do) a proviso giving precedence to the widows and children of deceased members, then widows and children (if otherwise entitled) will, as between creditors and contributories, always take precedence over all members, whether

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(*r*) *Re Sheffield and South Yorkshire Permanent Building Society* (1889), 22 Q. B. D. 470, *per* CAVE, J., at p. 475.

(*s*) *Ibid.*; *Re West Riding of Yorkshire Permanent Benefit Building Society, Ex parte Pullman* (1890), 45 Ch. D. 463.

(*t*) *Ibid.*

(*u*) *Brownlie* v. *Russell* (1883), 8 App. Cas. 235.

(*a*) *Re Carrick* (*North British Building Society in Liquidation*) (1885), 22 Sc. L. R. 833; *Re Sunderland 36th Universal Building Society* (1890), 24 Q. B. D. 394; *Re Ambition Investment Building Society*, [1896] 1 Ch. 89.

(*b*) *Re Ambition Investment Building Society*, *supra*, at p. 100.

(*c*) *Walton* v. *Edge* (1884), 10 App. Cas. 33.

(*d*) *Re Mutual Aid Permanent Benefit Building Society* (1885), 30 Ch. D. 434.

(*e*) *Re Norwich and Norfolk Provident Building Society, Ex parte Buckham* (1876), 45 L. J. (CH.) 785.

(*f*) *Walton* v. *Edge*, *supra*; and this although between the giving of the notices and the winding-up there never were any funds for payment. See *Barnard* v. *Tomson*, [1894] 1 Ch. 374.

(*g*) *Re Ambition Investment Building Society*, *supra*.

(*h*) *Re Counties Conservative Permanent Benefit Building Society*, [1900] 2 Ch. 819.

(*i*) *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society No. 2* (1885), 53 L. T. 203.

natured or withdrawing, and that, too, whether the deceased members had or had not given notice of withdrawal (*k*). Executors of deceased members may take a like priority (*l*). SECT. 3. Withdrawals.

A member who, having given notice of withdrawal, afterwards accepts from the society a loan upon terms whereby he still continues to receive interest upon his share, but pays interest upon his advance, cannot in the winding-up set off the amount of his share against the unpaid balance of the loan (*m*). Advance to withdrawing member.

758. Interest is payable by the society in case of withdrawal if the rules so provide (*n*), compound interest being recoverable equally with simple interest (*o*); and if by the rules the day for payment of the sum payable on withdrawal be fixed, it would seem that there would be a sum certain payable by virtue of some written instrument at a certain time so as to entitle the member to interest (*p*). But if the payment depend on a condition, such as the determination by the directors or the committee of the rate, or the availability of funds, payment cannot be enforced unless and until the condition be fulfilled (*q*). Interest, if payable, may in the case of withdrawals between half-yearly dates of payment be recovered for the period between the date of payment last past and the day of withdrawal (*r*). Right to interest.

SECT. 4.—*Fines and Forfeitures.*

SUB-SECT. 1.—*Fines.*

759. Unincorporated building societies have express powers to impose reasonable fines, penalties, and forfeitures on members who offend against the rules (*s*). No similar express power is given to incorporated societies, but the power is implied in the provision that societies shall make rules as to the fines and forfeitures to be imposed on the members (*t*). Rules as to fines cannot be arbitrarily dispensed with (*u*). Right to inflict fines.

(*k*) *Thompson* v. *Atlas Permanent Building Society* (1894), 97 L. T. Jo. 218; *Re West London and General Permanent Benefit Building Society* (1898), 78 L. T. 393. See *Barnard* v. *Tomson*, [1894] 1 Ch. 374, 392.

(*l*) *Re Counties Conservative Permanent Benefit Building Society*, [1900] 2 Ch. 819.

(*m*) *Ibid.*

(*n*) *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society No.* 2 (1885), 53 L. T. 203.

(*o*) *Re Doncaster Permanent Benefit Building and Investment Society* (1866), 14 L. T. 13.

(*p*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28; *Re Blackburn and District Building Society*, [1886] W. N. 22, C. A.

(*q*) *Re Blackburn and District Building Society, supra; Re Sunderland 36th Universal Building Society* (1890), 24 Q. B. D. 394.

(*r*) *Perratt* v. *London Scottish Permanent Benefit Building Society* (1888), 59 L. T. 31.

(*s*) Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 1.

(*t*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16 (13). The most usual object with which fines are imposed is as a punishment for non-payment of subscriptions or other dues.

(*u*) Compare *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102, *per* WRIGHT, J., at p. 110.

SECT. 4. **Fines and Forfeitures.**

The liability to be fined is in some cases, as, for instance, in that of executors or administrators of deceased members, a test of membership (*b*).

Nature of fines.

760. Fines are not penalties (*c*), nor are they interest by way of a penalty (*d*). In the case of unincorporated societies (*e*), fines that are unreasonable, such as those that are cumulative in arithmetical progression (*f*), cannot be enforced (*g*); but if possible the rules will be so construed as to make the fines reasonable (*h*), and if reasonable they will be enforced (*i*).

Interest on fines.

No interest is chargeable on fines unless the rules otherwise provide (*k*); but fines secured by covenant in a mortgage form part of the principal in foreclosure, and are payable with interest (*l*).

Fines for non-payment of fines.

Fines for non-payment of fines may be recovered, if the rules so provide (*m*).

Fines not enforced.

If the rules as to fines be not duly enforced, they cannot, as in liquidation proceedings, be revived against those members who have been allowed to escape their effect (*n*).

Fines not entered up.

The fact that fines are not entered up against a member by the proper official does not absolve the member from liability (*o*).

SUB-SECT. 2.—*Forfeiture.*

Effect of forfeiture.

761. Forfeiture usually takes place on non-payment for a definite period of subscriptions and fines, when the sums already paid by the defaulting member become forfeited to the society (*p*). Rules as to forfeiture of shares (*q*) will be enforced by the court, if reasonable (*r*). The forfeiture will, as a rule, take effect, not *ipso facto* on default, but at the option of the directors (*s*). But although the forfeiture is binding so far as the shares are concerned, the shareholder is

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(*b*) *Knox* v. *Shepherd* (1860), 2 L. T. 351.
(*c*) *Pilkington* v. *Baker*, [1877] W. N. 210.
(*d*) *Parker* v. *Butcher* (1867), L. R. 3 Eq. 762.
(*e*) Presumably the same would be held true of incorporated societies, but the Building Societies Acts, 1874 and 1894 (37 & 38 Vict. c. 42; 57 & 58 Vict. c. 47), contain no provision similar to that in s. 1 of the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32).
(*f*) *Re Tierney* (1874), I. R. 9 Eq. 1. As to what fines are reasonable, see *Parker* v. *Butcher*, *supra*; *Pilkington* v. *Baker*, *supra*.
(*g*) *Lovejoy* v. *Mulkern* (1877), 46 L. J. (CH.) 630; *Re Middlesbrough Building Society* (1884), 54 L. J. (CH.) 592.
(*h*) *Lovejoy* v. *Mulkern*, *supra*. See *Re Tierney*, *supra*.
(*i*) *Ibid.*
(*k*) *Parker* v. *Butcher*, *supra*; *Ingoldby* v. *Riley* (1873), 28 L. T. 55.
(*l*) *Provident Permanent Building Society* v. *Greenhill* (1878), 9 Ch. D. 122; *Re Knight, Ex parte Voisey* (1882), 21 Ch. D. 442, C. A.
(*m*) *Re Middlesbrough Building Society*, *supra*.
(*n*) *North British Building Society* v. *M'Lellan* (1887), 14 R. (Ct. of Sess.) 827.
(*o*) *Handley* v. *Farmer* (1861), 29 Beav. 362.
(*p*) *Irvine and Fullerton Property Investment and Building Society* v. *Cuthbertson* (1905), 8 F. (Ct. of Sess.) 1.
(*q*) For the statutory provisions as to forfeiture, see p. 361, *ante*.
(*r*) *Card* v. *Carr* (1856), 1 C. B. (N. S.) 197.
(*s*) *Moore* v. *Rawlins* (1859), 6 C. B. (N. S.) 289, *per* BYLES, J., at p. 310; *R.* v. *D'Eyncourt* (1864), 4 B. & S. 820, *per* BLACKBURN, J., at p. 835. Compare *Bigg's Case* (1865), L. R. 1 Eq. 309 (a company case). See, however, *Irvine and Fullerton Property Investment and Building Society* v. *Cuthbertson*, *supra*.

not therefore absolved from all relation to the society. He may, for instance, still be liable to be placed on the list of contributories in a winding-up (*t*). SECT. 4. Fines and Forfeitures

Part VIII.—Advances.

SECT. 1.—*In General.*

762. The general law of mortgages applies to mortgages taken by building societies as a security for advances made to members (*a*). The same law also applies to the questions which arise incidental to such mortgages, such as the presumption that a tenant for life who pays off the amount secured by a mortgage intends to keep the charge alive for his own benefit (*b*), and the postponment (*c*) of a legal mortgage to a subsequent equitable security on the ground of negligence in the custody of the title-deeds (*d*). Application of general law.

763. Although an infant is capable of being a member of a building society (*e*), he cannot execute a valid mortgage to secure sums advanced to him by the society (*f*); but if the advance has in fact been used to complete a purchase by the infant, the society will be entitled to stand in the shoes of the vendor and to enforce the vendor's lien (*g*). Advances to infant.

764. An executor may in his representative capacity give a valid mortgage to secure sums advanced to him by a building society for the purposes of the estate (*h*). If, to obtain the advance, the executor becomes a member of the society and renders himself liable to further payments, the liability for these will be merely personal although they are expressed to be secured by the mortgage (*i*). Mortgage by executor.

765. A society established after August 25, 1894, may not cause or permit applicants for advances to ballot for precedence, or in Advances by ballot.

(*t*) *Re St. George's Benefit Building Society* (1858), 6 W. R. 766.

(*a*) *Provident Permanent Building Society* v. *Greenhill* (1878), 9 Ch. D. 122; *Bell* v. *London and South Western Bank*, [1874] W. N. 10. For the general law of mortgages, see title MORTGAGE. For forms of mortgages to building societies, see Encyclopædia of Forms, Vol. III., pp. 43 *et seq.*

(*b*) *Re Harvey*, [1896] 1 Ch. 137, C. A. See, as to this presumption, title MORTGAGE.

(*c*) See *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1884), 26 Ch. D. 482, C. A.; and title MORTGAGE.

(*d*) *Garside* v. *Liverpool Railway Permanent Benefit Building Society* (1897), 13 T. L. R. 189, C. A., where the solicitor of the society obtained possession of and dealt with the title-deeds of property he had mortgaged to the society.

(*e*) Building Societies Act, 1874, s. 38; Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 32.

(*f*) *Nottingham Permanent Benefit Building Society* v. *Thurstan*, [1903] A. C. 6.

(*g*) *Ibid.*

(*h*) *Cruikshank* v. *Duffin* (1872), L. R. 13 Eq. 555; *Thorne* v. *Thorne*, [1893] 3 Ch. 196.

(*i*) *Thorne* v. *Thorne*, *supra*.

SECT. 1. In General.

any way make the granting of an advance depend on chance or lot (*k*).

Transfer of mortgage.

766. A mortgage in favour of a building society can be transferred with the consent of the mortgagor (*l*).

Annual value for county vote.

767. In ascertaining whether the annual value of the estate of an advanced member of a building society, who has mortgaged his estate to the society, is such as to entitle him to be placed on the register of county voters, no deduction is to be made for such part of the annual payments under the mortgage as represents principal (*m*).

SECT. 2.—*Security on which Advances may be made.*

Freehold, copyhold, or leasehold property.

768. The nature of the security which may be accepted by building societies is shown by their object, which is to make advances to members out of the funds of the society upon the security of freehold, copyhold, or leasehold estate (*n*). But the addition of collateral personal security will not invalidate an otherwise good advance, though the propriety of the advance must be tested as if no such ingredient entered into it (*o*).

Advance on other property.

An advance on the security of any other description of property, *e.g.*, the shares of a member, is beyond the powers of a society (*p*).

First mortgages only.

No advance may be made by an incorporated society on land subject to a prior mortgage unless such prior mortgage is in favour of the society making the advance (*q*). This prohibition seems to extend to any device by which a first mortgage is turned into a second mortgage (*r*).

Under Land Transfer Acts.

769. Land registered under the Land Transfer Acts, 1875 and 1897 (*s*), may be charged by the registered proprietor in favour of a

(*k*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 12. As to altering the rules when they provide that advances may be balloted for, see p. 334, *ante*.

(*l*) *Re Rumney and Smith*, [1897] 2 Ch. 351, C. A., *per* LINDLEY, L.J., at p. 359. It has not yet been decided whether such a mortgage can be transferred without such consent, but the better opinion appears to be that such a transfer would be invalid; see *ibid.*; *Ulster Building Society* v. *Glenton* (1888), 21 L. R. Ir. 124. As to the effect of amalgamations of societies or the transfer of the engagements of one society to another, see p. 391, *post*.

(*m*) *Rolleston* v. *Cope* (1871), L. R. 6 C. P. 292; *Robinson* v. *Dunkley* (1863), 15 C. B. (N. S.) 478. See *Copland* v. *Bartlett* (1848), 6 C. B. 18; *Beamish* v. *Stoke (Overseers)* (1851), 11 C. B. 29. As to county voters, see title ELECTIONS.

(*n*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 13; *Cullerne* v. *London and Suburban General Permanent Building Society* (1890), 25 Q. B. D. 485, C. A., *per* LINDLEY, L.J., at p. 488. See p. 323, *ante*.

(*o*) *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (1889), 44 Ch. D. 412.

(*p*) *Cullerne* v. *London and Suburban General Permanent Building Society*, *supra*.

(*q*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 13 (1). This prohibition does not apply to an unincorporated society nor to any society in Scotland or Ireland which was on August 25, 1894, authorised by the rules to make advances on second mortgage (*ibid.*, s. 13 (2)).

(*r*) *Portsea Island Building Society* v. *Barclay*, [1895] 2 Ch. 298, C. A., decided on the effect of a rule against advances on second mortgage, where the society postponed their first charge to that of another mortgagee.

(*s*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65. As to these Acts generally, see title REAL PROPERTY AND CHATTELS REAL.

building society by means of a mortgage made in pursuance of or consistent with the rules of the society, and the mortgage will be deemed to be a charge made in the prescribed manner and will be registered accordingly (*t*).

In order to enable the society to retain possession of the mortgage of registered land for the purpose of indorsing thereon the statutory receipt on discharge, the original mortgage will, if they wish, be delivered to them after registration upon their delivering at the registry a copy verified by the signature of the secretary, which copy will be admissible in evidence without the production of the original (*a*). The copy need not be stamped, but will be filed at the registry (*b*).

Delivery of instrument of charge to society.

The original mortgage when delivered to the society will be indorsed with a certificate of registration and thenceforth treated as the certificate of charge, and must be indorsed from time to time with notes of the various dealings, and on discharge of the security will be delivered up, cancelled, and retained in the Land Registry (*c*).

Cancellation on payment off.

770. Where a mortgage to an incorporated society includes copyholds, the society may require the lord of the manor of which the copyholds are held to admit such persons, not more than three in number, as the society appoints to be trustees on its behalf as tenants in respect of such copyholds, on payment of the usual fines, fees, and other dues payable on the admission of a single tenant, or the lord may admit the society as tenant on payment of such special fine, or compensation in lieu of fine, and fees as may be agreed upon (*d*).

Mortgage of copyholds.

SECT. 3.—*Construction and Effect of Mortgages.*

771. A provision in a mortgage that, on default being made of payment of an instalment, the whole sum secured shall immediately become payable, implies a covenant to pay accordingly upon which an action may be brought (*e*).

Implied covenant to pay.

A covenant in a mortgage to observe the rules of the society in effect incorporates in the mortgage the material provisions of the rules, and these provisions will bind a subsequent mortgagee having notice of the covenant (*f*).

Covenant to observe rules.

If the rules of a society make provisions for the payment of subscriptions by advanced members, the society may apply the subscriptions towards the discharge of the amount owing on the mortgage (*g*). If in such a case the member dies before the moneys

Set-off of subscriptions etc.

(*t*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 9 (3).
(*a*) Land Transfer Rules, 1903, r. 121.
(*b*) *Ibid.*
(*c*) *Ibid.*, r. 122.
(*d*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 28.
(*e*) *Sherriff* v. *Glenton* (1873), 28 L. T. 65. See further, as to such a provision, *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685; *Keene* v. *Biscoe* (1878), 8 Ch. D. 201; *Cordingley* v. *Alliance Society*, [1887] W. N. 220; and title MORTGAGE.
(*f*) *Andrews* v. *City Permanent Benefit Building Society* (1881), 44 L. T. 641, where the rules gave the society the right to consolidate. As to the effect of a subsequent alteration of rules upon the rights of the mortgagor, see p. 334, *ante*.
(*g*) *Moxon* v. *Berkeley Mutual Benefit Building Society* (1890), 59 L. J. (CH.)

SECT. 3. Construction and Effect of Mortgages.

secured by the mortgage are fully paid, and the mortgage is paid off without recourse to the amount paid as subscriptions, this amount must be paid to his legal personal representatives, and they are the only persons who can give a valid discharge to the society (*h*).

Where the rules of a society stipulate that an applicant for an advance shall make certain weekly payments until the advance is made, and after the execution of the mortgage shall repay the advance by certain quarterly instalments, any advanced member is entitled to set off sums paid in respect of the weekly payments against the instalments first becoming payable (*i*).

SECT. 4.—*Redemption.*

How far conditions for redemption to be specified in rules.

772. Any society established after August 25, 1894, or which substitutes a new set of rules for its existing rules after that date, must set forth the conditions upon which a borrower can redeem the amount due from him before the expiration of the period for which the advance was made, with tables showing the amount due from the borrower after each stipulated payment, unless the Registrar is of opinion that such tables are not applicable (*k*).

Difference between terminating and permanent society.

773. A fundamental difference exists in most cases between a mortgage to a terminating society and one to a permanent society. The former generally secures the payment by the member to whom the advance is made of the future subscriptions payable on the shares in respect of which the advance is made (the number of such subscriptions being usually not easily ascertainable), together with all fines and other moneys payable by the member to the society under the rules. A mortgage to a permanent society generally secures the repayment of the sum advanced with interest and possibly a premium by a definite number of instalments in accordance with tables in the rules, and also any fines or other moneys which may become payable by the member to the society under the rules during the continuance of the society (*l*). The result as regards redemption is that, while there is generally little difficulty in ascertaining the amount payable on redeeming a mortgage to a permanent society, it is often not easy to determine the amount payable on redeeming a mortgage to a terminating society, though sometimes in this case also the number of instalments is fixed (*m*).

524, the effect being practically to give the society a charge on the amount paid as subscriptions, and *pro tanto* to increase the margin on the mortgage.

(*h*) *Re Burton* (1897), 13 T. L. R. 275.

(*i*) *Inglis* v. *Cure*, [1869] W. N. 131. For another case of construction, but one which decides no question of principle, see *Weekes* v. *South London Equitable Building Society* (1897), 13 T. L. R. 291.

(*k*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 1 (e). Before 1874, though the rules of building societies generally made provision for the redemption of mortgages, the amount payable upon redemption was often not clearly to be ascertained from such rules.

(*l*) See Davidson, Precedents and Forms in Conveyancing, 4th ed., Vol. II., Part II., p. 704.

(*m*) See *Parker* v. *Butcher* (1867), L. R. 3 Eq. 762; *Sparrow* v. *Farmer* (1859), 26 Beav. 511. For the distinction between terminating and permanent societies, see pp. 325, 326, *ante*.

Redemption of mortgage to terminating society.

774. In the case of an ordinary terminating society the mortgage of an advanced member is only redeemable on payment of the amount of all moneys which would become due under the rules during the period during which the society continues. In some cases the period taken for this purpose is the probable duration of the society (*n*), in others its longest possible duration (*o*). Where the rules dealing with redemption permit it on payment of subscriptions for a fixed term of years, an advanced member is entitled to redeem in accordance with those rules, although on the construction of the rules as a whole he may be personally liable for further subscriptions (*p*).

Control of right to redeem by rules.

In general redemption will only be permitted in accordance with the terms of the contract of membership and security as contained in the rules of the society and the mortgage deed. Thus, a member may not be entitled to redeem upon payment of the amount by which the sum advanced to him exceeds the subscriptions which he has paid and the proportion of profits to which he is entitled, but only upon the terms of paying all future subscriptions without any deduction by way of discount (*q*). Where the construction of the rule is clear, an advanced member redeeming may be entitled to the same proportion of profits as an unadvanced member would have been entitled to on withdrawing, notwithstanding that taking an account on this footing will occasion inconvenience or even absurdity (*r*). Similarly, an advanced member redeeming may be entitled to a bonus according to the agreement, although it has been declared by mistake on too high a scale (*s*). As a question of construction, an advanced member may be allowed to set off redemption moneys paid by him although redemption moneys are not expressly mentioned in the rule (*t*); and the combined effect of the prospectus and rules of a society may entitle the society to add a premium to the actual sum advanced and to charge interest on the combined amount and demand payment of the whole from an advanced member seeking to redeem (*a*).

Payment of fines etc.

775. A member must on redemption pay all fines which have been stipulated for (*b*), but without interest thereon (*b*), unless there is express provision to that effect (*c*). If a mortgage purports to secure all subscriptions and other moneys becoming due from the mortgagor to the society, the words "other moneys" must be read

(*n*) *Mosley* v. *Baker* (1849), 1 H. & Tw. 301; *Seagrave* v. *Pope* (1852), 1 De G. M. & G. 783.
(*o*) *Fleming* v. *Self* (1854), 3 De G. M. & G. 997.
(*p*) *Sparrow* v. *Farmer*, (1859), 26 Beav. 511. See also *Handley* v. *Farmer* (1861), 29 Beav. 362.
(*q*) *Mosley* v. *Baker*, *supra*; *Seagrave* v. *Pope*, *supra*.
(*r*) *Fleming* v. *Self*, *supra*.
(*s*) *Archer* v. *Harrison* (1857), 7 De G. M. & G. 404.
(*t*) *Smith* v. *Pilkington* (1859), 1 De G. F. & J. 120.
(*a*) *Harvey* v. *Municipal Permanent Investment Building Society* (1884), 26 Ch. D. 273, C. A.
(*b*) *Parker* v. *Butcher* (1867), L. R. 3 Eq. 762.
(*c*) *Provident Permanent Building Society* v. *Greenhill* (1878), 9 Ch. D. 123.

SECT. 4. Redemption.

as *ejusdem generis* with the preceding words, and will, therefore, not include moneys due from a member in his character as secretary (*d*).

Contribution by redeeming member to losses.

776. Where there is a special contract to that effect, advanced members must on redemption pay their proper proportion of losses sustained by the society (*e*). But such liability can only be enforced in the manner prescribed by the contract and the rules (*f*). In the absence of a special contract, an advanced member who has discharged all the payments due in respect of his security is entitled to be released without contributing to losses sustained after the date of the advance (*g*). When an advanced member has paid all that is due under the rules and the terms of his mortgage and has had the statutory receipt indorsed on his deed he ceases to be a member of the society, and is not liable for any losses (*h*).

Effect of winding-up on right to redeem.

777. The right of an advanced member to redeem on payment of the sums for which he is liable under the mortgage and rules continues notwithstanding that the society is being wound up (*i*), but an advanced member of an unincorporated society in such circumstances must in addition pay the amount of any call made upon him for the purpose of satisfying the claims of outside creditors and costs of winding-up (*j*).

SECT. 5.—*Enforcement of Mortgage.*

SUB-SECT. 1.—*Sale.*

Society not trustee as regards power of sale.

778. A society is not a trustee of a power of sale contained in a mortgage. If the society exercises the power *bonâ fide* for the purpose of realising the debt, without corruption or collusion with the purchaser, the court will not interfere even although the sale be very disadvantageous (*k*). But on a sale in exercise of the power the property cannot be sold to the secretary, solicitor, or other

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(*d*) *Bailes* v. *Sunderland Equitable Building Society*, [1886] W. N. 191.

(*e*) *Re Albion Mutual Permanent Benefit Building Society* (1888), 43 Ch. D. 410, n.; *Re West Riding of Yorkshire Permanent Benefit Building Society* (1890), 43 Ch. D. 407. As to such a liability being imposed by rules made subsequently to the mortgage, see p. 334, *ante*.

(*f*) *Durham and Northumberland Working Men's Permanent Building Society* v. *Davidson* (1892), 61 L. J. (Q. B.) 473, C. A., where on the rules the liability was held enforceable by deductions from the amount standing to the credit of the member, not by surcharge.

(*g*) *Buckle* v. *Lordmany* (1887), 56 L. J. (CH.) 437. The increase of the liabilities of an advanced member by an alteration of the rules has already been dealt with at p. 334, *ante*.

(*h*) *Re West Riding of Yorkshire Permanent Benefit Building Society, Ex parte Pullman* (1890), 45 Ch. D. 463.

(*i*) *Brownlie* v. *Russell* (1883), 8 App. Cas. 235; *Took* v. *North British Building Society* (1886), 11 App. Cas. 489; *Re Doncaster Permanent Building Society* (1866), L. R. 3 Eq. 158; *Re Middlesbrough etc. Building Society* (1889), 58 L. J. (CH.) 771.

(*j*) *Re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. 352.

(*k*) *Warner* v. *Jacob* (1882), 20 Ch. D. 220. As to a mortgagee's power of sale generally, see title MORTGAGE.

agent of the society acting in the matter of the sale. Any attempt at such a sale will be set aside as invalid (*l*).

A power of sale in a mortgage executed in pursuance of an agreement to that effect contained in a memorandum accompanying a deposit of title-deeds with a building society to secure an advance will not be invalidated by the fact that between the respective dates of the deposit and the mortgage the property has been sold and conveyed to a purchaser subject to the charge created by the deposit. On an exercise of the power of sale by the society the person to whom the property has been conveyed will hold the legal estate as a trustee for the purchaser from the society (*m*).

Transfer of equity of redemption.

A power in a mortgage for the trustees or trustee for the time being of the society to sell in case of default cannot be exercised by an individual to whom the mortgage has been transferred by the society (*n*).

Rights of transferee of mortgage.

779. The amount which a society is entitled to retain out of the proceeds of a sale will depend on the terms of the contract contained in the mortgage and the rules (*o*). A building society having notice of a subsequent equitable mortgage and selling or joining with the mortgagor in a sale will be responsible to the equitable mortgagee for the surplus proceeds of sale (*p*).

Application of proceeds of sale.

If a member who has executed a mortgage to a society die intestate leaving an infant heir or co-heiress, the society may, after selling the mortgaged premises, pay to the administrator or administratrix of the deceased member any proceeds of sale, not exceeding £150 in amount, which may remain in the hands of the society after paying the amount due to the society and the costs and expenses of the sale. The sum so paid is to be considered personal estate, and liable to duty accordingly (*q*).

The purchaser of property sold under a power of sale is sometimes required to become a member and is liable accordingly (*r*).

How far purchaser liable as member.

SUB-SECT. 2.—*Foreclosure.*

780. A building society is, like other mortgagees, entitled to a decree for foreclosure (*s*), unless the mortgage is in the

Foreclosure.

(*l*) *Martinson* v. *Clowes* (1882), 21 Ch. D. 857.

(*m*) *Leigh* v. *Lloyd* (1865), 2 De G. J. & S. 330.

(*n*) *Re Rumney and Smith*, [1897] 2 Ch. 351, C. A.

(*o*) *Matterson* v. *Elderfield* (1869), 4 Ch. App. 207, where on the express terms of the rules the portions of future instalments attributable to interest were retained; *Re Goldsmith, Ex parte Osborne* (1874), 10 Ch. App. 41, where, in the absence of express provision, the interest portion of future instalments was not allowed to be retained; *Re O'Donohoe* (1876), I. R. 10 Eq. 221, where on the express terms discount was allowed on future instalments.

(*p*) *West London Commercial Bank* v. *Reliance Permanent Building Society* (1885), 29 Ch. D. 954, C. A., decided on general principles.

(*q*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 30.

(*r*) *Handley* v. *Farmer* (1861), 29 Beav. 362.

(*s*) *Provident Permanent Building Society* v. *Greenhill* (1878), 9 Ch. D. 122; Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 13. The form of decree will usually be the same as in the case of an ordinary mortgage (*Bell* v. *London and South Western Bank*, [1874] W. N. 10). In some cases reference has been

SECT. 5. Enforcement of Mortgage.

form of a trust for sale, in which case the proper remedy is a sale (*t*).

Where the sum actually advanced is less than £500, although the mortgage is expressed to secure a larger amount, the proceedings may be taken in the county court (*u*).

Costs.

A society is entitled to add the costs of foreclosure proceedings to its security (*w*), unless its conduct has been unreasonable or improper, in which case it may be deprived of its costs and may also be charged with interest on the balance (if any) in its hands (*a*).

Sale of foreclosed land.

Land acquired by foreclosure or surrender or other extinguishment of the right of redemption must be sold as soon as conveniently practicable (*b*).

SUB-SECT. 3.—*Proof in Bankruptcy.*

Future instalments.

781. If an advanced member become bankrupt, and the society prove in the bankruptcy for the amount owing, the proof may properly include the value of such parts of the future instalments as represent interest, but a rebate must be deducted from such parts of the future instalments as represent principal (*c*). A premium is in the nature of capital (*d*).

SECT 6.—*Discharge of Mortgage.*

Reconveyance.

782. When the moneys secured by a mortgage or further charge to an incorporated society have been paid and discharged, the society may execute a reconveyance of the mortgaged property to the then owner of the equity of redemption, or to such persons and to such uses as he may direct (*e*). An unincorporated society likewise may, on payment off of the mortgage, execute a reconveyance (*f*).

Statutory receipt.

783. In the case of both incorporated (*g*) and unincorporated (*h*) societies an alternative mode of revesting the property is provided by statute. The society may, if incorporated, indorse on or annex to, and, if unincorporated, indorse on, the mortgage or further

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made to the rules (*Ingoldby* v. *Riley*, [1873] W. N. 38; *Boney* v. *Charter*, [1887] W. N. 52). See also for a special form Seton, Forms of Judgments and Orders, 6th ed. 2124. As to foreclosure generally, see title MORTGAGE.

(*t*) *Schweitzer* v. *Mayhew* (1862), 31 Beav. 37.

(*u*) *Shields, Whitley, and District Amalgamated Model Building Society* v. *Richards*, [1901] W. N. 106. See title COUNTY COURTS.

(*w*) *Cotterell* v. *Stratton* (1872), 8 Ch. App. 295.

(*a*) Compare *Durham and Northumberland Working Men's Permanent Building Society* v. *Davidson* (1892), 61 L. J. (Q. B.) 473, C. A.

(*b*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 13.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 37, 40, and Sched. II., r. 21; *Re Browne & Wingrove, Ex parte Ador*, [1891] 2 Q. B. 574, C. A. *Re Phillips, Ex parte Bath* (1882), 22 Ch. D. 450, C. A., which was a building society case, is no longer law on this point. See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 233.

(*d*) *Re Phillips, Ex parte Bath* (1884), 27 Ch. D. 509, C. A.

(*e*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 42. The reconveyance cannot properly be made to anyone else (*Fourth City Mutual Benefit Building Society* v. *Williams* (1879), 14 Ch. D. 140, *per* JESSEL, M.R., at p. 146).

(*f*) *Re Page* (No. 2) (1863), 32 Beav. 485. Compare *Carlisle Banking Co.* v. *Thompson* (1885), 28 Ch. D. 398, a friendly society case.

(*g*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 42.

(*h*) Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 5.

charge a receipt; and such receipt vacates the mortgage or further charge, and vests the property comprised in the security in the person for the time being entitled to the equity of redemption.

If the society is unincorporated, the receipt must be in the form specified in the rules of the society and signed by the trustees (*i*); and if incorporated, it must be in the form specified in the schedule to the Building Societies Act, 1874, executed under the seal of the society, and countersigned by the secretary or manager (*j*).

Form of receipt.

A statutory receipt may be delivered as an escrow (*k*).

784. A statutory receipt, whether the society is incorporated (*l*) or unincorporated (*m*), operates to convey the legal estate to the person who has the best right to call for it. If there are subsequent incumbrances, this will in most cases be the next incumbrancer in point of time, but this is not necessarily so. The legal estate will vest in a person who, without notice of an existing second mortgage, pays off the building society and receives the title-deeds with a statutory receipt indorsed on the mortgage (*n*).

Vesting of legal estate by statutory receipt.

The legal estate vests in the person to whom it passes for all purposes. Accordingly, if in the case last mentioned the person who pays off the building society makes a further advance to the mortgagor on the security of the property comprised in the mortgage without notice of the second mortgage, he will be entitled to tack; and the further advance will be payable in priority to the second mortgage, which was prior in point of time (*o*).

A statutory receipt is a final discharge, and after it has been given no claim can be made by the society in respect of any sum secured by the mortgage, even though the receipt was given under a mistake (*p*).

785. If a mortgage or further charge in favour of an incorporated society has been registered under any Act for the registration or record of deeds or titles (*q*), the registrar, or his

Discharge of registered mortgage.

(*i*) Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 5.

(*j*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 42.

(*k*) *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192, where the mortgage with indorsed receipt was handed to the solicitor of the society to be delivered on payment off, and he, without receiving payment, dealt fraudulently with the property, without, however, thereby affecting the title of the society.

(*l*) *Fourth City Mutual Benefit Building Society* v. *Williams* (1879), 14 Ch. D. 140; *Sangster* v. *Cochrane* (1884), 28 Ch. D. 298.

(*m*) *Pease* v. *Jackson* (1868), 3 Ch. App. 576; *Laurence* v. *Clements* (1874), 31 L. T. 670; *Robinson* v. *Trevor* (1883), 12 Q. B. D. 423; *Hosking* v. *Smith* (1888), 13 App. Cas. 582.

(*n*) *Crosbie-Hill* v. *Sayer*, [1908] 1 Ch. 866; and cases cited in notes (*l*) and (*m*), *supra*.

(*o*) *Hosking* v. *Smith* (1888), 13 App. Cas. 582. As to tacking, see title MORTGAGE.

(*p*) *Harvey* v. *Municipal Permanent Investment Building Society* (1884), 26 Ch. D. 273, C. A., overruling *Farmer* v. *Smith* (1859), 4 H. & N. 196; *London and County United Building Society* v. *Angell* (1896), 65 L. J. (Q. B.) 194. These two cases were decided in connection with incorporated societies, but as the provisions in the Acts of 1836 and 1874 are alike, it may be assumed that the law is the same in the case of an unincorporated society. See also *Priestley* v. *Hopwood* (1864), 10 L. T. 646.

(*q*) For registration of deeds and titles generally, see title REAL PROPERTY AND CHATTELS REAL.

SECT. 6. Discharge of Mortgage.

deputy or assistant, or the recording officer, as the case may be, must, on production of the statutory receipt verified by oath, make an entry opposite the entry of the mortgage or charge to the effect that the mortgage or charge is satisfied; and the entry will have the effect of clearing the register or record of the mortgage. The officer must also give a certificate, which may be either indorsed on the mortgage or charge or separate, to the same effect as the entry. The certificate will be received as evidence in all courts and proceedings without any further proof (*r*).

Discharge of charge on registered land.

In the case of both incorporated and unincorporated societies an instrument of discharge of a charge under the Land Transfer Acts, 1875 and 1897 (*s*), in the required form, under the seal of the society, if incorporated, or under the hands and seals of the trustees or other proper officers, if unincorporated, and in either case attested by the secretary, has the same effect in vacating the mortgage and vesting the estate as a statutory receipt (*t*).

A statutory receipt is included in the definition of "assurance" in the Yorkshire Registries Act, 1884 (*u*).

Discharge of copyhold mortgage.

786. If a mortgage to an incorporated society comprising copyholds or lands of customary tenure has been entered upon the court rolls, the steward or his deputy must, on production of the statutory receipt verified by oath, make an entry and grant a certificate to the like effect as is above mentioned with regard to registered mortgages. The certificate is in like manner evidence without further proof (*w*).

SECT. 7.—*Stamp Duties and Income Tax.*

How far exempt from stamp duties.

787. Mortgages to building societies are subject to the same stamp duties as ordinary mortgages, except that a mortgage by a member to an unincorporated society securing a sum not exceeding £500 is exempt from duty (*x*).

Statutory receipts by both incorporated and unincorporated societies and reconveyances by incorporated societies are exempt from duty (*a*).

Income tax.

788. A building society is liable to pay income tax on so much of the payments made by advanced members as represents interest, provided that income tax has not been deducted by the member on payment (*b*). Advanced members are, however, entitled to deduct income tax on so much of the payments made by them as represents

(*r*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 42.

(*s*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65. For form of instrument of discharge see Land Transfer Rules, 1903, r. 166, and Form 48; and Encyclopædia of Forms, Vol. XI., p. 416.

(*t*) Land Transfer Rules, 1903, r. 167.

(*u*) 47 & 48 Vict. c. 54, s. 3. See title REAL PROPERTY AND CHATTELS REAL.

(*w*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 42.

(*x*) *Ibid.*, s. 41; *Walker* v. *Giles* (1848), 6 C. B. 662; Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 89.

(*a*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 41; *Old Battersea and District Building Society* v. *Commissioners of Inland Revenue*, [1898] 2 Q. B. 294; Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 37.

(*b*) *Leeds Benefit Building Society* v. *Mallandaine*, [1897] 2 Q. B. 402, C. A. See title INCOME TAX.

interest (*c*). The deduction must be made at the time of payment, and if the deduction is not so made, the sum cannot afterwards be retained out of future instalments (*d*).

Part IX.—Borrowing and Loans.

SECT. 1.—*Power to borrow and lend Money.*

SUB-SECT. 1.—*Incorporated Societies.*

Power to borrow.

789. Any society incorporated under the Building Societies Act, 1874, may receive deposits or loans at interest within the limits mentioned below from members or other persons, or from corporate bodies, joint stock companies, or terminating building societies (*e*).

Statement in rules of intention to borrow.

The rules of every incorporated society established after August 25, 1894, and of every incorporated society which substitutes a new set of rules for its existing rules after that date, must set forth whether the society intends to borrow money, and if so within what limits not exceeding those prescribed by statute (*f*).

Limitation on amount in case of permanent society.

790. In the case of a permanent society the amount for the time being owing by the society in respect of loans from all sources (*g*) must not exceed two-thirds of the amount for the time being secured to the society by mortgages from its members (*h*). In calculating the amount for the time being secured to the society, no credit may be taken for the amount secured by mortgages payments in respect of which were upwards of twelve months in arrear at the date of the society's last preceding annual account and statement, or by mortgages on properties of which the society had been twelve months in possession at the same date (*i*). It is immaterial whether the mortgages are mortgages in respect of shares or not so long as

(*c*) *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society, Ex parte Wythes* (1885), 53 L. T. 492.

(*d*) *Ibid.*

Owing to the practical difficulties which arise in dealing with income tax questions in connection with building societies, the Board of Inland Revenue has prepared two alternative schemes on the terms of which they are willing to enter into an arrangement with any society desiring it for the payment of income tax, and dispensing with any further question as to the liability of the society and its members in respect of interest. The arrangements are set out in a memorandum issued by the Board, which can be obtained on application at Somerset House.

(*e*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 15 (1).

(*f*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 1.

(*g*) See *Re West Riding of Yorkshire Permanent Benefit Building Society, Ex parte Pullman* (1890), 45 Ch. D. 463, 467.

(*h*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 15 (2). The section contains a saving clause preserving the rights of depositors and lenders in cases where societies had, prior to the passing of the Act, borrowed in accordance with their certified rules sums exceeding this limit.

(*i*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 14. The section further provides that the validity of any deposit or loan which was within the limit provided by law at the time when it was received should not be affected.

SECT. 1. Power to borrow and lend Money.

they are mortgages by members (*k*). Each mortgage is reckoned as a security for the total amount payable thereunder, whether in respect of principal, interest, fines, or otherwise, and no discount is deducted from sums payable *in futuro* (*l*).

Limitation in case of terminating society.

In the case of a terminating society the amount for the time being owing by the society in respect of loans may either be a sum not exceeding the amount which would be permissible in the case of a permanent society, or else a sum not exceeding twelve months' subscriptions on the shares for the time being in force (*m*). A society cannot take advantage of whichever of these limits may at any given time be most advantageous, but must by its rules adopt one of them. If at any time the amount owing by the society in respect of loans exceeds the limit adopted by the rules the borrowing is unauthorised, notwithstanding that the alternative limit is not exceeded (*n*).

Overdraft at bank.

Overdrawing the society's banking account is borrowing (*o*).

One month's notice of withdrawal.

791. An incorporated society may not accept any deposit except on the terms that not less than one month's notice may be required by the managers of the society before repayment or withdrawal. If this requirement is not complied with, the society and every director or member of the committee of management who is a party to the non-compliance is liable on summary conviction to a fine not exceeding £10, and in the case of a continuing offence to an additional fine not exceeding £10 for every week during which the offence continues (*p*).

Indorsement of statutory provisions on security.

Every deposit book or acknowledgment or security of any kind given for a deposit or loan by an incorporated society must have printed or written therein or thereon the whole of the fourteenth and fifteenth sections of the Building Societies Act, 1874 (*q*). The omission to carry out this obligation does not, however, invalidate any security given for a loan (*r*), but the person or persons by whom such omission is made is or are liable upon summary conviction before justices at the complaint of the Registrar to a penalty not exceeding £5 (*s*).

Death of depositor.

792. On the death intestate of a depositor having a sum not exceeding £50 in the funds of an incorporated society the directors

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(*k*) *Re West Riding of Yorkshire Permanent Benefit Building Society, Ex parte Pullman* (1890), 45 Ch. D. 463, 467.

(*l*) *Neath Building Society* v. *Luce* (1889), 43 Ch. D. 158.

(*m*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 15 (3).

(*n*) *Looker* v. *Wrigley* (1882), 9 Q. B. D. 397.

(*o*) *Brooks & Co.* v. *Blackburn Benefit Society* (1884), 9 App. Cas. 857.

(*p*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 15.

(*q*) 37 & 38 Vict. c. 42, s. 15 (5). S. 14 of the Act of 1874 limits the liability of members, as to which see p. 352, *ante*. S. 15 defines the power to borrow, as to which see p. 373, *ante*. As these sections are amended by s. 14 of the Building Societies Act, 1894 (57 & 58 Vict. c. 47), that amendment should also be printed, but there is no statutory requirement to that effect.

(*r*) *Re Guardian Permanent Benefit Building Society* (1882), 23 Ch. D. 440, C. A., reversed on other grounds *sub nom. Murray* v. *Scott* (1884), 9 App. Cas. 519.

(*s*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 43.

may pay the amount due to the person who appears to them to be entitled under the Statutes of Distribution (*t*) without taking out letters of administration. Before making the payment the directors must receive evidence of the death and a statutory declaration that the depositor died intestate, and that the claimant is entitled as above mentioned. Payment in this way is a complete discharge to the society, but any other person claiming to be next of kin or lawful representative of the depositor may take proceedings to recover the amount of the deposit from the person who has received it from the society (*u*).

SUB-SECT. 2.—*Unincorporated Societies.*

Extent of power to borrow.

793. An unincorporated society may borrow money to the extent (*w*) and for the purposes (*a*) authorised by its rules, but not otherwise (*b*). A rule which gives an unlimited power to borrow is valid (*c*). It is not essential that there should be a rule giving an express power to borrow, if on the construction of the rules as a whole it appears that power to borrow is included within their scope (*d*). A rule giving power to borrow so as to make the members personally liable beyond the amount properly payable in respect of their shares would be *ultra vires* (*e*).

Borrowing by officers.

Borrowing by officers in their own names on behalf of the society is borrowing by the society, so as to entitle the officers in the bankruptcy of the lenders to set off against the debt other moneys due from the lenders to the society (*f*). So a society is liable for money in fact lent to it though the promissory note on which it was lent is one on which the directors, and not the society, are liable (*g*).

SECT. 2.—*Exercise of Borrowing Powers.*

SUB-SECT. 1.—*In General.*

Conditions of repayment.

794. A building society may attach conditions to the repayment of money borrowed by it in addition to those required by law as above stated, and these conditions must be complied with before any action will lie against the society for repayment. Thus, a society

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(*t*) 22 & 23 Car. 2, c. 10; 1 Jac. 2, c. 17, s. 7. See further, title DESCENT AND DISTRIBUTION.

(*u*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 29. See p. 353, *ante*. See generally, title DESCENT AND DISTRIBUTION.

(*w*) *Murray* v. *Scott* (1884), 9 App. Cas. 519.

(*a*) *Moye* v. *Sparrow* (1870), 18 W. R. 400; *Re Durham County Permanent Investment, Land, and Building Society, Davis' Case* (1871), L. R. 12 Eq. 516.

(*b*) *Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. App. 309; *Re Victoria Permanent Benefit Building, Investment, and Freehold Land Society, Hill's Case* (1870), L. R. 9 Eq. 605; *Richardson* v. *Williamson* (1871), L. R. 6 Q. B. 276; *Re Professional, Commercial, and Industrial Benefit Building Society* (1871), 6 Ch. App. 856; *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696, C. A.

(*c*) *Murray* v. *Scott, supra*, overruling *Laing* v. *Reed* (1869), 5 Ch. App. 4.

(*d*) *Re Mutual Aid Permanent Benefit Building Society* (1885), 30 Ch. D. 434, C. A.

(*e*) *Re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. 352.

(*f*) *Ex parte Clennell, Re Davies* (1861), 9 W. R. 380.

(*g*) *Heath* v. *Kidegrove Permanent Building Society* (1887), 82 L. T. Jo. 449 (county court case). See p. 340, *ante*.

SECT. 2. Exercise of Borrowing Powers.

may require as a condition precedent to payment production by the lender or someone authorised by him of a loan pass-book, given to him when the loan was made (*h*). A society may also stipulate that, if the available balance in hand is not sufficient to pay all lenders requiring repayment, repayments shall be made according to priority of notice (*i*).

Giving of security.

795. An incorporated society may give security for deposits or loans unless the rules expressly or impliedly forbid it (*k*). An unincorporated society may mortgage specific property to secure loans if the rules expressly or impliedly authorise it (*l*); but a mere power to borrow is not a sufficient ground for such implication, and a declaration in the rules that moneys borrowed are to be a first charge on the property of the society negatives such an implication (*m*).

If security is given, it is a question of the construction of the instrument itself whether it amounts to a mortgage of specific property, or only constitutes a general charge on the assets of the society (*n*).

Personal credit of members.

The directors of a building society have no power to pledge the personal credit of the members as security for the repayment of moneys borrowed (*o*), and a rule professing to give them this power is *ultra vires* and void (*p*). The existence of such a rule will not, however, necessarily invalidate the rule giving the borrowing power, unless the two are so necessarily connected that the one must fall with the other (*p*).

SUB-SECT. 2.—*Excessive Exercise of Borrowing Powers.*

Society not liable for *ultra vires* borrowing.

796. Moneys borrowed by the directors of a society, whether incorporated (*q*) or unincorporated (*r*), in excess of its borrowing powers, create no debt as against the society; and any securities given by the society to secure the loan will be ordered to be delivered up (*s*). Any moneys paid by the society to the lender in discharge of the loan may be recovered back by the society (*t*). If

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(*h*) *Atkinson* v. *Bradford Third Equitable Benefit Building Society* (1890), 25 Q. B. D. 377.

(*i*) *Brett* v. *Monarch Investment Building Society*, [1894] 1 Q. B. 367, C. A.

(*k*) There is no statutory provision in regard to this power of incorporated societies to give charges on specific assets as security for money borrowed by them. Ss. 15 (5) and 19 of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), contain references to security given for a loan which it is apparently assumed that a society has power to give.

(*l*) *Murray* v. *Scott* (1884), 9 App. Cas. 519, *per* Lord BLACKBURN, at p. 556; *Re Durham County Permanent Investment, Land, and Building Society, Wilson's Case* (1871), L. R. 12 Eq. 521; but see *contrd*, *Moye* v. *Sparrow* (1870), 18 W. R. 400.

(*m*) *Murray* v. *Scott*, *supra*.

(*n*) *Jones* v. *Swansea Cambrian Benefit Building Society* (1880), 29 W. R. 382.

(*o*) *Murray* v. *Scott*, *supra*, *per* Lord SELBORNE, at p. 538; *Re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. 352.

(*p*) *Re Mutual Aid Permanent Benefit Building Society* (1885), 30 Ch. D. 434.

(*q*) *Cross* v. *Fisher*, [1892] 1 Q. B. 467, C. A., *per* Lord ESHER, M.R., at p. 478.

(*r*) *Brooks & Co.* v. *Blackburn Benefit Society* (1884), 9 App. Cas. 857; *Re Durham County Permanent Investment, Land, and Building Society, Davis' Case* (1871), L. R. 12 Eq. 516.

(*s*) *Re Guardian Permanent Benefit Building Society* (1882), 23 Ch. D. 440, *per* JESSEL, M.R., at p. 451.

(*t*) *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (1885), 29 Ch. D. 902, C. A.

the lender be the society's banker, he will not, in taking the accounts, be allowed the benefit of the rule that earlier drawings out are, in the absence of specific appropriation, to be attributed to earlier payments in (*a*).

The issue of a deposit note by an incorporated society, in accordance with its borrowing powers, to a person who had at an earlier date, when the society was unincorporated and was without borrowing powers, lent money to the society, does not improve the position of the lender, and the deposit note is unenforceable (*b*).

Personal liability of directors.

797. When an advance to a building society creates no debt against the society because it is not authorised by the rules, the directors of the society, whether incorporated or unincorporated, are personally liable for the amount (*c*). It is not essential that the money should have been applied for the purposes of the society, or that a receipt or acknowledgment should have been signed by the directors, if the money has been received by the person authorised, either expressly or by the course of business adopted, to receive deposits (*d*).

When *ultra vires* loan used to pay off society's debts.

798. If and so far as money lent to a society in excess of its borrowing powers has been applied in the discharge of lawful debts or obligations of the society, the lender is entitled to have his loan treated as valid, as the liabilities of the society are not thereby increased (*e*). He is not, however, entitled to the benefit of any securities held by the creditor so paid (*f*). If the society has given the lender security for the amount of the loan, he may hold the security as a security for the amount applied in paying creditors of the society (*g*). If the money lent has been employed by the society in making advances and security taken in return, the lender to the society is entitled to such security as having been in fact acquired with his own money (*h*), and is entitled to the benefit of the whole amount payable under the security, notwithstanding that, owing to the deduction of a premium or otherwise, the amount actually advanced by the society was less (*i*).

(*a*) *Brooks & Co.* v. *Blackburn Benefit Society* (1884), 9 App. Cas. 857. As to the general rule governing the appropriation of payments, see *Clayton's Case* (1816), 1 Mer. 572; and title BANKERS AND BANKING, Vol. I., p. 586.

(*b*) *Ex parte Watson* (1888), 21 Q. B. D. 301, where the deposit note was issued on the lender's agreeing to refrain from legal proceedings to enforce repayment of the loan.

(*c*) In the case of an incorporated society the liability is statutory (Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 43; *Looker* v. *Wrigley* (1882), 9 Q. B. D. 397). In the case of an unincorporated society, the liability depends on an application of the principle of warranty of authority (*Richardson* v. *Williamson* (1871), L. R. 6 Q. B. 276).

(*d*) *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696, C. A.; *Cross* v. *Fisher*, [1892] 1 Q. B. 467, C. A.

(*e*) *Brooks & Co.* v. *Blackburn Benefit Society, supra.* Compare *Re Wrexham, Mold, and Connah's Quay Rail. Co.*, [1899] 1 Ch. 440, C. A.

(*f*) *Re Wrexham, Mold, and Connah's Quay Rail. Co., supra.*

(*g*) *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1882), 22 Ch. D. 61, C. A., not appealed against on this point, *Brooks & Co.* v. *Blackburn Benefit Society, supra*; see *ibid., per* Lord BLACKBURN, at p. 866.

(*h*) *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (1885), 29 Ch. D. 902.

(*i*) *North Building Society* v. *Luce* (1889), 43 Ch. D. 158.

Part X.—Surplus Funds.

SECT. 1. Investment or other Application.

SECT. 1.—*Investment or other Application.*

Investment by unincorporated societies.

799. Unincorporated societies are, subject to the rules, authorised to invest their surplus funds in real or Government securities, in any of the chartered banks in Scotland, or in the Bank of the Commercial Banking Company of Scotland, and not otherwise (*k*), power being given to alter, transfer, or sell the securities (*l*). The powers of investing trust funds given by statute (*m*) to trustees do not apply to the funds of a building society, such funds being vested in trustees who have no power of investing, but only invest under the direction of the board of directors (*n*). There is no provision in the statutes defining what are "surplus funds"; and, in the absence of any recorded decision on the point, it is presumed that they are such funds as are not, at the time of investment, required for effecting the ordinary purposes of the society.

Investment by incorporated societies.

800. Incorporated societies, as the rules permit, may invest the surplus funds upon real or leasehold securities, in the public funds, in parliamentary stock or securities, and in any stock or securities payment of the interest on which is guaranteed by Parliament (*o*), and in any security in which trustees are for the time being authorised to invest (*p*), and, if terminating societies, also with other incorporated building societies (*q*). They may also invest in Government stock through a savings bank, provided that the Government stock credited by the bank to the society does not exceed £500 stock at any one time (*r*). For the purpose of investments in the public funds or upon the security of copyholds, a society or the directors or committee may appoint or remove trustees (*s*).

Purchase of land.

801. Funds of an unincorporated society may be invested in the purchase (whether from members of the society (*t*) or from strangers) of freehold estates even if the rules do not confer any

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(*k*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 13, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4, except as regards investments in savings banks, in which unincorporated building societies are expressly forbidden to invest by s. 6 of the latter Act.

(*l*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 13, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*m*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1.

(*n*) *Re National Permanent Mutual Benefit Building Society* (1889), 43 Ch. D. 431.

(*o*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 25.

(*p*) Building Societies Act, 1894 (57 & 58 Vict. c. 46), s. 17. See Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 1, 2, 5 (1); Colonial Stock Act, 1900 (63 & 64 Vict. c. 62), s. 2; and title TRUSTS AND TRUSTEES.

(*q*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 25.

(*r*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 16 (1) (b). For the meaning of "savings bank" and of "Government stock," see Savings Bank Act, 1893 (56 & 57 Vict. c. 69), s. 5 and Sched. I; and title BANKERS AND BANKING, Vol. I., p. 576.

(*s*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 25.

(*t*) *Cutbill* v. *Kingdom* (1847), 1 Exch. 494, *per* PARKE, B., at p. 505.

express power to that effect (*a*), and *d fortiori* if they do confer such power (*b*); but the society must be able then and there to make payment in full, and to make it out of surplus funds. No society must do anything that would be tantamount to altering its constitution, such as changing it into a freehold land society (*b*).

An incorporated society may purchase a building for conducting its business, and may purchase land for the purpose only of erecting thereon such a building (*c*).

Mortgage.

A society may lend its surplus funds on mortgage either to strangers (*d*) or to its own members (*e*), and the security in the case of loans to members may be either freeholds (*e*) or leaseholds (*f*).

Permanent investments.

802. The permanent investments of building societies are controlled by the Acts, which give power to invest in certain securities only (*g*).

Following of funds.

Funds of building societies, if improperly invested and in such a condition that they are ear-marked, may be followed and recovered (*h*). But they are not trust funds subject to the general powers of investment given by law to trustees (*i*).

Unauthorised investments.

Unauthorised investment of surplus funds does not put an end to the society or alter its constitution, but at most gives rise to a right to a remedy in equity (*k*). Loans to persons not mentioned in the Acts are not illegal, but only unauthorised, and they therefore would be valid if sanctioned by all the members, and can be recovered from the borrowers (*l*).

Temporary deposits by unincorporated societies.

803. Unincorporated societies may make temporary deposits of their funds in the Bank of England to the account of the National Debt Commissioners, provided no deposit be less than £50 (*m*), and in the funds of any savings banks within the meaning (and subject to the provisions) of the Savings Bank Act, 1828 (*n*), without

(*a*) *Mullock* v. *Jenkins* (1851), 14 Beav. 628.

(*b*) *Grimes* v. *Harrison* (1859), 26 Beav. 435. For the distinction between a freehold land society and a building society, see *ibid.*, *per* Lord ROMILLY, M.R., at p. 441: "Freehold land society buys land with the funds contributed by the members of the society, and then divides it amongst them; but a benefit building society advances to its borrowing members money derived from the subscriptions, and which the borrowing members themselves lay out in the purchase of lands or buildings and then mortgage them to the society." For freehold land societies, see title INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.

(*c*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 37.

(*d*) *Re Kent Benefit Building Society* (1861), 1 Drew. & Sm. 417, *per* KINDERSLEY, V.-C., at p. 424.

(*e*) *Cutbill* v. *Kingdom* (1847), 1 Exch. 494. Such loans, of course, have no connection with advances.

(*f*) *Morrison* v. *Glover* (1849), 4 Exch. 430. These cases (*Re Kent Benefit Building Society, supra*; *Cutbill* v. *Kingdom, supra*; and *Morrison* v. *Glover, supra*) were decisions under the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), but considering the more ample powers of investment given by the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 25, it is submitted that they would apply to incorporated societies also.

(*g*) *Hardy* v. *Metropolitan Land and Finance Co.* (1872), 7 Ch. App. 427.

(*h*) *Ibid.*

(*i*) *Re National Permanent Mutual Benefit Building Society* (1889), 43 Ch. D. 431.

(*k*) *R.* v. *D'Eyncourt* (1864), 4 B. & S. 820.

(*l*) *Re Coltman* (1881), 19 Ch. D. 64 (a friendly society case).

(*m*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 31, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*n*) 9 Geo. 4, c. 92.

SECT. 1. Investment or other Application.

being subject to the restriction as to amount imposed on friendly societies by that Act (*o*).

By incorporated societies.

An incorporated society may make temporary deposits in a savings bank (*p*), provided that the whole amount of the funds of the society, exclusive of Government stock (*q*), credited by the bank to the society does not exceed £300 at any one time (*r*).

SECT. 2.—*Transfer of Stock.*

Transfer of stock of unincorporated societies to persons nominated by court.

804. In the case both of unincorporated societies and of incorporated societies special provisions are made with regard to the transfer of stock in the Bank of England and the Bank of Ireland standing in the names of trustees of building societies. When stock or funds are standing in the names of persons as trustees of an unincorporated society, and the trustees, or any of them, are out of the jurisdiction, or bankrupt, or insolvent, or lunatic, or it is not known whether they or he be living or dead, then the court is empowered to direct that the stock and funds be transferred to such persons as the society may name (or to the other trustee or trustees where all are not so incapacitated), and that the dividends be paid to them accordingly (*s*).

To persons nominated by Registrar on behalf of incorporated societies.

In corresponding circumstances in the case of incorporated societies the Registrar is given power upon a written application from the secretary or other officer of the society and three directors or three members of the committee of management to direct the transfer of stock into the name of any person or persons. The persons to transfer are the surviving or continuing trustee or trustees or in their default the officials of the Bank of England and the Bank of Ireland respectively (*t*).

The application must be in the prescribed form, and accompanied by a statutory declaration verifying the facts, also in prescribed form, and the certificate of the stock (*u*).

Forged Transfer Acts.

Incorporated societies, but not unincorporated societies, come within the Forged Transfers Acts, 1891 and 1892 (*a*).

Part XI.—Disputes.

SECT. 1.—*In General.*

Provision of special tribunals.

805. As building societies are, in the contemplation of the legislature and to a large extent in fact, aggregations of persons of

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(*o*) Friendly Societies Act, 1834 (4 & 5 Will. 4, c. 40), s. 9, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*p*) That is, a trustee savings bank or a post-office savings bank, but no other (Savings Bank Act, 1893 (56 & 57 Vict. c. 69), s. 5 (1)). See title BANKERS AND BANKING, Vol. I., pp. 576—580.

(*q*) See Savings Bank Act, 1893 (56 & 57 Vict. c. 69), s. 5 (2) and Sched. I.

(*r*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 16 (1) (a).

(*s*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 16. See also *ibid.*, ss. 18, 19.

(*t*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 26.

(*u*) Building Society Regulations, 1895, rr. 16—19. A fee of £1 is payable (*ibid.*, r. 41). For the form, see *ibid.*, Forms Q and R; Encyclopædia of Forms, Vol. III., pp. 65—68.

(*a*) 54 & 55 Vict. c. 43, s. 3; 55 & 56 Vict. c. 36, s. 1. As to these Acts, see title COMPANIES.

small means engaged in the pursuit of a desirable object, the policy has been adopted of furthering their efforts by freeing their operations from all unnecessary expense. With this object special provision has been made for the economical settlement of disputes between a society and its members without recourse to the ordinary courts (*b*).

Every society, whether incorporated or unincorporated, must by its rules provide a tribunal to which any disputes between the society and its members or any person claiming under them may be referred for settlement (*b*). In the case of an incorporated society the tribunal must be either arbitrators, the Registrar, or the court (*c*), and in the case of an unincorporated society either arbitrators or the justices of the peace for the county in which the society may be formed (*d*).

Ordinary jurisdiction ousted.

If the matter in difference is a dispute within the meaning of the provisions above referred to, the ordinary tribunals have no jurisdiction to deal with it in the first instance (*e*).

SECT. 2.—*Arbitration.*

SUB-SECT. 1.—*Election of Arbitrators.*

Election of arbitrators.

806. Where the rules of a society direct disputes to be referred to arbitration (*f*), arbitrators must be named and elected in the manner provided by the rules or, if there be no such provision in the rules, at the first general meeting of the society (*g*). Notwithstanding that the rules provide that the election is to be made at the first general meeting, an election at a subsequent meeting would be good (*h*). No one can be chosen as an arbitrator who is interested directly or indirectly in the funds of the society (*i*). The names of the arbitrators must in the case of an incorporated society be entered in the minute book of the society, and in the case of an

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(*b*) See *Thompson* v. *Planet Benefit Building Society* (1873), L. R. 15 Eq. 333, *per* BACON, V.-C., at p. 347; *Prentice* v. *London* (1875), L. R. 10 C. P. 679, 680, 688.

(*c*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16 (9). The court is the county court of the district in which the chief office or place of meeting is situate (*ibid.*, s. 4).

(*d*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 27, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*e*) *Ex parte Payne* (1849), 5 Dow. & L. 679; *Norton* v. *Counties Conservative Permanent Benefit Building Society*, [1895] 1 Q. B. 246, C. A. See further p. 387, *post*.

(*f*) Arbitration as a method of settling disputes is applicable to both incorporated and unincorporated societies, and as the statutory provisions in each case are similar, it is convenient to treat of both classes of societies together. For the principles applicable to arbitrations generally, see title ARBITRATION, Vol. I.

(*g*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 34. The choice in the first instance of arbitrators of an unincorporated society is not now material, as no more unincorporated societies can be formed, but the procedure was in fact the same except that there was no corresponding provision allowing the method of election to be dealt with by the rules.

(*h*) *Christie* v. *Northern Counties Permanent Benefit Building Society* (1889), 43 Ch. D. 62, *per* NORTH, J., at p. 66, such a provision being directory only.

(*i*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 34; Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 27, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

SECT. 2. Arbitration.

unincorporated society in the book in which the rules of the society are entered (*j*).

Vacancy in office.

In case of the death or refusal or neglect to act of any one of the appointed arbitrators, a new arbitrator must be elected to act in his place, such election taking place in the case of an incorporated society at a general meeting of the society (*k*), and in the case of an unincorporated society at the next meeting of the society or of the general committee of the society (*l*).

SUB-SECT. 2.—*Procedure in regard to Arbitration.*

Arbitrators chosen by ballot.

807. In each case of dispute a number of the elected arbitrators not less than three must be chosen by ballot, the number of the arbitrators, which accordingly must be more than three, and the mode of ballot being determined by the rules of the society (*m*). If when a dispute arises for decision there is not a sufficient number of elected arbitrators to enable the dispute to be referred in compliance with the rules, an election of new arbitrators may then be held; and the arbitrators then chosen will be entitled to take part, if chosen, in the decision of the dispute (*n*).

Failure to appoint arbitrators.

If in the case of an incorporated society either party to a dispute fails for forty days to comply with an application under the rules for arbitration, any person concerned may apply to the county court by petition to have the dispute determined (*o*). In the case of an unincorporated society, the rules of which provide for arbitration, if any member or person claiming under a member makes application to the society or an officer thereof to have a dispute settled by arbitration, and such application is not complied with within forty days, any justice may, on complaint on oath, summon the officer of the society against whom the complaint is made, and the dispute may be determined by any two justices (*p*).

Notice of intention to proceed.

808. Notice of the intention to proceed with the reference must be given by the arbitrators to the member who is a party to the

(*j*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 34; Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 27, incorporated in the Building Societies Act, 1836 (6 & 7 Will 4, c. 32), by s. 4.

(*k*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 34.

(*l*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 27, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*m*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 34; Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 27, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*n*) *Norton* v. *Counties Conservative Permanent Benefit Building Society*, [1895] 1 Q. B. 246, C. A., overruling *Christie* v. *Northern Counties Permanent Benefit Building Society* (1889), 43 Ch. D. 62. This was the case of an incorporated society, and it was said that the member should apply for a mandamus to compel the society to elect arbitrators. See, however, as to this case, the Reports of the Chief Registrar of Friendly Societies for the year ending December 31, 1894, Part A, p. 55. Compare in the case of an unincorporated society, *Reeves* v. *White* (1852), 17 Q. B. 995. An alternative and preferable course would be for the member to wait for forty days and then apply to the county court or justices. See *infra*, and pp. 385, 386, *post*.

(*o*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 35 (1).

(*p*) Friendly Societies Act, 1834 (4 & 5 Will. 4, c. 40), s. 7, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

dispute. Notice which might under the rules be sufficient notice to the member in connection with the business of the society is not necessarily sufficient notice by the arbitrators of their intention to proceed (*q*).

Hearing of counsel.

809. The arbitrators may, if they think fit, refuse to hear counsel (*r*).

How far Arbitration Act, 1889, applicable.

810. The provisions of the Arbitration Act, 1889, apply to arbitrations where the reference is made under the rules of a building society so far as such provisions are consistent with the Acts regulating building societies, or with any rules or procedure authorised or recognised by such Acts (*s*).

Case stated by arbitrators.

811. Arbitrators to whom a dispute arising in connection with an incorporated society is referred may, at the request of either party, state a case for the opinion of the Supreme Court on any question of law (*t*), but they cannot be compelled to do so (*a*). The law with regard to unincorporated societies differs in that arbitrators not only may, but can be compelled to, state a case (*b*). There is no appeal from the opinion expressed by the court on a case stated by an arbitrator in the course of a reference (*c*).

Discovery.

812. If the dispute is one arising in connection with an incorporated society, the arbitrators have power to grant to either party such discovery, as to documents and otherwise, as might at the date of the passing of the Building Societies Act, 1874, have been granted by any court of law or equity (*d*). Discovery on behalf of the society is made by such officer as the arbitrators determine (*e*).

Refusal or neglect to make award.

813. If the arbitrators, in the case of an incorporated society, refuse, or for twenty-one days neglect, to make any award, any person concerned may apply to the county court to determine the

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(*q*) Where the rules of a society provided that all summonses, circulars, and notices should be deemed served if posted to the last entered address of a member, and notice of an intention to proceed was posted by the arbitrators, but not received by the member, it was held that the notice was insufficient, and that the arbitrators could not proceed in his absence without giving him further notice (*Hilton* v. *Hill* (1863), 9 L. T. 383).

(*r*) *Re MacQueen and Nottingham Caledonian Society* (1861), 9 C. B. (N. S.) 793. See title BARRISTERS, Vol. II., p. 376.

(*s*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 24; and see generally title ARBITRATION, Vol. I.

(*t*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 36.

(*a*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 20.

(*b*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19; *Tabernacle Permanent Building Society* v. *Knight*, [1892] A. C. 298. This case was decided in connection with the Building Societies Act, 1874 (37 & 38 Vict. c. 42), but it is equally applicable to unincorporated societies. The law has since been changed with regard to incorporated societies, as above stated, by the Act of 1894, but the decision still applies to unincorporated societies.

(*c*) *Re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q. B. 613, C. A., decided on the terms of s. 19 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), but the terms of s. 36 of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), are very similar. See title ARBITRATION, Vol. I., p. 464.

(*d*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 36.

(*e*) *Ibid.*

SECT. 2. Arbitration.

dispute (*f*). In the case of the refusal or neglect to make any award by the arbitrators of an unincorporated society, the dispute may be determined by two justices (*g*). This procedure is also available when an award has been made, but is not binding because not made in accordance with the rules (*h*).

SUB-SECT. 3.—*The Award.*

Majority award.

814. It is not necessary that the arbitrators should be unanimous. An award may be made by a majority (*i*).

Form of award.

There are no statutory provisions regulating the form of the award in the case of incorporated societies, except that the award must limit a time within which it is to be complied with (*k*). In the case of unincorporated societies, the form of the award has been fixed by statute (*l*).

Effect of award.

815. An award made according to the true purport and meaning of the rules (*m*) is binding and conclusive on all parties, and final to all intents and purposes, without appeal, and is not removable into any court of law, or restrainable by the injunction of any court of equity (*n*).

When part of an award is on the face of it *ultra vires*, and is severable from the rest of the award, the court can stay proceedings as to that part (*o*).

Enforcement of award in county court.

816. In the case of an incorporated society, should either of the parties to the dispute refuse or neglect to comply with the award within the time limited therein, the county court, upon proof of the making of the award and of the refusal of the party to comply therewith, will enforce compliance upon the petition of any person concerned (*p*).

(*f*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 35 (1). As to the form of application, see note (*s*), p. 385, *post*.

(*g*) Friendly Societies Act, 1834 (4 & 5 Will. 4, c. 40), s. 7, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4), c. 32, by s. 4.

(*h*) *R.* v. *Grant* (1849), 14 Q. B. 43, *per* Lord DENMAN, C.J., at p. 63. Compare *Bache* v. *Billingham*, [1894] 1 Q. B. 107, C. A., a friendly society case, where an award was held binding though made improperly, but not in a way contrary to the rules of the society.

(*i*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 34; Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 27, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*k*) *Ibid.* The form of award by the Registrar (Building Society Regulations, 1895, Form A) may be adopted.

(*l*) Form annexed to Friendly Societies Act, 1829 (10 Geo. 4, c. 56), incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*m*) See *R.* v. *Grant*, *supra*, at p. 63, where an award was held bad as having been made after hearing the evidence of one side only, the rules providing that evidence on both sides should be heard. Compare *Bache* v. *Billingham*, *supra*.

(*n*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 34, 36; Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 27, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*o*) *Armitage* v. *Walker* (1855), 2 K. & J 211, *per* WOOD, V.-C., at p. 226.

(*p*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 34. The proceedings will be commenced by plaint and summons in the ordinary way, the party claiming to be entitled to the award being plaintiff, and particulars must be filed stating the relief claimed (County Court Rules, 1903, Ord. 41, r. 4). See title COUNTY COURTS.

Enforcement by justices.

In the case of an unincorporated society, if either of the parties refuses or neglects to comply with the award, the party aggrieved may apply to any justice of the peace residing in the county in which the society is held, and such justice may, upon proof of the making of the award and the refusal to comply therewith, summon the defaulting party to appear at a time and place to be named in the summons. Upon the appearance of the defaulting party or, in default of appearance, upon proof of service of the summons, any two justices may deal with the matter and make such order as seems to them just, including a direction to pay costs not exceeding ten shillings (*q*).

Recovery by distress.

If any sum of money awarded by the justices is not immediately paid together with the costs, the justices may by warrant under their hands and seals cause the sum and costs to be levied by distress and sale of the moneys, goods, chattels, securities and effects of the society or party in default, as the case may be, or other legal proceeding, together with the costs of the distress and sale or other proceeding (*q*).

Liability of officers.

If no sufficient distress is found or if the legal proceeding is ineffectual, then the sum and costs above referred to are to be levied by distress of the proper goods of the party or of the officer of the society neglecting or refusing to comply with the award, by other legal proceedings.

An officer of a society, however, who is compelled to pay any sum under an award or order of justices, is entitled to be repaid out of the moneys of the society, or out of the first moneys thereafter received by the society (*q*).

Justice must enforce award as it stands.

Justices, if applied to, are bound to enforce an award once it is made. They are not entitled to go behind the award and consider such questions as whether the society by acting *ultra vires* has not freed the member from any liability for further payments (*r*).

SECT. 3.—*The County Court.*

County court for incorporated societies only.

817. The power of the county court to act in the decision of disputes is confined to disputes arising in incorporated societies. Where the rules of the society direct disputes to be referred to the court or to justices, the county court is the primary tribunal (*s*). But in certain events the court has also jurisdiction where the rules direct disputes to be referred to arbitration, and one party has failed to arbitrate (*t*), or the arbitrators have failed to make an award (*u*).

Powers of county court.

The county court has the same powers of stating a case and granting discovery as arbitrators, and the same provisions apply as to the finality of its determination (*b*).

(*q*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 27, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*r*) *R.* v. *D'Eyncourt* (1864), 4 B. & S. 820.

(*s*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 35 (2). The proceedings will be by plaint and summons in the ordinary way, the member being plaintiff, and the society being defendant (County Court Rules, 1903, Ord. 41, r. 2). Particulars of demand stating the nature of the dispute and the relief claimed must be filed (*ibid.*, r. 3). See title COUNTY COURTS.

(*t*) See p. 382, *ante*.

(*u*) See p. 383, *ante*.

(*b*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 36; and see pp. 383, 384, *ante*; and title ARBITRATION, Vol. I., pp. 462, 464, 470.

SECT. 4. Justices of the Peace.

SECT. 4.—*Justices of the Peace.*

Justices of the peace for unincorporated societies only.

818. The justices play the same part in the case of unincorporated societies as the county court does in the case of incorporated societies.

Enforcing compliance with rules.

Where the rules of the society direct disputes to be referred to justices, any justice may, on complaint being made to him of any refusal or neglect of any member or officer to comply with the rules, summon the person against whom the complaint is made to appear at a time and place named in the summons. Upon appearance of the person summoned or, in default of appearance, upon proof of service of the summons, two justices may proceed to hear and determine the dispute according to the rules of the society (*c*). If the award directs payment of a sum of money, the award may be enforced in the same way as a similar award made by arbitrators (*d*).

Jurisdiction in arbitrations.

The justices also have jurisdiction when the rules direct disputes to be referred to arbitration, and the society has failed for forty days to arbitrate (*e*), or the arbitrators have failed to make an award (*f*).

Reinstatement of expelled member.

819. If justices award that a member who has been expelled from a society should be reinstated they may also award to the expelled member, in default of reinstatement, such a sum of money as they shall think just and reasonable, payment of which may be enforced in the same way as payment of money awarded by arbitrators may be enforced (*g*).

Order of justices conclusive.

820. Every sentence, order, and adjudication of justices in a case in which they have jurisdiction is final and conclusive to all intents and purposes, and is not removable into any court of law or restrainable by injunction of any court of equity (*h*).

SECT. 5.—*The Registrar.*

Registrar.

821. The Registrar (*i*) has jurisdiction to decide a dispute arising in an incorporated society if the rules direct disputes to be referred to him, or if the parties agree to refer the particular dispute to him (*j*). When the rules provide for reference to the Registrar, and either party fails to fill up and execute the portion of the submission

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(*c*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 28, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*d*) *Ibid.*; and see p. 385, *ante*.

(*e*) See p. 382, *ante*.

(*f*) See p. 384, *ante*.

(*g*) Friendly Societies Act, 1834 (4 & 5 Will. 4, c. 40), s. 8, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4. As to enforcement of payment, see p. 385, *ante*.

(*h*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 29, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*i*) See p. 324, *ante*.

(*j*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 34. For form of reference, see Building Society Regulations, 1895, Form A G; Encyclopædia of Forms, Vol. III., p. 63. It must be executed in duplicate (Building Society Regulations, 1895, r. 32), and the Registrar may require statements to be supported by statutory declaration (*ibid.*). If the Registrar desires the parties to appear, he may give notice in Form A H (*ibid.*, r. 33).

relating to his or its case, the other party may send the submission to the Registrar (*k*).

The Registrar may grant discovery (*l*) and state a case on a question of law for the opinion of the Supreme Court (*m*). His award has the same effect as that of arbitrators (*n*), and equally is final and binding (*o*).

Powers of Registrar.

SECT. 6.—*What Disputes must be referred.*

SUB-SECT. 1.—*Unincorporated Societies.*

822. Dealing first with unincorporated societies, the cases have established two principles which serve as a guide.

The first principle is that a dispute, to be referred in accordance with the Acts, must be a dispute between the society and a member in his capacity as member. Thus, a claim by a society against an officer of a society who has purchased land on behalf of the society and endeavoured to retain it for himself, on the pretext that such a purchase would be an *ultra vires* act on the part of the society, is not a dispute which can be referred under the rules of the society (*p*). The question whether or not a person is member of a society is not such a dispute (*q*).

Disputes between societies and members.

The second principle is that, for a dispute to be within the scope of the statutory provisions for reference, the machinery set up by the statutes must be adequate to deal with it completely (*r*).

Statutory procedure must be applicable.

The proper method, therefore, of deciding questions between a society and a member involving claims on the covenants or other provisions contained in a mortgage (*s*), or the right to redeem the mortgaged property (*t*), or accounts as between mortgagor and mortgagee (*u*), is by action in the ordinary courts.

Questions regarding the rights of withdrawing members must be decided by the statutory machinery, and a member who has given a notice of withdrawal which has been accepted by the society still continues to be a member within the meaning of the provisions for referring disputes (*b*).

Withdrawing members.

(*k*) Building Society Regulations, 1895, r. 32.

(*l*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 36. For the form of order, see Building Society Regulations, 1895, Form A K.

(*m*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 36; but this is not compellable (Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 20).

(*n*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 34. For the form, see Building Society Regulations, 1895, Form A I.

(*o*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 36.

(*p*) *Mullock* v. *Jenkins* (1851), 14 Beav. 628.

(*q*) *Prentice* v. *London* (1875), L. R. 10 C. P. 679. Compare *Willis* v. *Wells*, [1892] 2 Q. B. 225; *Palliser* v. *Dale*, [1897] 1 Q. B. 257, C. A.

(*r*) See *Fleming* v. *Self* (1854), 3 De G. M. & G. 997.

(*s*) *Cutbill* v. *Kingdom* (1847), 1 Exch. 494; *Morrison* v. *Glover* (1849), 4 Exch. 430; *Doe d. Morrison* v. *Glover* (1850), 15 Q. B. 103; *Farmer* v. *Giles* (1860), 5 H. & N. 753. *Reeves* v. *White* (1852), 17 Q. B. 995, has not been followed.

(*t*) *R.* v. *Trafford* (1854), 4 E. & B. 122; *Fleming* v. *Self*, *supra*; *Buckle* v. *Lordonny* (1887), 56 L. J. (CH.) 437.

(*u*) *Mulkern* v. *Lord* (1879), 4 App. Cas. 182.

(*b*) *Trott* v. *Hughes* (1850), 16 L. T. (O. S.) 260; *Armitage* v. *Walker* (1855) 2 K. & J. 211; *Wright* v. *Derby* (1866), 4 H. & C. 209; *Hackle* v. *Wilson* (1877)

SECT. 6. **What Disputes must be referred.**

Where the executor of a deceased member has, in accordance with the rules, been dealt with by the directors of a society on the footing that he is in the position of a member, he may be a member for the purpose of having a dispute between him and the society referred to arbitration (*c*).

SUB-SECT. 2.—*Incorporated Societies.*

823. The law on this subject dealing with incorporated societies is practically the same as that with regard to unincorporated societies, except where express provision is made by the rules of a society (*d*).

Definition of "disputes."

The word "disputes" in the Acts regulating incorporated societies, or in the rules of an incorporated society is deemed to refer only to disputes between the society and a member or any representative of a member in his capacity of a member of the society, unless by the rules for the time being it is otherwise expressly provided (*e*). In the absence of such express provision, it does not apply to any dispute between a society and a member or any other person whatever as to the construction or effect of any mortgage deed or any contract contained in any document other than the rules of the society. Subject to the same qualification, it does not prevent the society or member, or person claiming through or under a member, from obtaining in the ordinary course of law any remedy in respect of any mortgage deed or other contract contained in any document other than the rules to which it or he would otherwise be entitled (*f*).

Withdrawing members.

A withdrawing member of an incorporated society continues to be a member for the purpose of referring disputes (*g*).

Misappropriation by officer.

A claim against a former director for sums of money which he is alleged to have received on behalf of the society and appropriated to his own use is a proper case for an action (*h*).

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2 C. P. D. 410; *Johnson* v. *Altrincham Permanent Benefit Building Society* (1883), 49 L. T. 568; *Thompson* v. *Planet Benefit Building Society* (1873), L. R. 15 Eq. 333, where BACON, V.-C., declined to follow *Smith* v. *Lloyd* (1859), 26 Beav. 507, and *Doubleday* v. *Hosking* (1869), L. R. 15 Eq. 344, n.

(*c*) Compare *Kelsall* v. *Tyler* (1856), 25 L. J. (EX.) 153.

(*d*) *Municipal Permanent Investment Society* v. *Richards* (1888), 39 Ch. D. 372, *per* STIRLING, J., at p. 383.

(*e*) *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Martin* (1886), 17 Q. B. D. 609, C. A., *per* FRY, L.J., at p. 618.

(*f*) Building Societies Act, 1884 (47 & 48 Vict. c. 41), s. 2, as interpreted by *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Martin*, *supra*, and altering the law as laid down in *Wright* v. *Monarch Investment Building Society* (1877), 5 Ch. D. 726; *Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 103, C. A.; and *Municipal Building Society* v. *Kent* (1884), 9 App. Cas. 260, all holding that questions concerning mortgages to incorporated societies must be referred.

(*g*) *Walker* v. *General Mutual Building Society* (1887), 36 Ch. D. 777, C. A.; *Davies* v. *Second Chatham Permanent Benefit Building Society* (1889), 61 L. T. 680; *Norton* v. *Counties Conservative Permanent Benefit Building Society*, [1895] 1 Q. B. 246, C. A.

(*h*) *Municipal Permanent Investment Building Society* v. *Richards*, *supra*.

Part XII.—Accounts and Inspection of Books or Affairs.

SECT. 1.—*Accounts.*

SECT. 1. Accounts.

824. Building societies, whether unincorporated or incorporated, are under statutory liability to render accounts. These accounts are of two sorts: those rendered to the society by its officers, or by anyone having any of its assets in possession, and those rendered by the society to its members. Incorporated societies must make suitable provision in their rules for the due taking of the accounts (*i*).

Statutory liability to render accounts.

825. Every person, whether an officer of the society or not (*k*), who has in his possession any of the money, effects, funds, or securities of an unincorporated society, must on demand in writing from the society or from the committee hand in his accounts at the usual meeting of the society, and pay over all moneys in his possession, and transfer all securities (*l*). Similar provisions exist in the case of incorporated societies (*m*).

Accounting to the society.

826. Every society must prepare an annual account, which, in the case of an incorporated society, must be in the form prescribed by, and must contain such particulars as are directed by, the Chief Registrar of Friendly Societies (*n*), and, in particular, must include a general statement of the funds and effects, liabilities and assets, investments and mortgages of, the society. This account must be made up to the end of the official year of the society to which it relates (*o*). The account must be attested by the auditors and countersigned by the secretary or other officer (*p*). A copy of the account must be sent to the Chief Registrar of Friendly Societies within fourteen days after the meeting at which the account was presented, or within three months after the expiration of the official year of the society, whichever period expires first (*a*). A copy must be suspended in a

Annual account by the society.

(*i*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16 (8).

(*k*) *Re Briton Friendly Society* (1852), 1 W. R. 50.

(*l*) Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 14, incorporated in the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), by s. 4.

(*m*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 24.

(*n*) *Ibid.*; Building Societies Act, 1894 (57 & 58 Vict. c. 47), ss. 21 (1), 25 (1). Forms of account, with a memorandum as to the manner of making out the account and statement, are issued by the registry office. For form of account of an incorporated society, see Encyclopædia of Forms, Vol. III., p. 71.

(*o*) Building Societies Act, 1894, s. 2 (1). "Official year" means in the case of societies formed after the passing of the Building Societies Act, 1894, the year ending December 31, and in the case of any other society the year ending with the time up to which its annual account and statement was made at the passing of the Act of 1894 (*ibid.*, s. 2 (4)).

(*p*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 40; Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 2 (2). As to the duties of the auditors in regard to the annual account, see p. 344, *ante*.

(*a*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 2 (3).

SECT. 1. Accounts.

conspicuous place in every office of the society, and every member, depositor, and creditor for loans is entitled to receive a copy (*b*).

Punishment for failing to account.

For any breach of the provisions relating to accounts the society and the officers responsible are liable on summary conviction to a fine not exceeding £20 for each offence, and, for a continuing offence, to an additional fine not exceeding £5 a week (*c*).

Account on dissolution.

When any incorporated society is dissolved, the person having the conduct of the dissolution must send a special and certified balance-sheet to the Registrar within twenty-eight days from the termination of the dissolution (*d*).

SECT. 2.—*Inspection of Books or Affairs.*

Inspection of books by accountant or actuary.

827. The Registrar may, on the application of ten members of an incorporated society who have been members for not less than twelve months, appoint an accountant or actuary to inspect the books of the society and report thereon (*e*).

Costs of inspection.

The applicants must give security for the costs of the inspection, but the Registrar may direct the costs to be paid either by the applicants or the society or the members or officers past or present (*f*).

Conduct of inspection.

The person appointed may make copies or extracts from the books, and the Registrar must communicate the results of the inspection to the applicants and the society (*g*).

Examination of affairs by inspector.

828. The Registrar may also, on the application of one-tenth of the members of an incorporated society or of 100 members in the case of a society consisting of more than 1,000 members, and with the consent of the Secretary of State, appoint an inspector to examine into and report on the affairs of the society (*h*).

Costs.

The applicants must give security for the costs of the inspection, but the Registrar may direct the costs to be paid by the applicants or the society or present or past members or officers (*i*).

Powers of inspector.

The inspector may require the production of all books, securities, and documents, and may examine on oath the officers, members, and servants (*k*).

Circumstances justifying appointment of inspector by Registrar.

The Registrar may appoint an inspector without such application, but with the consent of the Secretary of State, when the society has for two months after notice failed to make correct or complete

(*b*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 40.
(*c*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 21.
(*d*) *Ibid.*, s. 11.
(*e*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 4 (1). For form of application, see Encyclopædia of Forms, Vol. III., p. 80. A fee of £1 is payable (Building Society Regulations, 1895, r. 41). As to investigation with a view to dissolution, see p. 394, *post*.
(*f*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 4 (2).
(*g*) *Ibid.*, s. 4 (3), (4).
(*h*) *Ibid.*, s. 5 (1). For form of application and of statutory declaration to accompany it, see Building Society Regulations, 1895, r. 36, and Forms A I., A M; and Encyclopædia of Forms, Vol. III., pp. 81, 82. A fee of £1 is payable (Building Society Regulations, 1895, r. 41).
(*i*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 5 (2) (c), (d).
(*k*) *Ibid.*, s. 5 (3).

any return required by the Acts, or where evidence is furnished by a statutory declaration of not less than three members of facts which, in his opinion, call for investigation (*l*).

Part XIII.—Amalgamation and Transfer.

Requisites for amalgamation or transfer.

829. Two or more incorporated societies may unite and become one society, with or without any dissolution or division of the funds of such societies or either of them, or an incorporated society may transfer its engagements to any other incorporated society, upon such terms as shall be agreed upon by three-fourths of the members of each of such societies present at general meetings respectively convened for the purpose, provided either (1) that each such three-fourths majority hold amongst them not less than two-thirds of the total number of shares of the particular society (*m*), or (2) that the agreement for union or transfer agreed upon as above mentioned is approved of in writing by the owners of the same proportion of shares of each society, whether present at the meeting or not (*n*).

Notice of the union or transfer must be sent to the Registrar and registered by him (*o*).

Vesting of property on registration.

830. The registration by the Registrar of the notice of union or transfer operates as a conveyance, transfer, and assignment, as at the date of the registration, of the funds, property, and assets of the societies uniting to the united society, or of the society transferring its engagements to the society to which its engagements are transferred, as may be set forth in the instrument of union or transfer. This provision does not, however, apply in the case of stocks and securities in the public funds of Great Britain and Ireland, or in the case of estates in customary or copyhold hereditaments the title to which cannot be transferred without admittance (*p*).

Creditors unaffected.

A union or transfer of engagements does not affect the rights of any creditor of any society uniting or transferring its engagements (*q*).

Unincorporated societies.

Unincorporated societies cannot amalgamate (*r*).

(*l*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 5 (5). For form of declaration, see Encyclopædia of Forms, Vol. III., p. 82. It will be observed that even in this case the Registrar has no authority to defray the expenses out of public funds.

(*m*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 33.

(*n*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 19. For form of resolution for union, see Encyclopædia of Forms, Vol. III., p. 37.

(*o*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 33. The notice must be sent in duplicate (Building Society Regulations, 1895, rr. 30 and 31). For forms of notice, see *ibid.*, Forms A E and A F; and Encyclopædia of Forms, Vol. III., p. 38. A fee of 10*s.* is payable (Building Society Regulations, 1895, r. 41).

(*p*) Building Societies Act, 1877 (40 & 41 Vict. c. 63), s. 5. This is the only reference in the statutes to an "instrument" of union or transfer.

(*q*) *Ibid.*; Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 33.

(*r*) *Re Liverpool etc. Building Society* (1871), 15 Sol. Jo. 177.

Part XIV.—Dissolution and Cancellation or Suspension of Registry.

SECT. 1. Incorporated Societies.

SECT. 1.—*Incorporated Societies.*

SUB-SECT. 1.—*Dissolution by Instrument.*

Instrument of dissolution.

831. A society may be dissolved with the consent of three-fourths of the members holding not less than two-thirds of the shares. Their consent is testified by their signatures to an instrument of dissolution. The instrument of dissolution is binding on all members of the society, and must set forth (1) the liabilities and assets of the society in detail, (2) the number of members and the amount standing to their credit in the books, (3) the claims of depositors and other creditors and the provision made for their payment, (4) the intended appropriation or division of the funds and property of the society, and (5) the names of one or more persons to be appointed trustees for the special purpose and their remuneration (*s*).

Registration.

The instrument must be executed in duplicate (*a*), and must be registered in the same manner as the rules (*b*). When sent for registration the instrument must be accompanied by a statutory declaration by an officer of the society stating that it has been signed in the manner mentioned (*c*).

Signature of instrument.

Each member must sign both duplicates of the instrument (*d*). Joint holders of a share are reckoned as one member in calculating the number of consenting members, but they must all sign the instrument of dissolution, though a member who holds a share jointly with others and also a share in his own name need only sign each duplicate once (*e*). Infant members (*f*) and members who have given notice of withdrawal and have not been paid (*g*) may consent to a dissolution, and must be taken into account in calculating the number of members of the society. The duly authorised agent of a member may sign the instrument on behalf of his principal (*h*).

Subject to the same provisions regarding consents, signature, and registration, the instrument of dissolution may be altered (*i*).

Position during progress of dissolution

832. During the progress of the dissolution the Building Societies Acts continue to apply to the society as if the trustees

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(*s*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32 (3). For form of instrument, see Building Society Regulations, 1895, Form T; and Encyclopædia of Forms, Vol. III., p. 86

(*a*) Building Society Regulations, 1895, r. 20.

(*b*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32 (3).

(*c*) Building Society Regulations, 1895, r. 20. For form of declaration, see *ibid.*, Form U; and Encyclopædia of Forms, Vol. III., p. 87.

(*d*) *Dennison* v. *Jeffs*, [1896] 1 Ch. 611.

(*e*) *Ibid.*

(*f*) *Ibid.*

(*g*) *Sibun* v. *Pearce* (1890). 44 Ch. D. 354, C. A. See p. 359, *ante*.

(*h*) *Dennison* v. *Jeffs*, *supra*. But see *2nd Edinburgh and Leith 493rd Starr-Bowkett Building Society* v. *Aitken* (1892), 29 Sc. L. R. 456, where the Court of Session held that a signature by an agent was not sufficient.

(*i*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32 (3).

appointed under the instrument of dissolution were the board of directors or committee of management of the society (*k*).

Withdrawing members entitled to priority under the rules whose notices have matured before the date of the dissolution retain their priority in a winding-up under an instrument of dissolution (*l*). The representatives of deceased members have priority over withdrawing members (*m*). Priorities.

The rights of members under the rules cannot be altered by the instrument of dissolution, unless the alteration has been previously sanctioned so as to be effective as an alteration of rules (*n*). Alteration of rights by the instrument.

Advanced members cannot on dissolution be compelled to pay the amount payable under their securities or the rules except at the times, and subject to the conditions, therein expressed (*o*). Liability of advanced members.

833. Within fourteen days after the termination of the dissolution notice in duplicate of such termination must be sent to the Registrar (*p*). Returns to Registrar.

Within twenty-eight days after the termination of the dissolution the liquidators, trustees, or other persons having the conduct of the dissolution must send to the Registrar an account and balance-sheet, signed and certified by them as correct, showing the assets and liabilities of the society at the commencement of the dissolution, and the mode in which those assets and liabilities have been applied and discharged. Persons failing to comply with this requirement are subject to a penalty of £5 a day during default (*q*). Accounts etc. of dissolution

834. A trustee of an instrument of dissolution who relies entirely on his co-trustee and takes no active part in the execution of the trust does not act "honestly and reasonably" (*r*), so as to be entitled to claim relief from liability (*s*). Liability of trustees.

SUB-SECT. 2.—*Dissolution under the Rules.*

835. An incorporated society may be dissolved in manner prescribed by its rules (*t*). Dissolution under rules.

Notice in duplicate of the commencement of the dissolution must

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(*k*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 9.

(*l*) *Barnard* v. *Tomson*, [1894] 1 Ch. 374; *Re Counties Conservative Permanent Benefit Building Society*, [1900] 2 Ch. 819; and see p. 360, *ante*.

(*m*) *Re West London and General Permanent Benefit Building Society* (1898), 78 L. T. 393; *Re Counties Conservative Permanent Benefit Building Society*, *supra*; and see p. 361, *ante*.

(*n*) *E.g.*, taking away the priority of members who had given notice of withdrawal (*Botten* v. *City and Suburban Permanent Building Society*, [1895] 2 Ch. 441).

(*o*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 10; *Kemp* v. *Wright*, [1895] 1 Ch. 121.

(*p*) Building Society Regulations, 1895, r. 28. For form of notice, see *ibid.*, Form A C; and Encyclopædia of Forms, Vol. III., p. 91.

(*q*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), 1894, s. 11.

(*r*) See Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3 (1). See further, title TRUSTS AND TRUSTEES.

(*s*) *Re Second East Dulwich 745th Starr-Bowkett Building Society* (1899), 47 W. R. 408.

(*t*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32 (2).

SECT. 1. Incorporated Societies.

be sent to the Registrar within fourteen days after the commencement of the dissolution (*a*).

The same statutory provisions with regard to the Building Societies Acts continuing to apply to the society during the dissolution, with regard to sending an account and balance-sheet to the Registrar on the termination of the dissolution, and with regard to the rights of advanced members, apply as in the case of dissolution by instrument (*b*).

SUB-SECT. 3.—*Dissolution by Award of Registrar.*

Investigation by Registrar.

836. If an application in writing (*c*), stating that the society is unable to meet the claims of its members, and that it would be for their benefit that it should be dissolved, and requesting an investigation into the affairs of the society with a view to dissolution, is made to the Registrar by one-tenth of the members of an incorporated society, or by 100 members where the total number of members exceeds 1,000, the Registrar may investigate the affairs of the society, but he must first give two months' previous notice in writing to the society at its registered chief office or place of meeting (*d*).

Award of Registrar.

If on such investigation it appears that the society is unable to meet the claims of its members and that it would be to their advantage that it should be dissolved, the Registrar may, if he considers it expedient, award that it should be dissolved, and if he so awards must direct how its affairs are to be wound up (*e*). The award may be suspended for a period to enable the society to make such changes in its rules as will, in the opinion of the Registrar, obviate the necessity for dissolution (*f*).

Gazetting of award.

Within twenty-one days after making the award the Registrar must insert notice thereof in the *London Gazette*, and in some newspaper circulating in the county in which the chief office or place of meeting of the society is situate (*g*).

SUB-SECT. 4.—*Winding-up under the Companies Acts.*

Winding-up.

837. An incorporated society may be wound up either voluntarily under the supervision of the court or by the court (*h*).

(*a*) Building Society Regulations, 1895, r. 26 (2). For the form of notice, see *ibid.*, Form A A; and Encyclopædia of Forms, Vol. III., p. 89. A fee of 2*s.* 6*d.* is payable (Building Society Regulations, 1895, r. 41).

(*b*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), ss. 9—11; and see pp. 392, 393, *ante*.

(*c*) For the form of application, see Building Society Regulations, 1895, Form W; and Encyclopædia of Forms, Vol. III., p. 88.

(*d*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 7 (1). For the form of notice, see Building Society Regulations, 1895, Form X.

(*e*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 7 (2). For the form of award, see Building Society Regulations, 1895, Form Y.

(*f*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 7 (2).

(*g*) *Ibid.*, s. 7 (3). For the form of notice, see Building Society Regulations, 1895, Form Z.

(*h*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32 (1). A mere voluntary winding-up does not seem to be authorised. See Palmer's Company Precedents, Part II., 9th ed., p. 716. As to making an order for winding-up by the court when the liquidation has been begun under supervision, see Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 14; and title COMPANIES.

SECT. 1. Incorporated Societies.

Every incorporated society is a company within the meaning of the Companies (Winding-up) Act, 1890 (*i*); and the enactments for the time being in force for the winding up of companies in the Chancery Division of the High Court, whether enacted before or after 1874, apply to the winding up of building societies (*k*); and the same rules, therefore, both as to the court which will have jurisdiction in the winding-up and otherwise, apply to an incorporated society wound up by or under the supervision of the court as would apply to a company registered under the Companies Acts (*l*).

Courts having jurisdiction.

The jurisdiction is vested in the High Court, the Chancery Palatine Courts, and the county courts (*m*). If the capital of the society paid up or credited as paid up exceeds £10,000, the proceedings must be in the High Court or Palatine Court; and if the paid-up capital does not exceed that sum, the proceedings must, if the chief office of the society is within the jurisdiction of a county court having jurisdiction under the Companies (Winding-up) Act, 1890, be in that county court (*n*).

Winding-up in county court.

In the case of incorporated societies wound up in the county court the Companies Acts, 1862 to 1890, and the rules made thereunder, so far as the Acts and rules relate to winding-up, apply, and the winding-up is conducted in all respects as if the societies were companies registered under the Companies Acts (*o*). The costs of winding-up are taxed on the Supreme Court scale (*o*).

Who may petition.

838. In each case the petition for the order of the court must be made either by a member authorised to present the petition on behalf of the society by three-fourths of the members present at a general meeting of the society specially called for the purpose, or by a judgment creditor for not less than £50 (*p*).

(*i*) 53 & 54 Vict. c. 63; Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 8. See before that Act *Re Portsea Island Building Society*, [1893] 3 Ch. 205.

(*k*) *Re Portsea Island Building Society, supra; Jones v. Swansea Cambrian Benefit Building Society* (1880), 29 W. R. 382; *Re Sunderland 32nd Universal Building Society* (1888), 21 Q. B. D. 349.

(*l*) *E.g.*, proceedings against an officer for misfeasance under s. 10 of the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63) (*Re Liberator Permanent Benefit Building Society* (1894), 71 L. T. 406). As to winding up of companies generally, see title COMPANIES. It must, however, be remembered that many provisions of the Companies (Winding-up) Act, 1890, do not apply in the case of a winding-up under supervision (*ibid.*).

(*m*) Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (1).

(*n*) *Ibid.*, s 1 (2), (3). There is no reported decision as to the meaning of capital "paid up or credited as paid up" in the case of a building society, but it would probably be held to mean the amount paid up or credited as paid up on the shares in respect of which no advance had been made. As to which county courts have jurisdiction, see the County Courts (Bankruptcy and Companies Winding-up) Jurisdiction Order, 1899, s. 3, and Sched. I.; Statutory Rules and Orders Revised to December 31st, 1903, iii., title County Court, England, pp. 78—86; and title COUNTY COURTS. As to transfer of proceedings from one court to another, see Companies (Winding-up) Act, 1890, s. 3; Companies (Winding-up) Rules, 1903, rr. 42—47; Statutory Rules and Orders Revised to December 31st, 1903, ii., title Company, England, pp. 31—33; and title COMPANIES.

(*o*) County Court Rules, 1903, Ord. 41, r. 12.

(*p*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32 (4). In the case of the winding up of an incorporated society under the supervision of

SECT. 1. Incorporated Societies.

Notices to Registrar.

Notice of the commencement of the winding-up must be given in duplicate to the Registrar within fourteen days from the date of the supervision or winding-up order, as the case may be (*q*).

Notice of the termination of the winding-up must be given in duplicate to the Registrar within fourteen days after such termination (*r*).

Liabilities of unadvanced members.

839. The liability of an unadvanced member of an incorporated society is limited to the amount which he has actually paid or which at the commencement of the winding-up is in arrear on his shares (*s*). An unadvanced member who has withdrawn is under no liability though the withdrawal was less than a year from the winding-up (*a*).

Liability of advanced members.

The liability of an advanced member is limited to the amount payable on his shares under any mortgage or other security or under the rules of the society (*b*). He may redeem on payment of this amount (*c*), but he cannot be called upon to pay except at the time or times and subject to the conditions expressed in the mortgage or other security or the rules (*d*).

Transfer during compulsory winding-up.

In case of a sale and transfer of shares after a compulsory winding-up order has been made the transferee is not entitled to be registered as owner without the sanction of the court. The court has power to order the register to be rectified by the insertion of the transferee's name, but the exercise of the power is discretionary, and an order will not be made except a strong case is made out (*e*).

SUB-SECT. 5.—*Cancellation or Suspension of Registry.*

When registry cancelled or suspended.

840. Where the Registrar is satisfied that (1) the certificate of incorporation has been obtained by fraud or mistake, or (2) the society exists for an illegal purpose, or (3) the society has wilfully and after notice from the Registrar violated the provisions of any of the Building Societies Acts, or (4) the society has ceased to exist, he may, with the approval of the Secretary of State and after giving not less than two months' notice specifying the grounds for the proposed action (*f*), cancel the registry of a society, or suspend

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the court the society should pass a resolution for a voluntary winding-up in the same manner as if it were a company (see title COMPANIES), and then authorise a member, in accordance with s. 32 (4) of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), to apply for a supervision order.

(*q*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32; Building Society Regulations, 1895, r. 27. A fee of 2*s.* 6*d.* is payable on the registry of any such notice (*ibid.*, r. 41). For the form, see *ibid.*, Form A B; and Encyclopædia of Forms, Vol. III., p. 90.

(*r*) Building Society Regulations, 1895, r. 29. For the form, see *ibid.*, Form A D; and Encyclopædia of Forms, Vol. III., p. 92.

(*s*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 14; *Brownlie* v. *Russell* (1883), 8 App. Cas. 235.

(*a*) *Re Sheffield and South Yorkshire Permanent Building Society* (1889), 22 Q. B. D. 470. See p. 300, *ante*.

(*b*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 14.

(*c*) *Brownlie* v. *Russell* (1883), 8 App. Cas. 235.

(*d*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 10.

(*e*) *Re Onward Building Society*, [1891] 2 Q. B. 463, C. A.

(*f*) For the form of notice, see Building Society Regulations, 1895, Form H.

the registry for any period not exceeding three months, and he may also from time to time, with the like approval, renew the suspension for a similar period (*g*).

When application is made to the Registrar to exercise his compulsory power of cancellation, he may require the application to be made in duplicate and to be supported by a statutory declaration (*h*).

Gazetting of notice.

841. Notice of the cancelling or suspension must be advertised in the *London Gazette* and in some newspaper circulating in the county in which the head office of the society is situate (*i*).

Appeal.

If the registry is cancelled or suspended for a period exceeding six months, an appeal lies to the High Court (*j*).

Cancellation on request of society.

The Registrar may also, if he thinks fit, cancel the registry of a society at the request of the society (*k*).

Effect of cancellation or suspension.

842. A society, after the cancellation or during the suspension of its registry, absolutely ceases to enjoy the privileges of an incorporated society, but without prejudice to any liability incurred by the society, and any such liability can be enforced as if no cancellation or suspension had taken place (*l*). It will become a partnership with individual liability, and, if consisting of more than twenty members, an illegal association (*m*).

SECT. 2.—*Unincorporated Societies.*

SUB-SECT. 1.—*Dissolution.*

Dissolution under Friendly Societies Act, 1829.

843. It is doubtful whether the enactment contained in the Friendly Societies Act, 1829 (*n*), which provides for dissolution with the consent of five-sixths in value of the existing members ascertained in a special manner, is applicable to building societies. It might apply to an unincorporated society if the enactment has been incorporated in the rules (*o*).

(*g*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 6 (1), (2).

(*h*) Building Society Regulations, 1895, r. 9.

(*i*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 6 (2). For form of advertisement, see Building Society Regulations, 1895, Form L.

(*j*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 6 (3).

(*k*) *Ibid.*, s. 6 (4). For form of application, see Building Society Regulations, 1895, Form G. The application must name a newspaper in which the cancellation may be advertised, and must be accompanied by a sum to pay for the advertisement in that paper and in the *Gazette* (*ibid.*, r. 8).

(*l*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 6 (5).

(*m*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4. See *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. at p. 113; *Shaw* v. *Benson* (1883), 11 Q. B. D. 563; *Re Thomas, Ex parte Poppleton* (1885), 14 Q. B. D. 379; and title COMPANIES. For a discussion of the results which would follow from this state of things, see Reports of the Chief Registrar of Friendly Societies for the Year ending December 31, 1894, Part A, pp. 48—50, quoted in Davis's Building Societies, 4th ed., p. 80.

(*n*) 10 Geo. 4, c. 56, s. 26.

(*o*) Compare *Re London and Metropolitan Counties Benefit Building and Investment Society*, [1889] W. N. 18. It may, however, be pointed out that some of the provisions of the Friendly Societies Act, 1829 (10 Geo. 4, c. 56), s. 26, are clearly not applicable to building societies.

SECT. 2. SUB-SECT. 2.—*Winding-up under the Companies Acts.*

Unincorporated Societies.

844. An unincorporated society may be wound up as an unregistered company under the Companies Act, 1862 (*p*), except where the society was established after 1856 and has not been incorporated under the Act of 1874 (*q*).

Winding-up. Jurisdiction.

The court has also jurisdiction to make an order in the case of a society whose certificate of incorporation has been cancelled (*r*).

Seven members at least required.

To give the court jurisdiction the society must have at least seven members at the date of the petition (*s*). Representatives of deceased members, trustees of bankrupt members, and past members, although they may be liable to contribute, are not members (*t*).

Who may petition.

845. The petitioner may be a creditor (*a*) or an unadvanced (*b*) or advanced member (*c*). A petitioner who is a member of the society stands in a different position from one who is a creditor, as he is not entitled to an order *ex debito justitiæ*.

When order made.

The court before making the order will take into consideration the interests of all parties and the circumstances of the case generally (*d*), including the wishes of the majority of the members (*e*). Thus, an order has been refused where it would not have been to the advantage of the members generally (*f*), where it would have been of no service to the petitioner (*g*), where the petitioner had not previously taken the opinion of the members, as required by the rules (*h*), and where the costs of the winding-up would have been too great (*i*).

Vesting of property in liquidators.

846. Any application for an order vesting the property of the society in the liquidator ought to be made in the name of the

(*p*) Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 199—204; *Re No. 3 Midland Counties Benefit Building Society* (1864), 4 De G. J. & S. 468. Compare *Re St. George's Building Society* (1857), 4 Drew. 154; *Re Doncaster Permanent Building Society* (1866), L. R. 3 Eq. 158; *Re Queen's Benefit Building Society* (1871), 6 Ch. App. 815; *Re Cilfoden Benefit Building Society* (1868), 3 Ch. App. 462. See title COMPANIES.

(*q*) *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102. The contrary has been expressly held in Scotland (*Smith's Trustees* v. *Irvine and Fullerton Building Society* (1905), 6 F. (Ct. of Sess.) 99). See note (*g*), p. 325, *ante*.

(*r*) *Re Grosvenor House Property Acquisition and Investment Building Society*, [1902] W. N. 115.

(*s*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 199.

(*t*) *Re Bowling and Welby*, [1895] 1 Ch. 663, C. A. *Re National Permanent Benefit Building Society*, [1867] W. N. 225, *contra*, must be treated as overruled.

(*a*) *Re No. 3 Midland Counties Benefit Building Society, supra.* A person who has lent money for the purposes of a society which has no power to borrow is not a creditor (*Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. App. 309).

(*b*) *Re Queen's Benefit Building Society, supra.*

(*c*) *Re Professional, Commercial, and Industrial Benefit Building Society* (1871), 6 Ch. App. 856, where an order was refused.

(*d*) *Re Ilfracombe Permanent Mutual Benefit Building Society, supra.*

(*e*) *Re Professional, Commercial, and Industrial Benefit Building Society, supra.*

(*f*) *Re Planet Benefit Building and Investment Society* (1872), L. R. 14 Eq. 441.

(*g*) *Re London Permanent Benefit Building Society* (1869), 17 W. R. 513.

(*h*) *Re London and Metropolitan Counties Benefit Building and Investment Society*, [1889] W. N. 18.

(*i*) *Re Second Commercial Benefit Building Society* (1879), 48 L. J. (CH.) 753.

society and served on the trustees (*k*). If there is more than one liquidator, and they sell the real estate of the society, they must all execute the conveyance, otherwise only a share of the legal estate proportionate to the number executing the conveyance will pass (*l*).

Land subject to rent-charge.

Where land subject to a rent-charge is vested in the liquidator of a building society under the order of the court, the liquidator is not personally liable to pay the rent-charge (*m*). After the liquidator has repudiated the land subject to a rent-charge, no claim in the winding-up for arrears of the rent-charge accruing after the repudiation will be allowed (*n*).

Liabilities of members.

847. Apart from liabilities created by special rules and subject to the liabilities in respect of the costs of winding-up and debts owing to outside creditors mentioned below, the position of advanced and unadvanced members of an unincorporated society in a winding-up is similar to that of members of an incorporated society (*o*). Unadvanced members who have withdrawn and advanced members who have redeemed are no longer members, and are subject to no further liability (*p*).

Debts and loans to the society.

All members, advanced and unadvanced, are personally liable without limit for all ordinary debts incurred in the proper carrying on of the business of the society while they were members (*q*). But in respect of moneys lent to the society they are not liable beyond the amounts payable by them under the terms of the rules and tables (*r*).

Unadvanced members.

848. The liability of unadvanced members in regard to other members is limited to the amounts which they have paid or are, under the rules, liable to pay up to the commencement of the winding-up (*s*). They are not liable to calls for the purpose of adjusting the rights of unadvanced members *inter se* (*t*). Unadvanced members who have given notice of withdrawal expiring before the winding-up are entitled to be paid in priority to members who have not given notice (*u*).

Advanced members.

Advanced members are entitled to redeem their mortgages in accordance with the rules, and are not bound to remain to share losses, notwithstanding that they might have been entitled to share

(*k*) *Re Albion Mutual Permanent Building Society* (1888), 57 L. J. (CH.) 248.
(*l*) *Re Ebsworth and Tidy* (1889), 42 Ch. D. 23.
(*m*) *Graham* v. *Edge* (1888), 20 Q. B. D. 683, C. A.
(*n*) *Re Blackburn and District Benefit Building Society, Ex parte Graham* (1889), 42 Ch. D. 343.
(*o*) *Re Middlesbrough etc. Building Society* (1889), 58 L. J. (CH.) 771. See p. 396, *ante*.
(*p*) *Re West Riding of Yorkshire Permanent Benefit Building Society, Ex parte Pullman* (1890), 45 Ch. D. 463.
(*q*) *Re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. 352, applying the doctrine of principal and agent.
(*r*) *Ibid.*, *per* WRIGHT, J., at p. 371, on the ground that borrowing is not necessary for the purposes of the business of a building society.
(*s*) *Re Middlesbrough, Redcar, and Saltburn etc. Building Society, supra.*
(*t*) *Re Doncaster Permanent Building Society* (1867), L. R. 4 Eq. 579.
(*u*) *Walton* v. *Edge* (1884), 10 App. Cas. 33; *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society No. 2* (1885), 53 L. T. 203.

SECT. 2. Unincorporated Societies.

profits if any profits had been made (*w*). They may, however, be required to pay up immediately the amount owing on their securities, less any discount to which they would be entitled on voluntary redemption under the rules (*a*). They are not liable to a call for the purpose of making up any deficiency in the amount owing to unadvanced members (*b*), unless the rules specially so provide (*c*). If, however, there is such a special provision, payment of such a call will be secured by the mortgages given by the members if they purport to secure, in addition to fines etc., "other payments" in respect of their shares (*c*). They are also liable to contribute to the costs of the winding-up (*d*).

If under the rules advanced members are liable for any contribution to losses which the directors may have allotted to them in performance of their duties under the rules, they will be liable for any losses notwithstanding no apportionment has been made before the winding-up (*e*).

Mortgagor non-member.

The fact that a mortgage by a non-member to a society contains a recital that the mortgagor holds certain shares in the society is not sufficient, in the absence of other evidence of membership, to render the mortgagor subject to the liabilities of a member (*f*).

(*w*) *Tosh* v. *North British Building Society* (1886), 11 App. Cas. 489; *Re Middlesbrough, Redcar, and Saltburn etc. Building Society* (1889), 58 L. J. (CH.) 771; *Re Britannia Permanent Benefit Building Society*, [1891] W. N. 123.

(*a*) *Brownlie* v. *Russell* (1883), 8 App. Cas. 235, *per* Lord BRAMWELL, at p. 259; *London Provident Building Society* v. *Morgan*, [1893] 2 Q. B. 266. In both cases the societies were incorporated, but the decisions were given before the passing of the Building Societies Act, 1894 (57 & 58 Vict. c. 47). Six months' notice may be necessary in some cases. See *London Provident Building Society* v. *Morgan*, *supra*, *per* KENNEDY, J., at p. 273.

(*b*) *Re Doncaster Permanent Building Society* (1867), L. R. 4 Eq. 579; *Re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. 352, *per* WRIGHT, J., at p. 373.

(*c*) *Re West Riding of Yorkshire Permanent Benefit Building Society* (1890), 43 Ch. D. 407. See *Re Reliance Permanent Benefit Building Society* (1892), 61 L. J. (CH.) 453, where a call was made to repay preference shareholders.

(*d*) *Re West London and General Permanent Benefit Building Society*, *supra*. See *Re Albion Mutual Permanent Benefit Building Society* (1888), 43 Ch. D. 410, n.

(*e*) *Re Albion Mutual Permanent Benefit Building Society*, *supra*; *Re West Riding of Yorkshire Permanent Benefit Building Society*, *supra*.

(*f*) *Re Victoria Permanent Benefit Building, Investment and Freehold Land Society, Empsom's Case* (1870), L. R. 9 Eq. 597.

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Part I.—Duties of Executors and others as to Burial.

SECT. 1.—*Duty to dispose of Body.*

Mode of disposing of body.

849. Upon the death of any person the duty attaches to the survivors—to use advisedly an indefinite expression—to bury or otherwise dispose of the body. The ordinary method of disposing of the body is by burial; but there is no prohibition against other methods. Thus, even before the statute (*a*) by which the practice is now recognised and regulated, cremation was not unlawful (*b*). Where the body is buried the law does not require that the interment should be in any particular place, nor, if the burial takes place elsewhere than in consecrated ground (*c*), does it prescribe any particular ceremony. Burial in private ground is permissible unless the user of the ground for that purpose amounts to a nuisance (*d*), or involves a breach of some statutory prohibition against burial in the particular locality (*e*). A disregard of decency in the disposal of a dead body would, however, generally be a misdemeanour as amounting to a common nuisance (*f*), and is perhaps a misdemeanour apart from nuisance (*g*).

(*a*) Cremation Act, 1902 (2 Edw. 7, c. 8).

(*b*) *R.* v. *Price* (1884), 12 Q. B. D. 247.

(*c*) "Our Church knows no such indecency as putting the body into the consecrated ground without the service being at the same time performed" (*Kemp* v. *Wickes* (1809, 3 Phillim. 264, *per* Sir J. NICHOLL, at p. 295); and this is still the law unless the conditions of the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), are satisfied. See p. 424, *post*.

(*d*) See *Cowley* (*Lord*) v. *Byas* (1877), 5 Ch. D. 944, C. A., *per* JESSEL, M.R., at p. 951.

(*e*) *E.g.*, the prohibitions referred to at pp. 525, 526, *post*.

(*f*) *R.* v. *Price*, *supra*.

(*g*) The duty to dispose of a dead body has been described as a duty to

SECT. 1. Duty to dispose of Body.

It is a misdemeanour to dispose of a body so as to prevent the holding of an inquest over it in a case where the coroner has reasonable ground for holding an inquest (*h*).

Directions of deceased as to disposal of body.

850. A person cannot by will or otherwise legally dispose of his body after death; and any directions on the matter that he may have given are consequently not legally binding upon his representatives (*i*). There are, however, statutory provisions enabling a person to give effective directions with regard to the anatomical examination of his body after his death (*j*), and the cremation of the remains of a person known to have left written directions to the contrary is prohibited (*k*).

Upon whom duty of disposal lies.

851. The law as to the persons upon whom the duty of disposing of a dead body falls, and as to the nature of that duty (*l*), is imperfectly developed. Such a duty is, however, recognised as incumbent on the executors of the deceased (*m*), on the husband of a deceased wife (*n*), on the parent of a deceased child (*o*), and on any householder on whose premises the body lies (*p*); and neglect of the duty may be a common law misdemeanour (*q*).

Right to possession of body.

852. The law, in general, recognises no property in a dead body (*r*); but it does recognise as incident to the duty to dispose of

bury the body with decency, or to give it "Christian" burial. See *Gilbert* v. *Buzzard* (1820), 3 Phillim. 335, at p. 353; *R.* v. *Stewart* (1840), 12 Ad. & El. 773; *R.* v. *Vann* (1851), 2 Den. 325. And, if the duty is more than a moral duty, a breach of the duty without lawful excuse would seem to be a common law misdemeanour. See title CRIMINAL LAW AND PROCEDURE.

(*h*) *R.* v. *Price* (1884), 12 Q. B. D. 247; *R.* v. *Stephenson* (1884), 13 Q. B. D. 331.

(*i*) *Williams* v. *Williams* (1882), 20 Ch. D. 659.

(*j*) Anatomy Acts, 1832 and 1871 (2 & 3 Will. 4, c. 75 (see particularly ss. 7, 8); 34 & 35 Vict. c. 16). See further, title MEDICINE AND PHARMACY.

(*k*) Cremation Regulations, 1903, r. 3; and see p. 571, *post*.

(*l*) The matter is complicated by the circumstance that a dead body left unburied will generally give rise to a nuisance, and that there are of course duties to obviate or remedy such a nuisance which practically involve the duty of disposing of the body. These duties are, however, from a legal point of view, distinct from the duties referred to in the text.

(*m*) 2 Bl. Com. 508; and see the cases referred to pp. 406, 407, *post*, as to funeral expenses.

(*n*) *Jenkins* v. *Tucker* (1788), 1 Hy. Bl. 91; *Ambrose* v. *Kerrison* (1851), 10 C. B. 776; *Bradshaw* v. *Beard* (1862), 12 C. B. (N. S.) 344, all relating to the recovery of funeral expenses from the husband. And see *Clark* v. *London General Omnibus Co., Ltd.*, [1906] 2 K. B. 648, C. A., *per* FARWELL, L.J., at p. 663.

(*o*) *R.* v. *Vann* (1851), 2 Den. 325, where the father of a deceased child was indicted for failing to bury it, and the court, while expressing the opinion that it was the duty of a parent, if of sufficient means, to provide "Christian" burial for his child (by which, however, they must be taken to have meant no more than that it was his duty to dispose of the body with decency, see p. 404, *ante*), held that the defendant's want of means was a defence, and would have been a defence even if the indictment had been for nuisance arising from the unburied body, although the defendant could have obtained the necessary money from the poor law authorities on loan, as the defendant was not bound to incur a debt. The opinion expressed in this case was, however, doubted in *Clark* v. *London General Omnibus Co., Ltd.*, *supra*, where it was suggested that the obligation on a father to bury his child may be a moral obligation only.

(*p*) *R.* v. *Stewart*, *supra*.

(*q*) See *R.* v. *Vann*, *supra*.

(*r*) See *R.* v. *Sharpe* (1857), 26 L. J. (M. C.) 47, *per* ERLE, J., at p. 48. No

SECT. 1. Duty to dispose of Body.

the body rights to the possession of the body until it is disposed of (*s*). A creditor is not entitled to retain the dead body of his debtor as security for his debt (*t*).

SECT. 2.—*Funeral Expenses.*

Allowance out of deceased's estate.

853. Proper funeral expenses are payable out of the property of the deceased in priority to any other charges (*u*); and the executor will accordingly be allowed in respect of funeral expenses such amount, but such amount only, as is reasonable in the circumstances, regard being had, *inter alia*, to the position in life of the deceased. Less will, however, be allowed where the estate is insolvent, at any rate if the executor knew or had reason to suspect that the estate was insolvent, than in the case of a solvent estate (*w*). The amount that will be allowed in the case of a solvent estate may be affected by the terms of the will (*x*).

Payment of undertaker

854. An undertaker who performs a funeral suitable to the position and circumstances of the deceased may recover his reasonable charges from the executor of the deceased, having assets, without any specific contract (*y*), unless he has given credit to another, in which case the executor is not liable to the undertaker (*a*), but is liable to repay the person who employed the undertaker (*b*).

If, however, the heir of a deceased intestate employs and

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doubt, however, a dead body may in some circumstances be the subject of property, *e.g.*, in the case of a mummy. The shroud in which a dead body is wrapped remains the property of the person to whom it previously belonged, and should be described accordingly in an indictment for stealing the shroud after burial (*Haynes' Case* (1614), 12 Co. Rep. 113).

(*s*) 2 Bl. Com. 508, as explained in *Williams* v. *Williams* (1882), 20 Ch. D. 659, *per* KAY, J., at p. 664. The right is spoken of in that case as being the right of the executors; but no doubt other persons charged with the duty of disposing of the bodies of the dead have similar rights, *e.g.*, a husband in the case of a dead wife.

(*t*) *R.* v. *Fox* (1841), 2 Q. B. 246; *R.* v. *Scott* (1842), 2 Q. B. 248, n., decided with reference to an attempt on the part of a gaoler to detain, on account of pecuniary claims, the body of a debtor dying in prison. See also Ayl. Par. 135.

(*u*) 3 Co. Inst. 202. See title EXECUTORS AND ADMINISTRATORS.

(*w*) See 2 Bl. Com. 508; *Offley* v. *Offley* (1691), Prec. Ch. 26, 27; *Stag* v. *Punter* (1744), 3 Atk. 119, where £60 was allowed where the deceased was apparently of large means, though, as it proved, the solvency of the estate was at least doubtful; *Stacpoole* v. *Stacpoole* (1816), 4 Dow, 209, 227; *Hancock* v. *Podmore* (1830), 1 B. & Ad. 260, where, in the case of a captain on half-pay whose estate was insolvent, £79 was held to be too much, and £20 was suggested as reasonable; *Edwards* v. *Edwards* (1834), 2 Cr. & M. 612, the headnote of which appears to be inaccurate; *Bridge* v. *Brown* (1843), 2 Y. & C. Ch. Cas. 181; and compare *Mullick* v. *Mullick* (1829), 1 Knapp, 245. The former strictness of the common law as to the allowance in the case of an insolvent estate (as to which see *Shelly's Case* (1693), 1 Salk. 296, and *Stag* v. *Punter*, *supra*) is now relaxed. See *Edwards* v. *Edwards*, *supra*.

(*x*) See *Paice* v. *Canterbury* (*Archbishop*) (1807), 14 Ves. 364, at p. 372.

(*y*) *Tugwell* v. *Heyman* (1812), 3 Camp. 298; *Ambrose* v. *Kerrison* (1851), 10 C. B. 776.

(*a*) *Rogers* v. *Price* (1829), 3 Y. & J. 28; *Brice* v. *Wilson* (1834), 3 Nev. & M. (K. B.) 512.

(*b*) See *Green* v. *Salmon* (1838), 8 Ad. & El. 348.

voluntarily pays the undertaker, he cannot recover the amount so paid out of the personalty (*c*).

As the estate of the deceased is chargeable with the funeral expenses, administration will in a proper case be granted to the undertaker as a creditor in respect of such expenses (*d*).

Liability of husband.

855. A husband is liable for the funeral expenses of his wife, at any rate if she leaves no property, even though he may have separated from her altogether, and though she be buried without his knowledge or request; and he is equally liable whether the person who causes the body to be buried is an undertaker or any other person (*e*). But a husband who is his wife's executor is entitled to retain out of her estate the expenses of her funeral, although her will contains no charge of debts or funeral expenses and the estate is insolvent (*f*).

Liability of infant.

856. An infant widow whose husband dies without leaving assets is liable on a contract for the funeral expenses of her deceased husband; but it would seem that an infant is not liable upon a contract for the burial of his parent (*g*).

Persons killed by negligence.

857. The funeral expenses of a person who has been killed by the negligence of another appear to be in no case recoverable from the latter either under the Fatal Accidents Act, 1846 (*h*), or at common law (*i*).

Seamen.

There are statutory provisions as to the funeral expenses of sailors dying while on service, the effect of which is, shortly, to cast the expense on the shipowner if the sailor dies from injuries received in the service of the ship and to provide for the deduction of such expenses from the sailor's wages in other cases (*j*).

Part II.—Churchyards and Burial in Churchyards.

SECT. 1.—*Property etc. in Churchyards.*

Parish churchyards.

858. There is in most parishes a burial ground, usually adjoining the parish church, which is recognised as the parish

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(*c*) *Coleby* v. *Coleby* (1866), 12 Jur. (N. S.) 496.

(*d*) *Newcombe* v. *Below* (1867), L. R. 1 P. & D. 314; *Re Fowler* (1852), 16 Jur. 891.

(*e*) *Jenkins* v. *Tucker* (1788), 1 Hy. Bl. 91; *Ambrose* v. *Kerrison* (1851), 10 C. B. 776; *Bradshaw* v. *Beard* (1862), 12 C. B. (N. S.) 344.

(*f*) *Re M'Myn* (1886), 33 Ch. D. 575.

(*g*) *Chapple* v. *Cooper* (1844), 13 M. & W. 252.

(*h*) 9 & 10 Vict. c. 93 (Lord Campbell's Act).

(*i*) See *Clark* v. *London General Omnibus Co., Ltd.*, [1906] 2 K. B. 648, C. A., following *Osborn* v. *Gillett* (1873), L. R. 8 Exch. 88, and overruling *Bedwell* v. *Golding* (1902), 18 T. L. R. 436.

(*j*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 207 (1), (*b*). As to the application of the section, see *ibid.*, ss. 260—266, and the definition section, *ibid.*, s. 742. See generally, title SHIPPING AND NAVIGATION.

SECT. 1. Property etc. in Churchyards.

churchyard, and, unless closed for burials by Order in Council (*k*), constitutes the ordinary place of sepulture for the parishioners. It is proposed in the present part of this title to deal with certain branches of the law relating to such burial grounds, which it will be convenient to term parish churchyards, and to burial therein, and incidentally to some extent with the law as to burial in consecrated ground generally.

When a burial ground is a parish churchyard.

What conditions must be fulfilled in order that a burial ground should constitute a parish churchyard cannot be stated with certainty. Consecration, actual or presumed, appears to be essential, and there must, no doubt, be an intention that the ground should become a parish churchyard (*l*). If a burial ground has been recognised for any length of time as a parish churchyard, the presumption arises that the necessary conditions have been fulfilled. In some cases statutory provisions prevent there being any question as to whether a burial ground is a parish churchyard (*m*).

Freehold churchyard.

859. Where a parish has no rector, or the rector is himself the incumbent, the freehold of the parish churchyard is, normally at least, in the incumbent. Where, however, there are both a rector and an incumbent, it seems that normally, in the case of an ancient churchyard, the freehold is in the rector (*n*), but that in

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(*k*) See pp. 526 *et seq.*, *post*.

(*l*) The question was touched upon in argument in *Stewart* v. *West Derby Burial Board* (1886), 34 Ch. D. 314, 333.

(*m*) *E.g.*, the enactments in aid of the provision of churchyards referred to at pp. 432 *et seq.*, *post*.

(*n*) That, apart from statutory provisions, the freehold is *primâ facie* in the parson, to use the general expression, is clear (Com. Dig. tit. Eglise, G. 1; Degge's Parson's Counsellor, 7th ed., p. 230). But, while the better opinion seems to be that, where there is a rector distinct from the incumbent, the freehold is, in the absence of statutory provisions to the contrary, in the former (see *Greenslade* v. *Darby* (1868), L. R. 3 Q. B. 421; *Walter* v. *Montague* (1836), 1 Curt. 253, *per* Dr. LUSHINGTON, at p. 260; *Griffin* v. *Dighton* (1864), 5 B. & S. 93, *per* COCKBURN, C.J., at p. 103), there is some authority for the view that the freehold is in the incumbent, at least in the case of a vicar, and not in the rector (Com. Dig. tit. Cemetery, A. 2; Stephen's Commentaries, 14th ed., Vol. II., p. 679, repeating a statement contained in earlier editions; *St. Botolph-without-Aldgate* (*Vicar*) v. *Parishioners*, [1892] P. 161, *per* Dr. TRISTRAM, at p. 167). In *Stewart* v. *West Derby Burial Board*, *supra*, KAY, J., at p. 333, appeared disposed to accept the statement in Stephen's Commentaries, and referred to *Champneys* v. *Arrowsmith* (1867), L. R. 3 C. P. 107, Ex. Ch., as an authority for the same view. In the last cited case, however, though the freehold was taken to be in the vicar, it did not appear whether there was a rector or not, and the point was not discussed, nor was the churchyard in fact an ancient churchyard. And later in *Batten* v. *Gedye* (1889), 41 Ch. D. 507, KAY, J., seems to have considered that the freehold of an ancient churchyard was or might be in the lay rector. It seems that when by the sentence of consecration the landowner renounces all right and title to the land the freehold may thereupon become by operation of law vested in the parson (see *Campbell* v. *Liverpool Corporation* (1870), L. R. 9 Eq. 579); but that the freehold of consecrated ground can be in others, *e.g.*, in trustees, is clear (see the Burial Ground Act, 1816 (56 Geo. 3, c. 141), s. 4; and p. 445, *post*), and the fact that the freehold was in trustees would probably not in itself prevent the burial ground from being a parish churchyard (*Stewart* v. *West Derby Burial Board*, *supra*).

860. The right to the herbage and, subject to what is said below, to the trees in the churchyard is in the incumbent if the freehold is vested in him; and in the case of a vicarage the presumption from general practice and usage is that such right forms part of the vicar's endowment, though the freehold may be in the rector; but the right is *primâ facie* in the rector when he is the freeholder, and the incumbent is a perpetual curate (*q*). *Herbage and timber in churchyard.*

The rector or incumbent is not, however, at liberty to fell the trees inadvisedly, or for purposes other than the repair of the church and the like (*r*). If he does so, he may be restrained by injunction at the instance of the patron of the living (*s*), and may possibly be liable to indictment (*t*). *Felling trees*

Even where the freehold is in the rector, the incumbent is entitled to the possession of the churchyard for the purposes of

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(*o*) Some of the enactments enabling new churchyards to be provided contain provisions for the vesting of the freehold in the incumbent. See pp. 439, 440, 444, *post*. See also the general provisions in the Burial Ground Act, 1816 (56 Geo. 3, c. 141), s. 4, referred to at p. 445, *post*.

(*p*) Y. B. 11 Hen. 4, 12 a, pl. 25; and see *Batten* v. *Gedye* (1889), 41 Ch. D. 507, *per* KAY, J., at p. 516.

(*q*) *Greenslade* v. *Darby* (1868), L. R. 3 Q. B. 421; and see *Cox* v. *Ricraft* (1757), 2 Lee, 373; Lynd. lib. 3, tit. 28, De Communitate Ecclesiæ, p. 267. In 2 Roll. Abr., p. 337, it is said that the right is in the vicar as between him and the rector; but *Bellamie's Case* (1615), 1 Roll. Rep. 255, which is cited with reference to the proposition, appears only to show that the question is triable at law, and not in the Ecclesiastical Court. The case is cited on this point in 2 Roll. Abr., p. 311. See the note in 1 Gib. Cod., pp. 207, 208. Under the Incumbents Act, 1868 (31 & 32 Vict. c. 117), perpetual curates are now in almost all cases styled vicars, but the Act does not alter their legal position.

(*r*) By a document sometimes referred to as 35 Edw. 1, stat. 2 (printed in the Statutes Revised, 2nd ed., Vol. I., p. 79, as among statutes of uncertain date), but which is referred to by Lord COKE in his note on *Liford's Case* (1614), 11 Co. Rep. 46 b, at p. 49 b, as a treatise declaratory of the common law, it is declared that the parson shall not fell the trees "undiscreetly, but only when the chancel of the church doth want necessary reparations, nor shall convert them to any other use by any other means, unless the body of the church do likewise want reparations, and the parsons do of charity think good to give of those trees to the parishioners wanting them." In *Strachy* v. *Francis* (1741), 2 Atk. 217, however, Lord HARDWICKE said that a rector might cut the timber for repairing the parsonage-house as well as the chancel, and mentioned also the repair of pews belonging to the rectory, and obtaining botes for repairing barns and out-houses belonging to the parsonage, as purposes for which the timber might be felled; but in *Greenslade* v. *Darby*, *supra*, BLACKBURN, J., doubted whether Lord HARDWICKE was speaking of trees in a churchyard. See also *A.-G.* v. *Warren* (1844), Cripps' Law of the Church and Clergy, 6th ed., pp. 434, 435.

(*s*) *Strachy* v. *Francis*, *supra*; and see *Bradly* v. *Stratchy* (1740), Barn. (CH.) 399; *Knight* v. *Mosely* (1753), Amb. 176; *Sowerby* v. *Fryer* (1869), L. R. 8 Eq. 417.

(*t*) See *Cox* v. *Ricraft*, *supra*, *per* Sir G. LEE, at p. 375.

SECT. 1. Property etc. in Churchyards.

burials etc., and in respect of such possession may maintain trespass against a wrong-doer (*u*).

Certain powers of control over the churchyard may be exercised by the churchwardens for the avoidance of disturbance or irreverent conduct therein, though these powers are very ill defined (*a*).

How far parson is "owner."

861. The interest which the parson has in the churchyard as freeholder appears to be sufficient to qualify him, other conditions being satisfied, as a parliamentary elector in respect of the ownership qualification (*b*).

The parson appears, however, not to be "owner" of the churchyard within the meaning of statutory definitions of "owner," such as those applicable to the interpretation of the Public Health Acts and the Metropolis Management Acts, to the effect that "owner" means the person receiving the rack-rent of the premises, or who would receive the rack-rent if the premises were let at a rack-rent (*c*).

Incumbent as "occupier."

An incumbent in whom the freehold is vested is the "occupier" of the churchyard; and, if the occupation is of value by reason of his receiving a net income from fees in respect of exclusive rights of burial or rights of erecting monuments etc. in the churchyard, he is rateable accordingly (*d*).

Remedies for unauthorised interference.

862. An unauthorised interference with the churchyard, whether on the part of the rector or incumbent or others, is an offence against ecclesiastical law (*e*). And in a proper case a civil court will grant an injunction to restrain an interference with the churchyard that would constitute an offence against ecclesiastical law (*f*). Such an injunction will be granted at the instance of the

(*u*) See *Jones* v. *Ellis* (1828), 2 Y. & J. 265; *Griffin* v. *Dighton* (1864), 5 B. & S. 93; *Greenslade* v. *Darby* (1868), L. R. 3 Q. B. 421. The first two of these cases relate to the church, and it is not altogether clear how far in the respect in question the position of the churchyard is the same as that of the church.

(*a*) See Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 3; and p. 422, *post*. See also *Marriott* v. *Turpley* (1838), 9 Sim. 279; *Ex parte Blackmore* (1830), 1 B. & Ad. 122, *per* LITTLEDALE, J., at p. 124; *Jones* v. *Ellis*, *supra*; *Worth* v. *Terrington* (1845), 13 M. & W. 781; *Taylor* v. *Timson* (1888), 20 Q. B. D. 671.

(*b*) See *Kirton* v. *Dear* (1869), L. R. 5 C. P. 217; *Beswick* v. *Alker* (1872), L. R. 8 C. P. 265; *Vickers* v. *Selwyn* (1903), 89 L. T. 747; *Wolfe* v. *Surrey County Council* (*Clerk*), [1905] 1 K. B. 439, decided with reference to the parson's freehold in the church. See title ELECTIONS.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4; Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 250. See *Angell* v. *Paddington Vestry* (1868), L. R. 3 Q. B. 714, decided with reference to a church, and explained in *Wright* v. *Ingle* (1885), 16 Q. B. D. 379, C. A.; *R.* v. *Lee* (1878), 4 Q. B. D. 75, also decided with reference to a church.

(*d*) *North Manchester Overseers* v. *Winstanley*, [1908] 1 K. B. 835, C. A.

(*e*) See *Bennett* v. *Bonaker* (1828-9), 2 Hag. Ecc. 25, 3 Hag. Ecc. 17; *Burgoyne* v. *Free* (1829), 2 Hag. Ecc. 456, 662; *Walter* v. *Mountague* (1836), 1 Curt. 253, a case of forming a footpath across a churchyard and making a new gate to it; *Marriott* v. *Turpley*, *supra*; *Batten* v. *Gedye* (1889), 41 Ch. D. 507; and see also the cases cited as to monuments and vaults pp. 416 *et seq.*, *post*. See title ECCLESIASTICAL L

(*f*) *Marriott* v.

churchwardens (*g*), but, in view of the remedies available in the Ecclesiastical Court, not at the instance of a parishioner (*h*).

SECT. 1. Property etc. in Churchyards.

A faculty for the making of alterations etc. in the churchyard may be granted in spite of the opposition of the incumbent or rector, and notwithstanding that such incumbent or rector is the freeholder (*i*); and such a faculty would, it seems, override the rights of the rector or incumbent as freeholder (*k*).

Faculty against wishe of freeholder.

863. In a particular parish, by immemorial usage, the incumbent or the owner of particular land may be bound to maintain the churchyard and its fences. And such a duty, it seems, is enforceable by indictment, or, if the liability is not denied, by proceedings in the Ecclesiastical Court (*l*).

Maintenance of churchyard.

In general, however, it was the duty of the churchwardens to see that the churchyard and its fences were kept in proper repair, and this duty was enforceable at law so long as the payment of church rates, upon which the burden of repair fell, was compulsory (*m*). Since the abolition of compulsory church rates, the duty of churchwardens is limited to effecting repairs out of such funds as may be available for the purpose from voluntary church rates or subscriptions, and has ceased to be a legal obligation ((*n*).

Duty of churchwardens.

Statutory power is vested in the Ecclesiastical Commissioners (as successors of the Commissioners for the execution of the Church Building Acts (*o*)), if they think fit, to alter, repair, pull down, and

Powers of Ecclesiastical Commissioners.

(*g*) *Marriott* v. *Tarpley* (1838), 9 Sim. 279.

(*h*) *Batten* v. *Gedye* (1889), 41 Ch. D. 507.

(*i*) See *Bulwer* v. *Hase* (1803), 3 East, 217; *Tattersall* v. *Knight* (1811), 1 Phillim. 232; *Rich* v. *Bushnell* (1827), 4 Hag. Ecc. 164; *Rugg* v. *Kingsmill* (1867), L. R. 2 P. C. 59; *Keet* v. *Smith* (1876), 1 P. D. 73. Some of these cases relate to the church itself; but in this respect the church and churchyard appear to be in the same position.

(*k*) This seems to be the better opinion; see Cripps' Law of the Church and Clergy, 6th ed., p. 429, referring to the question of monuments in the church. The point has, however, never been definitely decided. It was raised as regards a church in *Bulwer* v. *Hase*, *supra*, where the court refused to prohibit, at the instance of the rector, proceedings for the grant of a faculty for stopping up a window, but without deciding whether the faculty, if granted, would override the rights of the rector in respect of his freehold. See, however, *Frances* v. *Ley* (1615), Cro. Jac. 366, also reported *sub nom. Day* v. *Beddingfield*, Noy, 104; and note (*a*), p. 415, *post*.

(*l*) See *Claydon Churchwardens* v. *Duncombe* (1638), 2 Roll. Abr. 287, tit. Prohibition, 52, where on a denial of the liability a prohibition went to restrain proceedings in the Ecclesiastical Court against a landowner alleged to be liable to repair the churchyard; *R.* v. *Reynell* (1805), 6 East, 315, where a new trial was refused in a case where the vicar had been indicted for non-repair of a churchyard for which he was alleged to be liable, and had been acquitted.

(*m*) In 2 Co. Inst. 489 it is said that the parishioners ought to repair the inclosure of the churchyard, a statement which may be taken to mean that it was their duty to contribute through the church rate to the expense. See Canones Ecclesiastici (1603), 85. See also *Walter* v. *Montague* (1836), 1 Curt. 263, *per* Dr. LUSHINGTON, at p. 260.

(*n*) The abolition of compulsory church rates was effected by the Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), the effect of which is (except in certain cases specially provided for) to make the payment of church rates voluntary, and thus to relieve churchwardens from the absolute duty of providing for the upkeep of church fabrics and ornaments. As to the maintenance of closed churchyards, see pp. 529 *et seq.*, *post*.

(*o*) Church Building Commissioners (Transfer of Powers) Act, 1856 (19

SECT. 1. Property etc. in Churchyards.

rebuild, or order or direct to be altered, repaired, pulled down, and rebuilt, the walls or fences of any existing (*p*) churchyard or burial ground of any parish or chapelry, and to fence off with walls or otherwise any additional or new burial ground set out or provided by virtue of the Church Building Acts; and also to stop up and discontinue or alter or vary, or order to be stopped up and discontinued or altered or varied, any entrance or gate leading into any churchyard or burial ground, and the paths, footways, and passages into, through, or over the same, as to them may appear useless and unnecessary, or as they shall think fit to alter or vary, provided that the same be done with the consent of any two justices of the peace of the county, city, town, or place where any such entrance, gate, path, or passage shall be stopped up or altered, and on notice being given in the manner and form prescribed by the Highway Act of 1815 (*q*).

SECT. 2.—*Consecration of Churchyards and Burial Grounds.*

Consecration by bishop and chancellor.

864. When land is to be consecrated for a churchyard or burial ground (*r*), the bishop and chancellor of the diocese attend upon the land, and a special service of consecration is held, which varies somewhat in different dioceses, but the effective part of which is the act or sentence of consecration, which is read by the chancellor and signed by the bishop (*s*).

Fees.

The total amount of the fees payable when a church and burial ground are consecrated together is twelve guineas, and when a cemetery is consecrated alone ten guineas (*t*).

Consecration of additional ground.

865. Where any ground adjoining an existing (*u*) churchyard has been or is added thereto, the bishop of the diocese may if he thinks fit, at the churchyard or in the church to which it belongs, by his own hand or by the hand of any bishop of the Church of England lawfully appointed as his commissary, sign an instrument

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& 20 Vict. c. 55), s. 1. As to the Ecclesiastical Commissioners, see title ECCLESIASTICAL LAW.

(*p*) As the words "existing churchyard" here used appear to be contrasted with "any churchyard" later in the section, it is probable that this part of the section applies only to churchyards existing in 1819, the date of the Act.

(*q*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 39. The statute of 1815 (55 Geo. 3, c. 68) referred to is repealed by the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 1 (see title HIGHWAYS, STREETS AND BRIDGES); but its provisions as to notices remain applicable to proceedings under s. 39 of the Church Building Act, 1819 (*R.* v. *Stock* (1838), 8 Ad. & El. 405; *R.* v. *Arkwright* (1848), 12 Q. B. 960). There is no appeal against an order of the Commissioners under s. 39 of the Act of 1819, for that section cannot be read as incorporating the provisions of the Act of 1815 as to appeals (*R.* v. *Stock*, *supra*). It is essential to the validity of the order that notice should be duly given before the order is made (*R.* v. *Arkwright*, *supra*).

(*r*) Except where, in cases where it is available, advantage is taken of the statutory method referred to at p. 413, *post*.

(*s*) As to the form of service etc., see title ECCLESIASTICAL LAW.

(*t*) The fees are fixed by a table settled by the two archbishops and the Lord Chancellor and confirmed by Order in Council of December 10, 1895, under the Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 131, and the Ecclesiastical Fees Act, 1867 (30 & 31 Vict. c. 135). See Statutory Rules and Orders revised to 1903, Vol. IV., Ecclesiastical Fees, 1.

(*u*) This probably means existing for the time being.

declaring or recording the consecration of such ground, without the presence of the chancellor or registrar of the diocese being necessary. The signature of the bishop to such instrument is to be attested by the chancellor, or by a surrogate, or by any two clergymen of the diocese, and is to be in the following form, indorsed on a plan of the ground so added: "I, A. B., Bishop of , do hereby declare and record the ground added to the churchyard of , as on the within plan, to be consecrated ground and part of the said churchyard." Such instrument so signed and attested, on being deposited in the registry of the diocese, has the same effect as a sentence of consecration (*a*). SECT. 2. Consecration of Churchyards etc.

In such case no officer of the bishop or of the diocese is to receive any fee for attendance at the consecration, or any allowance for travelling or for attendance (*b*); but a fee of five shillings is payable to the registrar for the deposit of the instrument of consecration (*c*). Fees.

SECT. 3.—*Right of Burial.*

866. Every parishioner and inhabitant of a parish and every person dying within the parish has the right to be buried in the parish churchyard or burial ground (*d*). The right is enforce- Persons having right

(*a*) Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), s. 1. Land may "adjoin" an existing churchyard within this section, though separated from it by a highway (*Re Bateman (Baroness) and Parker*, [1899] 1 Ch. 599).

(*b*) Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), s. 2.

(*c*) *Ibid.*, s. 3.

(*d*) While the existence of the right is clear, the authority as to the persons by whom it is enjoyed is meagre. In Com. Dig. tit. Cemetery, A. 2, the inclosure of the churchyard is spoken of as "belonging" to the "parishioners," but this appears to mean only that the duty of inclosing the churchyard and of repairing the walls etc. rests upon the parishioners; see Com. Dig. tit. Prohibition, G. 3; and in Com. Dig. tit. Cemetery, B., it is said that "every person may have burial in the churchyard [*sc.* of the parish] where he dies." In Degge's Parson's Counsellor, 7th ed., p. 175, there is a similar statement, and also a quotation from the canon law: "ubi decimas persolvebat vivus sepeliatur mortuus." In *Ex parte Blackmore* (1830), 1 B. & Ad. 122, the right was spoken of as being that of the "parishioners," and in *Hughes v. Lloyd* (1888), 22 Q. B. D. 157, as being that of the inhabitants or residents. The right is referred to in statutes in various ways, *e.g.*, in the Burial Acts it is spoken of in some cases as the right of the "parishioners and inhabitants," in others as the right of the parishioners and persons dying in the parish, while in s. 2 of the Church Building Act, 1827 (7 & 8 Geo. 4, c. 72), it is spoken of as the right of persons dying in the parish. In the enactments mentioned at pp. 540, 541, *post*, it seems to be assumed that the right extends to paupers chargeable (apart from the modern legislation as to chargeability to unions) to the parish.

To speak of the deceased as having a right of burial involves some laxity of language, but the expression is convenient and sanctioned by usage.

Formerly persons unbaptised or excommunicate or *felo de se* were excluded from Christian burial (see p. 421, *post*), and as, according to ecclesiastical law, no one could be buried in consecrated ground without the Church service (*Kemp v. Wickes* (1809), 3 Phillim. 264, at p. 295), they might thus be excluded from burial in the parish churchyard. But the ecclesiastical law was never allowed to prevail over the common law right so as to exclude such persons from burial in the churchyard (*R. v. Taylor* (1721), Burn, Ecclesiastical Law, Vol. 1., p. 258, cited in *Andrews v. Cuthorne* (1745), Willes 536, at p. 538, where it was held that an information could be granted against a parson for opposing

SECT. 3. Right of Burial.

able at common law and not merely in the Ecclesiastical Court (*e*).

Districts of parish.

If a parish is divided into ecclesiastical districts under the Church Building Acts, and there is no burial ground within any such district, then, until a burial ground has been provided, the bodies of persons dying within such district may be interred in the cemetery of the parish church in all respects as if such division had not taken place (*f*). But when any such district which has become a new parish by virtue of the New Parishes Act, 1856 (*g*), has a burial ground of its own, the inhabitants of the district lose the right of being buried in the churchyard of the mother parish (*h*).

Non-parishioners.

867. Strangers to the parish, that is, persons not connected with the parish so as to have the right of burial under discussion, are in practice not infrequently buried in the parish churchyard with the permission of the incumbent and churchwardens, and it seems that such burials do not necessarily involve any breach of the common law or of ecclesiastical law (*i*). The common practice of incumbents to allow strangers to be buried in the churchyard without obtaining the consent of the churchwardens is not supported by any authority (*k*).

The burial of strangers to the parish in the parish churchyard without a faculty in that behalf, however, if it causes actual inconvenience to the parishioners, is an offence against ecclesiastical law (*l*), and might probably be restrained by injunction (*m*).

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the burial of an unbaptised parishioner in the churchyard, though the Court of King's Bench refused to interpose as to the reading of the service over the deceased). Now s. 13 of the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), makes it clear that such persons have the right of burial in the churchyard, though not with the full Church service; see pp. 421, 428, *post*.

(*e*) *R.* v. *Taylor* (1721), Burn, Ecclesiastical Law, Vol. I., p. 258, cited in *Andrews* v. *Cawthorne* (1745), Willes, 536, at p. 538; and see *R.* v. *Coleridge* (1819), 2 B. & Ald. 806.

(*f*) Church Building Act, 1827 (7 & 8 Geo. 4, c. 72), s. 2, the operation of which, though confined in terms to cases where districts have been created under the Church Building Act, 1818 (58 Geo. 3, c. 45), appears to be extended by the Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 25, to all districts created under any of the Church Building Acts. In *Bliss* v. *Woods* (1831), 3 Hag. Ecc. 486, at p. 521, Sir J. NICHOLL spoke of s. 2 of the Act of 1827 as "hardly required." See also *Hughes* v. *Lloyd* (1888), 22 Q. B. D. 157.

(*g*) 19 & 20 Vict. c. 104. As to this Act, see title ECCLESIASTICAL LAW.

(*h*) *Hughes* v. *Lloyd*, *supra*.

(*i*) See *Bardin* v. *Calcott* (1789), 1 Hag. Con. 14, where Lord STOWELL (then Sir W. SCOTT), at p. 17, would appear to have regarded the incumbent and churchwardens as competent to give permission for the burial of strangers to the parish in the churchyard, though saying that the permission should be sparingly granted. See also *Littlewood* v. *Williams* (1815), 6 Taunt. 277; *Nevill* v. *Bridger* (1874), L. R. 9 Exch. 212.

(*k*) See *A.-G.* v. *Strong*, (1868), referred to in 1 Seton's Forms of Judgments and Orders, 6th ed., p. 559. See note (*m*), *infra*.

(*l*) See Burn, Ecclesiastical Law, Vol. I., p. 258, referring to an unreported case of *Harrow-on-the-Hill Churchwardens*; *Littlewood* v. *Williams*, *supra*.

(*m*) In *A.-G.* v. *Strong*, *supra*, an interim injunction (afterwards made perpetual by consent) was granted restraining an incumbent from permitting the burial of strangers in the parish churchyard without the consent of the churchwardens and parishioners; but the case is not reported, and the circumstances in which the injunction was granted do not appear.

868. The right to burial does not entitle the representatives of the deceased to insist upon the burial of the deceased in any particular part of the churchyard (*n*), and there cannot be a good custom entitling the inhabitants of a particular parish to be buried as near as possible to their ancestors (*o*).

Limits of right.

869. The right of burial extends only to burial in an ordinary manner. Thus, it does not carry with it a right to the erection of a monument (*p*), or the construction of a vault (*q*). And, while the right of burial is, as has been said, enforceable at common law, the question as to the particular manner of burial is within the exclusive cognisance of the Ecclesiastical Court (*r*). The Ecclesiastical Court will in general treat burial in an iron coffin as proper, provided that a reasonable payment is made in respect of the privilege (*s*).

SECT. 4.—*Burial in Churches.*

Burial in church on issue of faculty.

870. Parishioners and others entitled to a right of burial in the parish churchyard have not, as such, any right to burial within the church (*t*). And it seems that the construction of a vault for burial under a church, and possibly the burial of a body in the church apart from the construction of a vault, without a faculty in that behalf, even with the consent of the incumbent or rector in whom the freehold is vested, is an offence against ecclesiastical law. A faculty may issue for the purpose notwithstanding the opposition of the incumbent or rector, and such a faculty would apparently override the rights of the incumbent or rector as freeholder (*a*). And, on the other hand, a rector in whom the freehold is vested is not entitled as of right to the

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(*n*) *Ex parte Blackmore* (1830), 1 B. & Ad. 122. It was said in this case that the discretion as to the particular part of the churchyard in which a burial should take place was in the incumbent and churchwardens. But the question as to the person or persons with whom the decision ultimately rests, *e.g.*, in case of difference between the incumbent and churchwardens, or where there are other interests in the churchyard besides those of the incumbent and churchwardens, was not under consideration. See also *North Manchester Overseers* v. *Winstanley*, [1908] 1 K. B. 835, C. A., *per* BARNES, P., at p. 842.

(*o*) *Fryer* v. *Johnson* (1755), 2 Wils. 28.

(*p*) See pp. 416, 417, *post*.

(*q*) See p. 419, *post*.

(*r*) *R.* v. *Coleridge* (1819), 2 B. & Ald. 806; *Ex parte Blackmore*, *supra*. See title ECCLESIASTICAL LAW.

(*s*) This seems to be the effect of the decision in *Gilbert* v. *Buzzard* (1820), 3 Phillim. 335.

(*t*) As to the history of the practice of burying in churches, see Kennett, Parochial Antiquities 591, 592; *Gilbert* v. *Buzzard*, *supra*; *Rich* v. *Bushnell* (1827), 4 Hag. Ecc. 164, 171.

(*a*) See *Rich* v. *Bushnell*, *supra*; *Rugg* v. *Kingsmill* (1867), L. R. 2 P. C. 59; and see note (*k*), p. 411, *ante*. The resolution in the Star Chamber in *Frances* v. *Ley* (1615), Cro. Jac. 366, also reported *sub nom. Day* v. *Beddingfield*, Noy, 104, that "neither the ordinary himself nor the churchwardens can grant licence of burying to any within the church but the parson only, because the soil and freehold of the church is only in the parson, and in none other," cannot apparently now be regarded as law.

SECT. 4. **Burial in Churches.**

issue of a faculty authorising him to construct a vault under the church (*b*).

A right of burial in a church may, however, be prescribed for as belonging to a messuage (*c*).

Prescription.

Statutory restrictions.

871. There are certain statutory prohibitions against burial in or near churches.

In the first place, there is a prohibition (which, however, does not extend to prevent burial in a vault wholly arched with brick or stone constructed for the purpose under the church or chapel, and to which the only access is by steps outside the church or chapel) against breaking the pavement or opening the soil within a church or chapel erected under the Church Building Acts for the purpose of burial, or constructing a grave in a cemetery or churchyard adjacent or belonging to the church or chapel within twenty feet from its external walls. Breach of this prohibition is punishable by penalties recoverable summarily (*d*).

Again, no vault or grave may be constructed or made within the walls of or underneath any church or other place of public worship built in any urban district after August 31, 1848; and a breach of this prohibition entails liability to a penalty recoverable in an action of debt (*e*).

SECT. 5.—*Monuments in Churches and Churchyards.*

Faculty strictly necessary for erection of monument.

872. In strictness it would seem that a person who places a monument to the dead in a church or churchyard otherwise than in pursuance of a faculty in that behalf renders himself liable to a criminal suit in the Ecclesiastical Court (*f*); and there cannot, it

(*b*) *Rich* v. *Bushnell* (1827), 4 Hag. Ecc. 164.

(*c*) *Waring* v. *Griffiths* (1758), 1 Burr. 440; *Harvey's Case*, Co. Ent. 8, cited in *Downey* v. *Dee* (1621), Cro. Jac. 605; 1 Gib. Cod. 453.

(*d*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 80. The prohibition does not apply to the burial of the ashes of a body that has been cremated (*Re Kerr*, [1894] P. 284).

(*e*) Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 83, repealed and re-enacted by s. 343 and Sched. V. of the Public Health Act, 1875 (38 & 39 Vict. c. 55). Whether the prohibition attaches in the case of a church built after August 31, 1848, but before the locality was included in an urban district, is not clear.

(*f*) See *Palmer* v. *Exeter* (*Bishop*) (1724), 1 Stra. 576; *Maidman* v. *Malpas* (1794), 1 Hag. Con. 205; *Beckwith* v. *Harding* (1818), 1 B. & Ald. 508; *Seager* v. *Rowle* (1823), 1 Add. 541; *Rich* v. *Bushnell*, *supra*. There are passages in the judgment of Lord STOWELL (then Sir W. SCOTT) in *Bardin* v. *Calcott* (1789), 1 Hag. Con. 14, which might be understood as supporting the view that under some circumstances, at any rate by custom, the leave of the churchwardens would be sufficient to completely legalise the erection of tombstones in a churchyard. But, unless, as seems improbable, there is some distinction in this respect between ordinary tombstones and more important monuments, the later cases cited above seem conclusively to negative this view. In *Hopper* v. *Davis* (1754), 1 Lee, 640, it was said, with reference to a tombstone set up in a church, that "the tombstone was originally set up by a proper authority, it having been done with the parson's consent; for though the ordinary may interpose and order a monument to be taken down if it is inconveniently placed, yet if he does not interpose, the parson's consent is sufficient"; but probably this means no more than that the Ecclesiastical Court will not necessarily order the removal of a monument merely because it was in the first instance erected without a faculty. See the reference to the case in Phillimore, Ecclesiastical Law, 2nd ed., Vol. I., p. 693.

seems, be a valid custom for the erection of such monuments in a particular church, even with the consent of the churchwardens or the like, without a faculty (*g*). In practice, however, a faculty is seldom sought in ordinary cases. The leave of the incumbent or churchwardens, or both, together with that of the rector where the freehold is vested in a rector other than the incumbent, is obtained, and is treated as sufficient authority without more (*h*).

Erection without consent a trespass.

The placing of monuments in a church or churchyard without a faculty in that behalf is further an act of trespass, in respect of which the incumbent or rector, as the case may be, has a cause of action if his consent has not been obtained (*i*).

Issue and effect of faculty.

Although, however, the consent of the incumbent, and of the rector also where his rights will be affected, should be sought before application is made for a faculty for the erection of monuments, the withholding of such consent will not necessarily prevent the issue of a faculty (*k*); and the better opinion seems to be that the faculty will justify the erection of the monument notwithstanding the rights of property of the incumbent or rector (*l*).

Appeal as to grant of faculty.

An appeal to the superior Ecclesiastical Court lies from the decision of the ordinary with regard to the grant of a faculty for the erection of a monument (*m*).

Repair.

A faculty is not necessary to authorise the repair of a monument that has been lawfully erected (*n*).

(*g*) See *Beckwith* v. *Harding* (1818), 1 B. & Ald. 503; *Seager* v. *Bowle* (1823), 1 Add. 541. In the former of these cases, though Lord ELLENBOROUGH, C.J., at p. 517, should perhaps be understood as having decided no more than that the particular custom there set up for the churchwardens to erect monuments at their free will and pleasure was bad, BAYLEY, J., at p. 518, said that the custom was "against the general rule of law, which requires the consent of the ordinary, and is therefore bad." In *Seager* v. *Bowle*, *supra*, the High Court of Delegates ordered an allegation in the defendant's pleadings to the effect that in the particular parish it had been usual and customary previous to the erection of any monument to obtain the consent of the minister and churchwardens, but not to apply for the consent of the ordinary except in particular cases, to be expunged, and thus, as explained in a note to the case by the learned editor at p. 554, may be taken to have expressed its final judgment that no practice can absolutely legalise the erection of a monument without a faculty.

(*h*) In *Maidman* v. *Malpas* (1794), 1 Hag. Con. 205, where it was held that a criminal suit would lie in the Ecclesiastical Court against one who had erected a monument in the chancel, without, it should be said, obtaining the consent of the incumbent or rector, Lord STOWELL (then Sir W. SCOTT) said at p. 208: "There can be no question as to the jurisdiction of the court, which is established by its own decisions, and those of the temporal courts, that no monument can be erected without leave of the ordinary. All parishioners have a right to be buried in the churchyard without leave of the incumbent; but the permission of the ordinary is necessary before any monument can properly be erected. . . . The consent of the incumbent is taken on such occasions, and especially of the rector, for monuments in the chancel. A faculty likewise is required, though it is frequently omitted under the confidence reposed in the minister, and the Ecclesiastical Court is not eager to interpose."

(*i*) *Beckwith* v. *Harding*, *supra*.

(*k*) See p. 411, *ante*.

(*l*) *Ibid.*

(*m*) *Cart* v. *Marsh* (1738), 2 Stra. 1080; *Bulwer* v. *Hase* (1803), 3 East, 217.

(*n*) *Bardin* v. *Calcott* (1789), 1 Hag. Con. 14, where it was said that the consent of the churchwardens should be asked where it was desired to repair a monument, but that the churchwardens would be bound to grant such consent.

SECT. 5. **Monuments in Churches and Churchyards.**

Even where a monument has been placed in a church or churchyard without due authority, its removal without a faculty is an offence against ecclesiastical law (*o*).

Inscriptions on monuments.

873. The nature of an inscription proposed to be placed on a monument in a church or churchyard may constitute a ground for the refusal of a faculty for the erection of the monument (*p*). Or, again, the question of the propriety of an inscription on such a monument may in some cases be raised directly by a criminal suit in the Ecclesiastical Court against a person who is alleged to have put up an inscription of an unlawful character (*q*). It is the duty of the incumbent to superintend the placing of inscriptions on monuments, but the discretion of the incumbent may be overruled by the ordinary or by the superior Ecclesiastical Courts, and a faculty granted without the incumbent's consent, if such consent is unreasonably withheld (*r*).

Property in monuments.

874. A monument set up in a church or churchyard remains the property of the person by whom it is set up during his life, and that person may accordingly sustain an action for trespass against anyone removing or defacing it (*s*); and it is said on high authority that after the death of the person setting it up the monument becomes the property of the heir of the deceased in whose honour it was erected, and descends to the heirs of the latter, as being in the nature of an heirloom, and at any rate that such heirs may sustain an action if the monument be interfered with (*t*).

Alteration of monuments.

The alteration of monuments may, however, be authorised by

(*o*) See *Hutchins* v. *Denziloe* (1792), 1 Hag. Con. 170, *per* Lord STOWELL (then Sir W. SCOTT), at p. 172; *Maidman* v. *Malpas* (1794), 1 Hag. Con. 205, 212; and see *Ritchings* v. *Cordingley* (1868), L. R. 3 A. & E. 113; *Vincent* v. *Eyton*, [1897] P. 1.

(*p*) See *Keet* v. *Smith* (1876), 1 P. D. 73, where on appeal to the Privy Council a faculty was ordered to issue in a case where the incumbent had objected to an inscription on the ground that it was proposed that a Wesleyan minister should be styled "Reverend"; *Egerton* v. *All of Odd Rode*, [1894] P. 15.

(*q*) *Brecks* v. *Woolfrey* (1838), 1 Curt. 880, where it was held that an inscription, "Pray for the soul of J. Woolfrey. 'It is a holy and wholesome thought to pray for the dead' (2 Macc xii. 46)," was not open to objection as being contrary to the doctrines of the Church. This decision was distinguished in *Egerton* v. *All of Odd Rode*, *supra*, where a faculty for a stained glass memorial window bearing the words "De caritate tua ora pro anima H . . . mortuæ . . . et pro anima J . . . mortui . . ." was refused. And in *Pearson* v. *Stead*, [1903] P. 66, where a monument with the words "of your charity pray for the repose of the souls of W. —, also of G. —," had been erected in a churchyard, a confirmatory faculty for the retention of the monument was refused, and a faculty authorising its removal was granted. The circumstances were, however, of a special character.

(*r*) *Keet* v. *Smith*, *supra*; *Brecks* v. *Woolfrey*, *supra*; *Pearson* v. *Stead*, *supra*.

(*s*) *Dame de Wyche's Case* (1469), Y. B. 9 Edw. 4, 14 A, as explained in *Corven* v. *Pym* (1605), 12 Co. Rep. 105; *Spooner* v. *Brewster* (1825), 3 Bing. 136.

(*t*) See *Corven* v. *Pym*, *supra*; 3 Co. Inst. 202; 1 Co. Litt. 18 b; *Frances* v. *Ley* (1615), Cro. Jac. 366; also reported *sub nom. Day* v. *Beddingfield*, Noy, 104; *May* v. *Gilbert* (1613), 2 Bulst. 150. In *Hitchcock* v. *Walter* (1838), 6 Bowl. 457, an action of the kind was actually brought by the heir of the deceased, but the case is only reported on a point of pleading.

(*u*) See *Sharpe* v. *Hansard* (1830), 3 Hag. Ecc. 335, where a scheme for

SECT. 6.—*Exclusive Rights of Burial.*

SECT 6. Exclusive Rights of Burial.

875. An exclusive right to the use of a particular part of the churchyard for the purposes of burial cannot be obtained without a faculty (*a*).

Faculty necessary.

What has already been said (*b*) as to the erection of a monument without a faculty, as to the grant of such a faculty without the consent of the rector or incumbent, and as to the effect of a faculty granted without such consent, would appear to apply *mutatis mutandis* to the construction of vaults for burial in churches and churchyards (*c*).

The rector or incumbent in whom the freehold is vested is not entitled as of right to the issue of a faculty for a vault which he desires to construct (*d*).

Issue of faculty.

The Ecclesiastical Court will, before granting a faculty for the reservation of an exclusive right of burial or the construction of a vault, require to be satisfied that what is proposed is not likely to be generally prejudicial to the parish, even though the issue of the faculty is not opposed (*e*). A faculty cannot issue for a vault under a church which is not consecrated (*f*).

Limitations in faculty.

876. A faculty for a vault or the reservation of a grave space may be limited in the same way as is usual in respect of pews "to the use of the family of A. B. so long as they continue parishioners and inhabitants" (*g*), or "to A. B., his heirs and family" (*h*); and a faculty for the reservation of a grave space may, in a proper case, be granted to a non-parishioner (*i*).

Faculty for vault does not pass freehold.

The grant of a faculty for a vault does not confer upon the grantee a freehold interest in the vault (*j*).

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levelling a churchyard, and laying upright head and foot stones flat, was authorised by faculty. As to the alteration or removal of monuments in connection with the utilisation of a disused burial ground as an open space, see p. 535, *post*.

(*a*) *Gilbert* v. *Buzzard* (1820), 3 Phillim. 335, *per* Lord STOWELL (then Sir W. SCOTT), at pp. 357, 358; *Bryan* v. *Whistler* (1828), 8 B. & C. 288; *De Romana* v. *Roberts*, [1906] P. 332.

(*b*) See pp. 416, 417, *ante*.

(*c*) See *Rich* v. *Bushnell* (1827), 4 Hag. Ecc. 164; *Rugg* v. *Kingsmill* (1867), L. R. 2 P. C. 59.

(*d*) *Rich* v. *Bushnell*, *supra*.

(*e*) *Rosher* v. *Northfleet* (*Vicar*) (1825), 3 Add. 14.

(*f*) *Turner* v. *Hanwell* (*Rector*) (1842), 1 Notes of Cases, 368.

(*g*) *Magnay* v. *St. Michael* (*Rector etc.*) (1827), 1 Hag. Ecc. 48.

(*h*) Oughton, Ordo Judiciorum (1738), Vol. II., p. 297, No. 323.

(*i*) *Re Sargent* (1890), 15 P. D. 168. The objection to the grant of a faculty for a pew, with a limitation to "A. B. and his heirs," on the ground that the heirs might not be parishioners, referred to in *Walter* v. *Gunner* (1798), 1 Hag. Con. 314, *per* Lord STOWELL (then Sir W. SCOTT), at p. 321, appears therefore not necessarily to extend to a faculty for a vault or the reservation of a grave space.

(*j*) *St. Botolph-without-Aldgate* (*Vicar*) v. *Parishioners*, [1892] P. 161, *per* Dr. TRISTRAM, at pp. 167, 168: "It is sometimes erroneously supposed that the owner of a faculty vault in a church or churchyard has a freehold interest in it. But this can only happen where a vault is in a private chapel or private aisle the fee of which is in the owner of the chapel or aisle. . . . The final control of the church and chancel and of the churchyard is vested in the chancellor as ordinary, for this purpose. It is by virtue of this control that

SECT. 7. **Burial Service.**

SECT. 7.—*Burial Service.*

Minister's duty to perform service.

877. It is the duty of every minister of the Church of England to perform the burial service, according to the rites of the Church, over the body of any person not excluded from Christian burial (*k*), and otherwise entitled to burial in a churchyard, which is brought there for burial, after convenient warning to such minister (*l*).

Penalty for refusal.

In case of breach of this duty the minister is liable to be suspended from his ministry for three months by the bishop of the diocese (*m*). The bishop has no discretion in the matter, but, on proof of the offence, is bound to suspend the incumbent for the full three months (*n*).

The refusal on the part of a minister to bury the body of a parishioner is not only an ecclesiastical offence, but is or may be also an offence at common law (*o*); and it is possible that an action for damages would lie at the suit of those put to expense by the refusal (*p*). The duty of the minister in the matter is, moreover, enforceable by mandamus (*q*).

Warning to minister.

878. The "convenient warning" which must be given to the minister has reference to the convenience of the minister rather

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chancellors formerly granted faculties for vaults in churches or churchyards, and latterly in churchyards only, but in every such faculty there is a proviso saving the jurisdiction of the court. . . . What is really granted by the faculty is the use of the ground for a vault so long as it is not required for the general use of the parishioners; and when it is so required, by the practice of the Ecclesiastical Courts, the owner of the vault is entitled to have it removed to another site in the churchyard at the cost of the applicant for the faculty."

(*k*) See p. 421, *post*.

(*l*) Canones Ecclesiastici (1603), 68. The canon provides that "no minister shall refuse or delay . . . to bury any corpse that is brought to the church or churchyard (convenient warning being given him thereof before) in such manner and form as is prescribed in the . . . Book of Common Prayer. And if he shall refuse to . . . bury [the corpse] . . ., except the party deceased were denounced, excommunicated *majori excommunicatione* for some grievous and notorious crime (and no man able to testify of his repentance), he shall be suspended by the bishop of the diocese from his ministry by the space of three months." As is explained in *Escott* v. *Mastin* (1842), 4 Moo. P. C. C. 104, the effect of the incorporation of the rubric of the Prayer-book with the Act of Uniformity (13 & 14 Car. 2, c. 4) is to except from the operation of the canon cases where the deceased, though not within the exclusion there mentioned, is excluded from Christian burial by the rubric. There appears to be no other case where the minister is justified in refusing burial. See *Cooper* v. *Dodd* (1850), 2 Rob. Eccl. 270, where a clergyman was suspended for refusing to perform the burial service on the ground that the deceased, who was found drowned, must have met with his death while intoxicated. Notwithstanding the generality of the language of the canon, it is clear that the duty can only attach to a minister as regards a churchyard or burial ground in which it is his duty to officiate, *e.g.*, to the incumbent in the case of a parish churchyard, and in the case of a person entitled in some way to burial in such churchyard or burial ground. See *Nevill* v. *Baker* (1862), cited in Phillimore, Ecclesiastical Law, 2nd ed., Vol. I., p. 655, and in *Re Sargent* (1890), 15 P. D. 168, at p. 169, where a minister was suspended for refusal to perform the burial service over the body of a non-parishioner lawfully brought for burial in a family vault.

(*m*) Canones Ecclesiastici (1603), 68.

(*n*) *Escott* v. *Mastin*, *supra*.

(*o*) *R.* v. *Taylor* (1720), Burn, Ecclesiastical Law, Vol. 1, p. 258, cited in *Andrews* v. *Cauthorne* (1745), Willes, 536, at p. 538.

(*p*) Compare *Davis* v. *Black* (1841), 1 Q. B. 900.

(*q*) *Ex parte Tickmarsh* (1845), 9 Jur. 159. For mandamus, see title CROWN

than to that of the persons undertaking the funeral of the deceased. It must be given before the corpse is brought to the church, and a warning that the corpse has been brought is insufficient (*r*).

Irregularity in service.

879. Except where the omission of any service or the use of a shortened service is authorised by the Burial Laws Amendment Act, 1880 (*s*), the full burial service must be read, or the minister will be liable to suspension (*t*).

Irregularities in the performance of the burial service, or as regards the use of any ornament or vesture in any burial ground, are among the matters in respect of which proceedings against incumbents under the Public Worship Regulation Act, 1874, are authorised (*a*).

SECT. 8.—*Exclusion from Christian Burial.*

Persons excluded.

880. Persons who die unbaptised or excommunicate, or who have laid violent hands upon themselves, are excluded by ecclesiastical law from Christian burial, and the full burial service must not be read over their remains (*b*). The use of a shortened service at the burial of such persons is, however, now permitted by statute (*c*).

Meaning of "unbaptised."

Although, as has been stated, the burial service according to the rites of the Church is not to be used in the case of a person who has never been baptised, a minister may not refuse to perform the service in the case of a person baptised according to the forms of a Church or sect other than the Church of England (*d*), or by a layman in the name of the Trinity (*e*).

Felo de se

881. Where any person is found *felo de se* by a coroner's jury, the coroner must direct that the remains of such person be interred in the churchyard or other burial ground of the parish or place in which the remains of such person might by law or custom be

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(*r*) *Titchmarsh* v. *Chapman* (1844), 1 Rob. Eccl. 175, at p. 182.

(*s*) 43 & 44 Vict. c. 41. As to this Act, see pp. 424 *et seq.*, *post*.

(*t*) *Re Todd* (1844), 3 Notes of Cases, supplement, p. li., where the minister was suspended for omitting the words expressing the hope that the deceased "resteth in our Lord Jesus Christ," being under the impression that the deceased was intoxicated when he died.

(*a*) 37 & 38 Vict. c. 85, s. 8. With regard to this Act, and the means of enforcing the due observance of the ritual of the Church generally, see title ECCLESIASTICAL LAW.

(*b*) Rubric of the Burial Service incorporated with the Act of Uniformity (13 & 14 Car. 2, c. 4). See *Escott* v. *Mastin* (1842), 4 Moo. P. C. C. 104. In addition to these classes, there were formerly others to whom Christian burial was denied, notably to heretics, to persons not receiving the Holy Sacrament at least at Easter, and to persons killed in duels, tilts, or tournaments. See 1 Gib. Cod. 450.

(*c*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 13; and see p. 428, *post*.

(*d*) *Kemp* v. *Wickes* (1809), 3 Phil. 264; *Titchmarsh* v. *Chapman*, *supra*; *Nurse* v. *Henslowe* (1844), 3 Notes of Cases, 272. In the two last-mentioned cases baptism according to the custom of the Independents and Primitive Methodists was considered sufficient.

(*e*) *Escott* v. *Mastin*, *supra*. Until 1844 Papists were not only permitted, but required, to be buried with the Church of England service, under the sanction of a penalty imposed on their representatives (stat. 3 Jac. 1, c. 5, s. 10, repealed by stat. 7 & 8 Vict. c. 102); and see *Kemp* v. *Wickes*, *supra*.

SECT. 8. Exclusion from Christian Burial.

interred if the verdict of *felo de se* had not been found against such person (*f*). The interment may take place in any of the ways prescribed or authorised by the Burial Laws Amendment Act, 1880 (*g*).

Executed criminals.

882. The body of every offender executed by process of law must be buried within the walls of the prison within which judgment of death is executed on him, unless a Secretary of State, being satisfied, on the representation of the visiting justices of a prison, that there is no convenient space within the walls for such burials, has by writing appointed some other place for the purpose (*h*).

SECT. 9.—*Brawling and Nuisances.*

Brawling etc.

883. Any person guilty of riotous, violent, or indecent behaviour in any churchyard or burial ground, or who molests, lets, disturbs, vexes, or troubles, or by any other unlawful means disquiets or misuses, any clergyman in holy orders celebrating any divine service, rite, or office in any churchyard or burial ground, is liable on summary conviction to fine or imprisonment (*i*). An appeal to quarter sessions lies against the conviction (*k*).

Apprehension of offenders.

An offender against this provision may, immediately after the offence is committed, be apprehended by any constable or churchwarden of the parish or place where the offence was committed and taken before a justice to be dealt with according to law (*l*).

Brawling by clergyman.

A clerk in holy orders guilty of brawling in a churchyard is liable to suspension for such time as the ordinary may think fit (*m*),

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(*f*) Interments (felo de se) Act, 1882 (45 & 46 Vict. c. 19), s. 2.

(*g*) *Ibid.*, ss. 3, 4. As to the methods of burial prescribed and authorised by the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), see pp. 424 *et seq.*, *post*. Formerly the bodies in question were directed by the coroner to be buried in a public highway, and a stake driven through them. The statute 4 Geo. 4, c. 52, directed that they should be buried privately in the usual churchyard or burial place between the hours of 9 and 12 p.m. without Christian rites. This statute is repealed by the Interments (felo de se) Act, 1882 (45 & 46 Vict. c. 19), s. 1.

(*h*) Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), s. 6. The Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 3, provides that the bodies of persons executed for murder are to be buried within the precincts of the prison; but this provision appears to be superseded, or at least modified, by s. 6 of the Act of 1868.

(*i*) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 2. As to the meaning of the section, which extends to brawling in churches etc. as well as in churchyards, see *Cope* v. *Barber* (1872), L. R. 7 C. P. 393; *Kensit* v. *St. Paul's (Dean and Chapter)*, [1905] 2 K. B. 249.

(*k*) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 4, repealed as regards procedure by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4. See titles CRIMINAL LAW AND PROCEDURE; ECCLESIASTICAL LAW.

(*l*) Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 3. The words are "every such offender in the premises after the said misdemeanour so committed immediately and forthwith may be apprehended and taken" etc.

(*m*) Stat. 5 & 6 Edw. 6, c. 4, s. 1. The words are if he shall, "by wordes onelye, quarrell, chyde, or brawle." The statute formerly applied to brawling in churches and churchyards by any person, but the jurisdiction of the Ecclesiastical Courts as to brawling was abrogated, and the Act of Edward VI. repealed, except as to persons in holy orders, by the Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), ss. 1, 5.

and if guilty of assault in the churchyard is liable to excommunication (*n*). SECT. 9. Brawling and Nuisances.

A nuisance in a churchyard is cognisable by the Ecclesiastical Court (*o*).

SECT. 10.—*Use of Churchyard for Secular Purposes.*

884. In strictness, when a churchyard or burial ground has once been consecrated, only an Act of Parliament can divest it of its sacred character, and a faculty should not be granted for applying it to secular purposes (*p*). But deviations from the strict rule are frequently allowed, and faculties may be granted for various purposes consonant with modern requirements (*q*). Faculty.

A faculty will, in proper cases, be granted for appropriating a portion of a churchyard for widening a public highway, at any rate where the churchyard is closed for burials (*r*), or for making and Way over churchyard.

(*n*) Stat. 5 & 6 Edw. 6, c. 4, s. 2. See note (*m*), p. 422, *ante*. The words are if he shall "smyte or laye violent hands upon anye other." The section provides that the offender shall be *ipso facto* excommunicate; but this merely means liable to excommunication. See *Bilson* v. *Chapman* (1735), *Loc temp.* Hard. 190; *Wilson* v. *Greaves* (1757), 1 Burr. 240; *Titchmarsh* v. *Chapman* (1844), 3 Notes of Cases, 370, *per* Sir H. J. Fust, at pp. 396, 397.

(*o*) See *Quilter* v. *Newton* (1691), Carth. 151, cited in *Batten* v. *Gedye* (1889), 21 Ch. D. 507, *per* KAY, J., at p. 514.

(*p*) See *R.* v. *Twiss* (1869), L. R. 4 Q. B. 407, *per* COCKBURN, C.J., at p. 412; *St. George, Hanover Square* (*Rector*) v. *Stewart* (1740), 2 Stra. 1126, where the Ecclesiastical Court was prohibited from granting a faculty to a private person to build a charity school on the churchyard contrary to the wishes of the rector and parishioners.

(*q*) Thus, faculties have been granted, in the case of closed churchyards, for the construction of chambers under a churchyard for the storing and transformation of electricity (*Re St. Nicholas Cole Abbey*; *Re St. Benet Fink Churchyard*, [1893] P. 58), and for flights of steps and entrances thereto to give access to chambers for storing electricity constructed under a street adjoining the churchyard (*Re St. Benet, Shereditch*, [1893] P. 66, n.). And see the cases cited in note (*r*), *infra*, and notes (*s*) and (*t*), p. 424, *post*. Faculties were formerly granted in some cases for the erection of schools or vestry rooms or the like in disused burial grounds (*Campbell* v. *Paddington* (*Parishioners*) (1852), 16 Jur. 646; *Russell* v. *St. Botolph* (*Parishioners*) (1859), 5 Jur. (N. S.) 300; *Re Bettison* (1874), L. R. 4 A. & E. 294; *Hansard* v. *St. Matthew, Bethnal Green* (*Parishioners*) (1878), 4 P. D. 46; *St. George, Hanover Square* (*Rector*) v. *Hall* (1879), 5 P. D. 42); but faculties for such purposes could not in general be properly issued now, in view of the provisions of the Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), prohibiting building in disused burial grounds. See *London County Council* v. *Dundas*, [1904] P. 1, by which, apparently, *St. James-the-Less, Bethnal Green* (*Vicar*) v. *Parishioners*, [1899] P. 55, must be taken as overruled; *Re St. Sepulchre, Holborn Viaduct* (1903), 19 T. L. R. 723; and pp. 532, 533, *post*.

(*r*) *Ex parte Bideford Parish* (*Rector*), [1900] P. 314, a decision of Sir A. CHARLES in the Court of Arches, explaining *Harper* v. *Forles* (1859), 5 Jur. (N. S.) 275. The previous decisions of the consistorial courts on the point had been divergent (*St. John's, Walbrook* (*Rector*) v. *Parishioners* (1852), 2 Rob. Eccl. 515; *St. Botolph-without-Aldgate* (*Vicar etc.*) v. *Parishioners*, [1892] P. 161; *St. Andrew's, Hove* (*Vicar*) v. *Mawn*, [1895] P. 228, n.; *Re Plumstead Burial Ground*, [1895] P. 225; *St. Nicholas, Leicester* (*Vicar*) v. *Langton*, [1899] P. 19). In *St. John the Baptist, Cardiff* (*Vicar*) v. *Parishioners*, [1898] P. 155, a faculty was granted for the formation of a footpath across a closed churchyard for the use of the parishioners and public, subject to provisions for the closing of the path one day in the year to show that it remained an integral part of the

SECT. 10. Use of Churchyard for Secular Purposes.

fencing a pathway across a churchyard as a private way to adjoining premises (*s*).

Land granted for burials and consecrated for that purpose does not, unless under the provisions of a special Act of Parliament, revert to the grantor upon the discontinuance of burials therein (*a*).

Part III.—Burial in Consecrated Ground without Service of the Church of England.

When service may be omitted.

885. Except in the case of burials under the Burial Laws Amendment Act, 1880 (*b*), it is necessary that the burial service of the Church of England, and no other, should be performed over the dead body of any person (other than a person excluded from the right of Christian burial) who is buried in consecrated ground (*c*); and that service must be performed by a duly authorised minister of the Church (*d*).

Under the Act of 1880, however, any relative, friend, or legal representative having the charge of or being responsible for the burial of a deceased person (*e*) may give notice that it is intended that the deceased person shall be buried within the churchyard or graveyard (*f*) of a parish or ecclesiastical district or place without the performance, in the manner prescribed by law, of the burial service according to the rites of the Church of England, and after receiving such notice no rector, vicar, incumbent, or officiating minister is liable to any censure or penalty, ecclesiastical or civil, for permitting such burial (*g*).

(*s*) *St. Gabriel, Fenchurch Street (Rector)* v. *City of London Real Property Co.*, [1896] P. 95. As to the statutory provisions authorising the utilisation of closed churchyards as open spaces, see pp. 533 *et seq.*, *post*. As to the grant of a faculty for the improvement of a disused burial ground, with a view to its enjoyment by the public, before this legislation, see *Re St. George-in-the-East (Rector)* (1876), 1 P. D. 311.

(*a*) *Campbell* v. *Liverpool Corporation* (1870), L. R. 9 Eq. 579.

(*b*) 43 & 44 Vict. c. 41. The Act is often called Osborne Morgan's Act.

(*c*) *Kemp* v. *Wickes* (1809), 3 Phillim. 264, at p. 295.

(*d*) *Johnson* v. *Friend* (1860), 6 Jur. (N. S.) 280; *Wood* v. *Headingley-cum-Burley Burial Board*, [1892] 1 Q. B. 713.

(*e*) There are special provisions as to the persons by whom the notice may be given, and to whom it is to be given, in the case of deceased paupers. See p. 425, *post*.

(*f*) The term "graveyard" in this connection includes any burial ground or cemetery vested in any burial board or burial authority having the functions of a burial board (see pp. 445 *et seq.*, *post*), or provided under any Act relating to the burial of the dead, in which the parishioners or inhabitants of any parish or ecclesiastical district have rights of burial (Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 1), and also any cemetery provided under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31) (Burial Act, 1900 (63 & 64 Vict. c. 15), s. 7).

(*g*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 1.

886. Where it is desired that the burial should take place in the consecrated part of a burial ground or cemetery vested in a burial authority (*h*), the notice is to be given at such time and to such person as the burial authority may direct (*i*); and the burial authority are under no obligation to transmit it to the incumbent (*k*).

Rules as to notice.

In other cases the notice is to be a forty eight hours' notice, and is to be given to or left at the usual place of abode of the rector, vicar, or other incumbent, or, in his absence, the officiating minister in charge of the parish or ecclesiastical district or place, or any person appointed by him to receive the notice (*l*). In the case, however, of a cemetery or burial ground (other than a cemetery or burial ground provided by a burial authority) provided under any Act relating to the burial of the dead, if a chaplain is appointed to perform the burial service of the Church of England therein, the notice is to be addressed to him (*m*).

Form of notice.

The notice is to be in writing, plainly signed with the name and stating the address of the person giving it; it is to be in the form scheduled to the Act of 1880, or in a form to the like effect; it is to be indorsed on the outside "Notice of Burial"; and it is to state the day and hour when the burial is proposed to take place (*n*).

Deceased pauper

887. The notice, in the case of any deceased poor person whom a board of guardians are required or authorised to bury, may be given to the rector, vicar, or other incumbent, in manner above stated, and also to the master of any workhouse in which the poor person may have died, or otherwise to the guardians, by the husband, wife, or next of kin of such poor person, who for the purposes of the Act of 1880 is to be deemed the person having charge of the burial; and in such case it is the duty of the guardians to permit the body to be buried in the manner provided by that Act (*o*).

Bye-laws of cemetery company.

888. The proprietors or directors of any proprietary cemetery may make such bye-laws or regulations as may be necessary for enabling any burial to take place therein in accordance with the Act of 1880 (*p*).

Time of burial.

889. If the time proposed in the notice for the burial is inconvenient on account of some other service having been, previously to the receipt of the notice, appointed to take place in the churchyard or graveyard or the church or chapel connected therewith, or

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(*h*) As to the meaning of burial authority, see p. 450, *post*.
(*i*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 8.
(*k*) *Wood* v. *Headingley-cum-Burley Burial Board*, [1892] 1 Q. B. 713
(*l*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 1.
(*m*) *Ibid.*
(*n*) *Ibid.*, ss. 1, 3. If the address of the person giving the notice is not stated, the notice is ineffectual (*Hoare* v. *Ram* (1881), 45 J. P. 729). For form of notice, see Encyclopædia of Forms, Vol. III., p. 147.
(*o*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 2. As to the powers and duties of boards of guardians with regard to the burial of the poor, see pp. 539 *et seq.*, *post*.
(*p*) *Ibid.*, s. 1.

PART III. Burial without Service of Church of England.

on account of any bye-laws or regulations lawfully in force in any graveyard limiting the times at which burials may take place in that graveyard, the person receiving the notice must, unless some other day or time is mutually arranged within twenty-four hours from the time of giving or leaving the notice, signify in writing, to be delivered to or left at the address or usual place of abode of the person from whom the notice has been received, or at the house where the deceased person is lying, at which hour of the day named in the notice, or (in case of burial in a churchyard, if such day is a Sunday, Good Friday, or Christmas Day) of the day next following, the burial shall take place; and the burial will then take place (*q*) at the hour so appointed or mutually arranged, and in other respects in accordance with the notice.

Unless otherwise mutually arranged, the time of the burial must be between 10 a.m. and 6 p.m. if the burial be between April 1 and October 1, and between 10 a.m. and 3 p.m. if the burial be between October 1 and April 1. No such burial may, however, take place in any churchyard on Sunday, Good Friday, or Christmas Day, if any such day being proposed by the notice be objected to in writing for a reason assigned by the person receiving the notice (*r*).

When no such intimation of change of hour is sent to the person from whom the notice was received, or left at the house where the deceased person is lying, the burial is to take place in accordance with and at the time specified in the notice (*s*).

Burial may be with or without religious service.

890. At any burial under the Act of 1880 all persons are to have free access to the churchyard or graveyard in which it takes place. The burial may take place, at the option of the person having charge of or being responsible for the same, either without any religious service, or with such Christian and orderly religious service at the grave, as such person may think fit; and any person or persons invited or authorised by the person having charge of or being responsible for the burial may conduct such service or take part in any religious act thereat. The words "Christian service" for this purpose include every religious service used by any church, denomination, or person professing to be Christian (*t*).

Burials to be decent and orderly.

891. All burials under the Act of 1880, whether with or without a religious service, must be conducted in a decent and orderly manner; and any person guilty of riotous, violent, or indecent behaviour at any such burial, or wilfully obstructing such burial or any such service as above mentioned thereat, or who delivers any address in the churchyard or graveyard not being part of or incidental to a religious service permitted by the Act, nor otherwise permitted by any lawful authority, or who, under colour of any religious service or otherwise, in any such churchyard or graveyard, wilfully endeavours to bring into contempt or obloquy the Christian

(*q*) The words of the section are "and it shall be lawful for the burial to take place, and it shall take place, at the hour" etc.
(*r*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 3.
(*s*) *Ibid.*, s. 4.
(*t*) *Ibid.*, s. 6.

religion or the belief or worship of any church or denomination of Christians or the members or any minister of any such church or denomination, or any other person, is guilty of a misdemeanour (*a*).

Position etc. of graves.

892. All regulations as to the position and making of the grave which would be in force in any churchyard or graveyard in the case of persons interred therein with the service of the Church of England apply with regard to burials under the Act of 1880 (*b*).

Fees.

893. Subject to exceptions in the case of burial grounds provided by burial authorities (*c*), any person who, if the burial had taken place with the service of the Church of England, would have been entitled by law to receive any fee, is entitled, in case of a burial under the Act of 1880, to receive the like fee in respect thereof (*d*).

Powers for prevention of disorder.

894. All powers and authorities existing by law on September 7th, 1880 (*e*), for the preservation of order, and for the prevention and punishment of disorderly behaviour in any churchyard or graveyard, may be exercised in case of a burial without the rites of the Church of England in the same manner and by the same persons as if the same had been a burial according to the rites of the Church of England (*f*).

Use of Church of England service in unconsecrated ground.

895. No minister in holy orders of the Church of England is subject to any censure or penalty for performing the burial service according to the rites of the Church of England in any unconsecrated burial ground or cemetery or part of a burial ground or cemetery, or in any building thereon, in any case in which he might have lawfully used the same service if such burial ground or cemetery or part of a burial ground or cemetery had been consecrated. And the relative, friend, or legal representative having charge of or being responsible for the burial of any deceased person who had a right of interment in any such unconsecrated ground vested in any burial board or authority with the powers of a burial board, or provided under any Act relating to the burial of the dead, is entitled, if he think fit, to have such burial performed therein according to the rites of the Church of England by any minister of the Church of England who may be willing to perform the same (*g*).

(*a*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 7.

(*b*) *Ibid.*, s. 5. As to the position etc. of graves in a churchyard, see p. 415, *ante*. In the case of a burial ground provided by a burial authority these matters may be the subject of regulations made before January 1, 1901, by a Secretary of State, or since that date by the Local Government Board (see p. 537, *post*), or of bye-laws (see pp. 508, 509, *post*), as the case may be. Subject to such regulations or bye-laws, the burial authority have control over them by virtue of their general control over the burial ground. As to the control of the burial authority over a burial ground provided under the Burial Acts, see p. 465, *post*.

(*c*) See pp. 480, 481, *post*.

(*d*) *Ibid.*, s. 5. As to fees in respect of burials in churchyards, see pp. 428 *et seq.*, *post*. As to burial fees in burial grounds provided by burial authorities, see pp. 479 *et seq.*, *post*.

(*e*) The words in the section are "powers and authorities now existing by law for the preservation of order" etc.

(*f*) *Ibid.*, s. 8. As to these powers and authorities, see pp. 422, 423, *ante*, pp. 466, 512, *post*.

(*g*) *Ibid.*, s. 12.

PART III. **Burial without Service of Church of England.**

Use of other than prescribed service in certain cases.

896. It is lawful for any minister in holy orders of the Church of England authorised to perform the burial service, in any case where the burial service according to the rites of the Church of England may not be used and in any other case at the request of the relative, friend, or legal representative having the charge of or being responsible for the burial of the deceased, to use at the burial such service, consisting of prayers taken from the Book of Common Prayer and portions of Holy Scripture, as may be prescribed or approved of by the ordinary, without being subject to any ecclesiastical or other censure or penalty (*h*).

No right of burial conferred where such does not otherwise exist.

897. The Act of 1880 does not authorise the burial of any person in any place where such person would have had no right of interment if the Act had not passed, or without performance of any express condition on which, by the terms of any trust deed, any right of interment in any burial ground vested in trustees under such trust deed, not being the churchyard or graveyard or part of the churchyard or graveyard of the parish or ecclesiastical district in which the same is situate, may have been granted (*i*).

Registration.

898. There are special provisions, the effect of which will be stated later, as to the registration of burials under the Act of 1880, and as to the person to whom, in the case of such a burial, the certificate of the registrar of births, deaths, and marriages of his having registered or received notice of the death is to be delivered, and to whom, where the burial is authorised under a coroner's order, such order is to be delivered (*k*).

Saving as to Church of England ministers.

899. Save as in the Act of 1880 expressly provided as to ministers of the Church of England, nothing in that Act authorises or enables any such minister who has not become a declared member of any other church or denomination, or executed a deed of relinquishment under the Clerical Disabilities Act, 1870 (*l*), to do any act which he would not by law have been authorised or enabled to do if the Act had not passed, or exempts him from any censure or penalty in respect thereof (*m*).

Part IV.—Fees on Burial in Churchyard etc.

SECT. 1.—*Burial Fees etc.*

Fees due by custom or statute.

900. No fee in respect of burial in a parish churchyard is due at common law, but a burial fee may be due by immemorial custom

(*h*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 13. The Church of England service may not be used at the burial of suicides, unbaptised or excommunicated persons. See p. 421, *ante*.
(*i*) *Ibid.*, s. 9.
(*k*) *Ibid.*, ss. 10, 11; and see p. 561, *post*.
(*l*) 33 & 34 Vict. c. 91. See title ECCLESIASTICAL LAW.
(*m*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 14.

in any particular parish (*n*), or by statute; and in fact burial fees alleged to be customary are very generally paid.

To whom payable by custom.

901. The burial fee is by custom generally payable to the incumbent; but it may by custom be payable to the churchwardens of the parish (*o*), or a moiety may be payable to the incumbent and a moiety to the churchwardens (*p*); and there may possibly be other similar special customs.

No fee where no service done.

There cannot be a valid custom for the payment of a burial fee where no service is done (*q*). Thus, there cannot be a custom that a fee should be paid to the rector of a parish upon the burial of one of his parishioners in another parish (*r*).

Recovery of fees.

902. Burial fees due by custom are not recoverable in a court of common law, but in the Ecclesiastical Court only (*s*). If, however, the custom be denied, its existence must be tried in the common law courts (*t*), and the Ecclesiastical Court will be restrained by prohibition from trying it (*a*). Statutory burial fees, on the other hand, are not recoverable in the Ecclesiastical Court, unless the statute expressly or impliedly so provides (*b*).

Validity of custom.

903. In theory, in order that a customary burial fee should be payable, the custom must have originated before the time of legal memory, *i.e.*, before the commencement of the reign of Richard I. And though evidence of uniform practice in modern times will raise the presumption that the custom has existed from before the time of legal memory, the presumption will be rebutted if it is shown that the custom cannot have existed so long (*c*). In order that a burial fee should be due by custom, it must be reasonable, and of fixed amount; and therefore, whatever the practice may

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(*n*) *Andrews* v. *Cawthorne* (1745), Willes, 536; *Dean of Exeter's Case* (1707), 1 Salk. 334. In *Gilbert* v. *Buzzard* (1821), 3 Phillim. 335, Lord STOWELL (then Sir W. SCOTT) made an order approving a table that had been prepared by the vestry of fees for burial in a parish churchyard. In so doing, however, it seems clear that he must be taken, so far as concerned the fees for ordinary burials, to have been merely intimating what fees were in his view proper to be paid, for it is quite clear that no order of an Ecclesiastical Court can impose an enforceable liability to pay such fees. See *Spry* v. *St. Marylebone (Directors etc.)* (1839), 2 Curt. 5, *per* Dr. LUSHINGTON, at pp. 11, 12; *Varty* v. *Nunn* (1841), 1 Notes of Cases, 191, *per* Dr. LUSHINGTON, at pp. 207, 208, affirmed 2 Notes of Cases, 108.

(*o*) *Gilbert* v. *Buzzard*, *supra*, at pp. 365, 366; *Andrews* v. *Symson* (1676), 3 Keb. 504, 523, 527; *Anon.* (1682), 2 Show. 184; *Waring* v. *Griffiths* (1758), 1 Burr. 440.

(*p*) *Littlewood* v. *Williams* (1815), 6 Taunt. 277; *Burdin* v. *Calcott* (1789), 1 Hag. Con. 14, 17.

(*q*) *Patten* v. *Castleman* (1753), 1 Lee, 387; *Naylor* v. *Scott* (1729), 2 Ld. Raym. 1538.

(*r*) *Topsall* v. *Ferrers* (1617), Hob. 175, approved in *Burdeaux* v. *Lancaster* (1697), 1 Salk. 332, where a christening fee was in dispute.

(*s*) *Spry* v. *Gallop* (1847), 16 M. & W. 716.

(*t*) *Anderson* v. *Walker* (1692), 2 Lut. 1030. See title CUSTOMS AND USAGES.

(*a*) *Spry* v. *St. Marylebone (Directors etc.)*, *supra*, *per* Dr. LUSHINGTON, at p. 11; *Topsall* v. *Ferrers*, *supra*; *Dean of Exeter's Case* (1707), 1 Salk. 334.

(*b*) *Spry* v. *St. Marylebone (Directors etc.)*, *supra*. See also *Spry* v. *Emperor* (1840), 6 M. & W. 639.

(*c*) See title CUSTOMS AND USAGES.

SECT. 1. Burial Fees etc.

have been so far back as the evidence goes, no fee can be due by custom of an amount which would have been unreasonably excessive in the time of Richard I., having regard to the then value of money (*d*).

Fees on erection of monuments etc.

904. Fees in addition to burial fees are generally paid in respect of the erection of monuments, the construction of vaults, and the like, in a church or churchyard; but the law with regard to such fees is not clearly settled (*e*).

Special fees on burial of non-parishioners.

905. Special fees are generally paid on the burial of strangers to the parish, and an agreement to pay such fees is good and enforceable on the ground that, when the incumbent is called upon to do

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(*d*) See *Bryant* v. *Foot* (1868), L. R. 3 Q. B. 497 (marriage fees). In many cases sums that would have been excessive in the time of Richard I. have been held to be payable, *e.g.*, for toll, by custom, on the ground that the custom may be taken to have been to pay a reasonable fee, the modern practice being taken as evidence of what is reasonable. See *Lawrence* v. *Hitch* (1869), L. R. 3 Q. B. 521. These cases were distinguished in *Bryant* v. *Foot*, *supra*, on the ground that a marriage fee must necessarily be of a fixed amount; and there seems no reason for distinguishing between burial fees and marriage fees in this respect.

(*e*) It seems clear that such fees may, like ordinary burial fees, be payable by custom. See *Bardin* v. *Calcott* (1789), 1 Hag. Con. 14, *per* Lord STOWELL (then Sir W. SCOTT), at p. 17 (fees payable to churchwardens); *Rich* v. *Bushnell* (1827), 4 Hag. Ecc. 164, *per* Sir J. NICHOLL, at p. 173 (fees payable to the vicar on the erection of monuments in a chancel of which the freehold was in the rector). The existence of fees payable by custom to the incumbent is also recognised by provisions in the part of s. 33 of the Burial Act, 1852 (15 & 16 Vict. c. 85), now repealed by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 12 and Sched. II., which refers to fees so due "by law or custom."

The payment of fees may also in some cases be insisted on apart from custom. Thus, Lord STOWELL in *Bardin* v. *Calcott*, *supra*, spoke of a fee in respect of the erection of tombstones in a churchyard as being due to the vicar "as of common right"; and in *Young* v. *Kingston-on-Thames Joint Burials Committee*, [1907] 1 K. B. 416, C. A., MOULTON, L.J., at p. 422, used language which may be understood as showing that in his view the incumbent is in ordinary cases entitled to a fee of the kind, apart from custom, by virtue of his rights of property in the churchyard. It may be doubted, however, whether, apart from custom, any fee is due to the incumbent in the sense that it could be recovered either in a court of common law or in the Ecclesiastical Court. It should be added in this connection that in *Rich* v. *Bushnell*, *supra*, Sir J. NICHOLL said that no fee was due to the vicar as of common right in respect of burial in the church of which the freehold was in the rector. As has been seen, however, at p. 417, *ante*, the practice where it is proposed to erect a monument, or tombstone, or vault, is to seek the consent of the incumbent, and of the rector where the freehold is in a rector distinct from the incumbent, whether, as is the strict course, a faculty is afterwards applied for or not. And it seems that an agreement to pay a fee to the rector or incumbent in respect of his consent would be a good and enforceable agreement; see *Nevill* v. *Bridger* (1874), L. R. 9 Exch. 214; and compare *Dean of Exeter's Case* (1707), 1 Salk. 334, where it is laid down that no fee is due for burial of common right; "but where a licence is necessary, the person giving it may stand upon his own price." Again, the Ecclesiastical Court is in a position to enforce the payment of a fee to the rector or incumbent as a condition of the grant of a faculty. In *Maidman* v. *Malpas* (1794), 1 Hag. Con. 205, Lord STOWELL would seem to have regarded a demand by a rector in whom the church was vested for a reasonable fee in respect of his consent to the erection of a monument as proper. But in *Rich* v. *Bushnell*, *supra*, Sir J. NICHOLL appears to have taken the contrary view. See also *Gilbert* v. *Buzzard* (1820), 3 Phillim. 335; *North Manchester Overseers* v. *Winstanley*, [1908] 1 K. B. 835, C. A.

what by law he is not bound to do, he may refuse except upon such conditions as he chooses to impose (*f*).

Fees under Church Building Acts.

906. The Ecclesiastical Commissioners, as successors of the Church Building Commissioners (*g*), are empowered to make and fix any table of fees (including burial fees) for any parish with the consent of the vestry or select vestry, or persons exercising the powers of a vestry in such parish, or in or for any district chapelry or parochial chapelry, in which any church or chapel is built or appropriated under the Church Building Acts, with the consent nevertheless, in all such cases, of the bishop of the diocese; and all fees so fixed may be demanded, received, sued for, prosecuted, and recovered by the spiritual person or clerk or sexton to whom the same are assigned in like manner and by the same means as any ancient legal fees of a like nature may be sued for, prosecuted, and recovered (*h*). The table of fees must be registered in the registry of the diocese (*i*).

SECT. 2.—*Mortuaries or Corse-presents.*

Nature of a mortuary.

907. In connection with the subject of burial fees a few words should be said as to mortuaries or corse-presents, though the law with regard to these matters has almost, if not entirely, ceased to be of more than antiquarian interest.

A mortuary, at any rate in its more modern form, may be described as a payment due by custom on a man's death out of his property to the parson. And, whether corse-presents and mortuaries were identical in origin or not, corse-presents may now be regarded as only another name for mortuaries (*k*).

Payment of mortuaries.

The right of the clergy to mortuaries was limited by an Act of Henry VIII. (*l*), the main provisions of which are, shortly,

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(*f*) *Nevill* v. *Bridger* (1874), L. R. 9 Exch. 214; and see *Ex parte Blackmore* (1830), 1 B. & Ad. 122, *per* LITTLEDALE, J., at p. 124.

(*g*) Under the Church Building Commissioners (Transfer of Powers) Act, 1856 (19 & 20 Vict. c. 55).

(*h*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 11. The section refers to churches or chapels built or appropriated under the Church Building Acts, 1818 and 1819 (58 Geo. 3, c. 45; 59 Geo. 3, c. 134), only, but would appear to be extended to churches or chapels built or appropriated under later Church Building Acts by the Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 25.

(*i*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 18.

(*k*) See, as to the origin etc. of mortuaries and corse-presents, Spelman, Concilia, Vol. I., pp. 545, 564, Vol. II., p. 390; Spelman, De Sepultura, p. 189; Lynd., lib. 1, tit. 3, De Consuetudine, p. 19, lib. 3, tit. 14, De Sepultura, p. 184, tit. 16, De Decimis, p. 196; Glanv., lib. 7, c. 5; Stillingfleet, Ecclesiastical Cases, ed. 1698, Vol. I., p. 248; Selden, History of Tythes, 287; Dugdale, Antiquities of Warwickshire, 2nd ed., p. 929; 2 Co. Inst. 491; Fleta, lib. 2, c. 60, par. 30. The authorities on the subject are collected in Brooke-Little, Law of Burial, 3rd ed., pp. 50—52. See also for a full discussion of the nature of mortuaries, *Ayrton* v. *Abbott* (1849), 14 Q. B. 1, 5, where it was held that mortuaries were not recoverable summarily as "small tithes, offerings, oblations, obventions, or compositions" under stat. 7 & 8 Will. 3, c. 6, s. 2 (now repealed, except as to tithes, offerings, and compositions not commuted or otherwise still payable, by the Statute Law Revision Act, 1887 (50 & 51 Vict. c. 59)). This case appears to be the last reported decision relating to mortuaries.

(*l*) Stat. 21 Hen. 8, c. 6. Certain special rights preserved by the statute

SECT. 2. **Mortuaries or Corse-presents.**

to the following effect: No mortuary is to be paid except where the payment of mortuaries has been customary, nor by any married woman or child or person other than a householder, nor in the case of a person dying possessed of goods to a value under ten marks. In the case of persons dying possessed of goods of greater value the mortuary is limited to 3*s.* 4*d.* where the value of the goods is less than £30, to 6*s.* 8*d.* where it is less than £40, and to 10*s.* in other cases, and to the customary sum where such sum is less than the limit. No one is to pay more than one mortuary, and that is payable in the parish where the deceased last resided.

Recovery of mortuaries.

Mortuaries are recoverable in the Ecclesiastical Court (*m*), and possibly also at law (*n*). If, where proceedings are taken in the Ecclesiastical Court, the alleged custom on which the claim is based is denied, the custom is triable in the courts of common law, and prohibition will lie to the Ecclesiastical Court accordingly (*o*); but prohibition will not be granted if, without denial of the custom of payment, it is alleged that the mortuary is of custom payable to the impropriator, and not to the vicar (*p*).

Commutation by parochial agreement.

Parochial agreements for the commutation of mortuaries were authorised by the Tithe Act, 1839 (*q*); but, in the absence of a special provision in the parochial agreement, the provisions of the Tithe Act, 1886 (*r*), do not extend to them (*s*).

Part V.—Alienation of Land for Burial Grounds etc.

SECT. 1.—*Introductory.*

Charity.

908. The provision, maintenance, or improvement of a burial ground of a public character is a charitable purpose (*a*).

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were subsequently dealt with by the Mortuaries (Bangor etc.) Abolition Act, 1713 (13 Anne, c. 6), and the Mortuaries (Chester) Act, 1755 (28 Geo. 2, c. 6). The statute of Henry VIII. remains unrepealed.

(*m*) 2 Co. Inst. 491; Lynd., lib. 1. tit. 3, De Consuetudine, p. 19.

(*n*) *Manby* v. *Curtis* (1816), 2 Price, 284, *per* THOMSON, C.B., at p. 295; Degge's Parson's Counsellor, 7th ed., p. 349.

(*o*) Prohibition lies in such cases notwithstanding a provision in the statute "Articuli Cleri" (9 Edw. 2, stat. 1, c. 1, s. 2) declaring that prohibition is not to issue to the Ecclesiastical Court in suits for, *inter alia*, mortuaries, and a somewhat similar provision in the statute "Circumspecte Agatis" (13 Edw. 1, stat. 4). See *Proud* v. *Piper* (1809), 3 Mod. Rep. 268; *White's Case* (1589), Cro. Eliz. 151; *Hinde* v. *Chester (Bishop)* (1631), Cro. Car. 237; *Johnson* v. *Oldham* (1700), 1 Ld. Raym. 609; *Johnson* v. *Wrightson* (1701), 1 Lut. 1066. See also *Torrent* v. *Burley* (1726), 2 Stra. 715, where an attempt seems to have been made to recover a mortuary by means of proceedings in equity.

(*p*) *Marks* v. *Gilbert* (1665), 1 Sid. 263.

(*q*) 2 & 3 Vict. c. 62, s. 9, repealed by the Statute Law Revision (No. 2) Act, 1890 (53 & 54 Vict. c. 51).

(*r*) 6 & 7 Will. 4, c. 71.

(*s*) *Ibid.*, s. 90.

(*a*) *Re Vaughan* (1886), 33 Ch. D. 187; *Re Manser*, [1905] 1 Ch. 68, where a bequest for the maintenance of a Quaker burial ground was held good; *Re Douglas*, [1905] 1 Ch. 279. And see *Re Pardoe*, [1906] 2 Ch. 184; and title CHARITIES.

Hence it follows, on the one hand, that a grant of land or money for such a purpose in perpetuity is not invalid as infringing the rule against perpetuities (*b*).

On the other hand, it follows that a devise or bequest of land, or of money to be laid out on land, for the purposes in question, is subject to the provisions of the Mortmain and Charitable Uses Act, 1891 (*c*), unless it is authorised by some other Act; and that before the Act of 1891 such a devise or bequest was void unless authorised by statute, as also was a bequest of impure personalty for the purposes in question. It follows similarly that grants *inter vivos* of land, or of money to be laid out on land, for the purpose in question, unless made pursuant to statutory authority, are valid only if made in compliance with Part II. of the Mortmain and Charitable Uses Act, 1888 (*d*), and were formerly valid only if made in compliance with the enactments thereby replaced.

Mortmain.

In some cases, moreover, the grant of land for a burial ground without a licence in mortmain might, unless made in pursuance of statutory authority, be voidable under Part I. of the Mortmain and Charitable Uses Act, 1888 (*e*), and might similarly have been voidable before that Act under the statutes replaced by Part I. of that Act (*f*).

Modern enactments.

A number of enactments, passed partly with the view of removing the difficulties in the way of grants for the purpose of burial grounds arising under the enactments above referred to and partly with a view to facilitating grants for the purpose by limited owners and the like, are, however, in force (*g*). Some of these enactments are available only for the purpose of providing a consecrated burial ground. Others are not so confined, and are thus available, for instance, where it is desired to provide a burial ground for the use of a religious community other than the Established Church.

Maintenance of tomb etc. apart from fabric not a charity.

909. A gift for the provision or maintenance of a tomb or sepulchral monument of the donor or his family, and not within or forming part of the fabric of a church or place of worship, is not a gift for a charitable purpose. Hence a gift, or devise, or bequest for such a purpose does not come within Part II. of the Mortmain and Charitable Uses Act, 1888 (*h*), or the Mortmain and Charitable Uses Act, 1891 (*i*), and formerly did not come within the enactments thereby replaced (*k*). It follows, too, that a gift, devise, or bequest of the kind is invalid if it infringes the rules against perpetuities (*l*). But the provision or upkeep of a monument

(*b*) As to the rule against perpetuities, see title PERPETUITIES.
(*c*) 54 & 55 Vict. c. 73.
(*d*) 51 & 52 Vict. c. 42.
(*e*) *Ibid.* See title CORPORATIONS.
(*f*) Difficulty was in particular created by stat. 23 Hen. 8, c. 10.
(*g*) These enactments, falling conveniently into seven groups, are discussed at pp. 434 *et seq.*, *post*.
(*h*) 51 & 52 Vict. c. 42.
(*i*) 54 & 55 Vict. c. 73.
(*k*) *Mellick* v. *Asylum* (*President and Guardians*) (1821), 1 Jac. 180; *Adnam* v. *Cole* (1843), 6 Beav. 353.
(*l*) *Lloyd* v. *Lloyd* (1852), 2 Sim. (N. S.) 255; *Bickard* v. *Robson* (1862), 31

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inside a church or forming part of its fabric is a good charitable purpose (*m*).

SECT. 2.—*Gifts for Churches Acts*, 1803 *and* 1811.

Power to give not more than five acres or £500 for burial ground.

910. Under the Gifts for Churches Act, 1803 (*n*), every sane person of full age other than a *feme covert* without her husband (*o*) having in his or her own right any estate or interest in possession, reversion, or contingency, of or in any lands or tenements, or of any property in any goods or chattels, may by deed enrolled in manner provided by the statute 27 Hen. 8, c. 16 (*p*), or by will duly executed three calendar months at least, including the days of execution and death, before death, give and grant to any person or body politic or corporate all his or her estate, interest, or property in such lands or tenements not exceeding five acres, or goods or chattels not exceeding in value £500 (*q*), for or towards, *inter alia* (*r*), the repairing, purchasing, or providing of any churchyard for a Church of England church or chapel, and to be for that purpose applied according to the will of the benefactor in and by such deed or will expressed, the consent and approbation of the ordinary being first obtained, and in default of such direction, limitation, or appointment, in such manner as shall be directed and appointed by the patron and ordinary, with the consent and approbation of the parson, vicar, or other incumbent; and such person, body politic or corporate, their heirs and successors, may purchase, receive, take, hold, and enjoy for the purpose aforesaid, as well from such persons as may be charitably disposed to give the same as from all other persons as may be

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Beav. 244; *Fowler* v. *Fowler* (1864), 33 Beav. 616; *Hoare* v. *Osborne* (1866), L. R. 1 Eq. 585; *Re Rigley* (1866), 36 L. J. (CH.) 147; *Fisk* v. *A.-G.* (1867), L. R. 4 Eq. 521; *Hunter* v. *Bullock* (1872), L. R. 14 Eq. 45; *Dawson* v. *Small* (1874), L. R. 18 Eq. 114; *Re Williams* (1877), 5 Ch. D. 735; *Re Vaughan* (1886), 33 Ch. D. 187; *Re Tyler*, [1891] 3 Ch. 252, C. A., where a condition in a bequest to a charity that the testator's family vault should be kept in repair, and that on non-compliance with this condition the bequest should go over to another charity, was held to be valid on the principle that the rule against perpetuities does not apply to a transfer, in certain events, of property from one charity to another; *Re Manser*, [1905] 1 Ch. 68, where a bequest for maintaining a burial ground, and in particular the grave of the testator's wife, was held to be good, the direction with regard to the particular grave being merely a special obligation ancillary to the repair of the burial ground, and not a separate trust. See title CHARITIES.

(*m*) *Hoare* v. *Osborne* (1866), L. R. 1 Eq. 585; *Re Rigley's Trusts* (1866), 36 L. J. (CH.) 147.

(*n*) 43 Geo. 3, c. 108. See further, title ECCLESIASTICAL LAW.

(*o*) This restriction is not removed by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (1) (*Re Smith* (1887), 35 Ch. D. 589).

(*p*) That is, by being enrolled in the High Court, or (subject to a proviso as to land in towns corporate where the corporation officers have authority or have been lawfully used to enrol deeds etc.) within the county where the land is situate before the custos rotulorum and two justices and the clerk of the peace, or two of them, whereof the clerk of the peace is one, within six months next after the date of the deed.

(*q*) These limitations do not prevent larger grants where such grants can be supported apart from the Act (*Re Douglas*, [1905] 1 Ch. 279).

(*r*) The other purposes are, shortly, providing churches of the Established Church and residences for the officiating ministers. The provision of a new church clock is within these purposes (*Re Hendry* (1887), 56 L. T. 908).

willing to sell or alienate to them, any lands or tenements, goods or chattels, without licence in mortmain (*s*).

Only one such gift or devise may be made by one person, and if the same exceeds five acres in lands or tenements, or the value of £500 in goods and chattels, it is to be good and valid to that extent; and the High Court (*t*) may make order for reducing every such gift or devise within the said limits, and for allotting such specific five acres, and, if occasion require, such specific goods and chattels, as in its judgment may be most convenient, and otherwise as may appear to the court just and reasonable (*u*). Reduction of excessive gift.

911. The Gifts for Churches Act, 1803, further contains provisions enabling corporations aggregate or sole to grant, by way of gift or exchange, plots of land not exceeding one acre for, *inter alia*, the enlargement of a churchyard, and possibly, in some instances the provision of a new churchyard (*w*). Grants by corporations.

912. The Gifts for Churches Act, 1811, contains provisions enabling Crown lands and lands of the Duchy of Lancaster to be granted, to an extent not exceeding five acres in the case of any one grant, for, *inter alia*, the purpose of a churchyard for any church or chapel of the Church of England (*x*). Crown lands.

By the same Act any person or body politic or corporate seised of or entitled to the entire and absolute fee simple of any manor is enabled, by deed enrolled in the High Court, to grant to the rector, vicar, or other minister of any parish church and his successors, or to the curate or minister of any chapel and his successors, any land, not exceeding in the whole five acres, parcel of the waste of such manor, and lying within the parish or extra-parochial district where such church or chapel is or is intended to be erected, for the purpose, *inter alia*, of a churchyard or burying ground, or of enlarging a churchyard or burying ground, for such Waste lands of manor.

(*s*) Gifts for Churches Act, 1803 (43 Geo. 3, c. 108), s. 1. A bequest of money for the repair of a churchyard is good under this section (*Re Vaughan* (1886), 33 Ch. D. 187). So also is a devise on a secret trust for the purpose of the section (*O'Brien* v. *Tyssen* (1884), 28 Ch. D. 372). But a gift for the upkeep of a tomb outside the church is not within it (*Re Rigley's Trust* (1866), 36 L. J. (CH.) 147; *Re Vaughan*, *supra*). The section does not authorise the grant or devise of land to be sold in order that the proceeds should be applied for the purposes of the section, for it contemplates that the land granted or devised should be applied specifically to these purposes in connection with a particular church (*Incorporated Church Building Society* v. *Coles* (1855), 5 De G. M. & G. 324). A devise of the kind would now, however, be good under the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), subject to the provisions of that Act; see title CHARITIES. A grant under the section is not rendered invalid by a reservation in the grantor's favour (*Fisher* v. *Brierley* (1860), 29 L. J. (CH.) 477). As to the apportionment of a bequest under the section between pure and impure personalty, see *Sinnett* v. *Herbert* (1872), 7 Ch. App. 232; *Champney* v. *Davy* (1879), 11 Ch. D. 949.

(*t*) This jurisdiction is given by the section to the Lord Chancellor on petition, but appears to have been transferred to the High Court by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66). See *ibid.*, ss. 16, 17, 34, 76; and *Re Pollard* (1888), 20 Q. B. D. 656, C. A.

(*u*) Gifts for Churches Act, 1803 (43 Geo. 3, c. 108), s. 2.

(*w*) *Ibid.*, s. 4. The section is very confusedly expressed.

(*x*) Gifts for Churches Act, 1811 (51 Geo. 3, c. 115), s. 1. See further, title ECCLESIASTICAL LAW.

SECT. 2. Gifts for Churches Acts, 1803 and 1811.

parish or extra-parochial place, freed and discharged of and from all rights of common thereon (*y*).

SECT. 3.—*The Burial Ground Act*, 1816.

Sale by ecclesiastical corporation of land not exceeding one acre.

913. Under the Burial Ground Act, 1816, any ecclesiastical corporation, aggregate or sole, possessing land adjacent to any cemetery, churchyard, or burying ground, may sell by deed enrolled in the High Court within six calendar months, for the purpose of consecration, such portion thereof as may be deemed necessary for enlarging such cemetery, churchyard, or burial ground, not exceeding one acre (*z*), subject, however, in the case of a corporation sole, to conditions of which the effect is shortly as follows:—

Requirements in case of corporation sole.

The consent of the bishop and of the patron of the living must be testified by their being parties to the conveyance. The land must be valued and a description thereof prepared by a person appointed by the ordinary, and the description and valuation must be verified on oath before a justice. If the value exceeds £100, land of an equal value must be conveyed to the same uses as that conveyed by the corporation sole; if it is between £20 and £100, such value must be paid to the Governors of Queen Anne's Bounty to be applied for the benefit of the corporation sole; and if under £20, it must be paid to the corporation sole to be applied by him at his own discretion (*a*).

Indefeasibility of title.

No alienation by an ecclesiastical corporation under the provisions of the Burial Ground Act, 1816, is to be questioned after the expiration of twenty years from the time of such alienation on account of any want of compliance with the forms prescribed by the Act (*b*).

SECT. 4.—*The Church Building Acts.*

Acquisition of land for churchyards etc.

914. The Church Building Acts, 1818 to 1884 (*c*), contain an elaborate code of provisions for the purchase on behalf of parishes and other ecclesiastical areas of land for sites for churches and chapels and burial grounds, resembling that contained in the Lands Clauses Acts, and including powers for the compulsory acquisition of land (*d*). The compulsory provisions of this code appear, however,

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(*y*) Gifts for Churches Act, 1811 (51 Geo. 3, c. 115), s. 2. This enactment does not authorise a grant overriding customary rights other than rights of common, *e.g.*, a customary right to use the land as part of a village green (*Forbes* v. *Ecclesiastical Commissioners* (1872), L. R. 15 Eq. 51).

(*z*) Burial Ground Act, 1816 (56 Geo. 3, c. 141), s. 1.

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

(*b*) *Ibid.*, s. 3. See also *ibid.*, s. 4; and p. 445, *post*.

(*c*) This collective title is given to a group of nineteen Acts by the Short Titles Act, 1896 (59 & 60 Vict. c. 14), s. 2 and Sched. II. There is no provision in the Acts that they are to be read or construed together; but s. 25 of the Church Building Act, 1845 (8 & 9 Vict. c. 70), provides that the powers, privileges, and authorities contained in the previous Acts may be used and applied for the purpose of carrying the Act of 1845 and the previous Acts into execution, *mutatis mutandis*, so far as the same are applicable thereto, and are not inconsistent with or repugnant to the Act of 1845. The Acts, it may be mentioned, are notorious for faulty draftsmanship and obscurity.

(*d*) See particularly Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 35—53; Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 36—38; Church Building Act,

SECT. 4. The Church Building Acts.

from the first to have been practically a dead letter (*e*); and the provisions as to limited owners appear to be largely superseded by later legislation (*f*).

The Acts further contain provisions for meeting the expenses of the acquisition of land for the purposes above mentioned by means of church rates or rates in that nature and grants from a sum of £1,500,000 appropriated by the Acts of 1818 and 1824, and enabling the provision of churches and burial grounds to be made obligatory. But with the abolition of compulsory church rates (*g*) and the exhaustion of the above-mentioned appropriation these provisions have become obsolete.

Expenses.

The Acts, however, also contain provisions as to gifts of land for the purposes, *inter alia*, of burial grounds, and as to the property in land for burial grounds acquired under the Acts, and other matters, which are still of practical importance.

Gifts of land etc.

The general effect of these provisions is briefly (*h*) stated below. The working of the Church Building Acts is in the hands of the Ecclesiastical Commissioners, as successors (*i*) of a body of commissioners, commonly known as the Church Building Commissioners, originally established by the Church Building Act, 1818, and continued from time to time by subsequent Acts.

Powers of Ecclesiastical Commissioners.

915. The Ecclesiastical Commissioners are empowered to accept and take land for, *inter alia*, sites of additional churches or chapels, including ground for providing a churchyard, and making a proper and sufficient access thereto, from any person willing to give the same (*j*). Whether this power is extended to land for burial grounds independently of sites for additional churches is not clear (*k*).

Power of Commissioners to accept land.

916. There are provisions authorising the grant for the purposes of a burial ground of Crown land and of land of the Duchies of Cornwall and Lancaster (*l*), and also, though it may be questioned

Grants of Crown lands.

1822 (3 Geo. 4, c. 72), ss. 2—4, 7—9, 26, 28, 29, 34; Church Building Act, 1845 (8 & 9 Vict. c. 70), ss. 19—21; Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 27; Church Building Act, 1854 (17 & 18 Vict. c. 32). See further, title ECCLESIASTICAL LAW, and as to compulsory acquisition of land generally, see title COMPULSORY PURCHASE AND COMPENSATION.

(*e*) From a parliamentary return of 1886 (sess. 1, 103, li. 13) these powers would appear to have been exercised only in one case, which occurred in 1820.

(*f*) See particularly Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50); Places of Worship Sites Amendment Act, 1882 (45 & 46 Vict. c. 21); and pp. 442 *et seq.*, *post*.

(*g*) By the Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109).

(*h*) The obscurity of the Acts is such that any attempt to state the effect of the enactments referred to with precision would necessarily fail.

(*i*) Under the Church Building Commissioners (Transfer of Powers) Act, 1856 (19 & 20 Vict. c. 55).

(*j*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 33.

(*k*) See Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 36, 37; Church Building Act, 1822 (3 Geo. 4, c. 72), s. 26; Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 25; *North Manchester Overseers* v. *Winstanley*, [1908] 1 K. B. 835, C. A., *per* BIGHAM, J., at p. 850.

(*l*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 34; Church Building Act, 1838 (1 & 2 Vict. c. 107), s. 8.

SECT. 4. The Church Building Acts.

whether they are still operative, provisions authorising grants for like purposes by Government departments (*m*).

Grants by charitable corporations etc.

917. Any body politic, corporate, and collegiate, and corporation aggregate or sole, or any trustees, guardians, commissioners, or other persons having the control, care, or management of any hospitals, schools, charitable foundations, or other public institutions, are empowered to grant lands, by way of gift, for, *inter alia*, church or chapel yards or cemeteries or the enlargement thereof. Such grants are to be made to the Ecclesiastical Commissioners or their nominees to be used for the purposes of the Church Building Acts, and are declared to be valid notwithstanding any law, statute, usage, or custom to the contrary; and the grantors are declared to be indemnified in respect thereof (*n*).

These powers do not, however, enable trustees of a charity to give, for the purposes of the Church Building Acts, lands of the charity which are required for the purposes of the charity (*o*).

Form of conveyance.

918. A statutory form is provided for conveyances to the Ecclesiastical Commissioners or their nominees under the Church Building Acts, applicable alike in the case of conveyances by way of gift and conveyances by way of sale; and it is declared that such conveyances shall be effectual in law and a complete bar to all estates tail, and other estates, rights, titles, trusts, interests, and incumbrances (*p*).

Exemption from stamp duty.

Conveyances under the Church Building Acts are exempt from stamp duty (*q*).

Consecration.

919. It is expressly provided that land which is added to an existing churchyard or burial ground, or appropriated and set apart for a new burial ground under the Church Building Act, 1819, shall be, as soon as conveniently may be, consecrated for the burial of the dead according to the usage of the Church of England, and be used for ever after as an additional burial ground (*r*).

But, though the Acts contemplate that burial grounds provided under them will in all cases be consecrated, it is not clear whether

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(*m*) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 1. The doubt as to whether the powers conferred on Government departments by this section are still operative arises from the changes in the constitution of such departments which have taken place since 1822.

(*n*) *Ibid.* See also Church Building Act, 1818 (58 Geo. 3, c. 45), s. 34, extended by the Church Building Act, 1819 (59 Geo. 3, c. 134), s. 37, by which somewhat similar, but apparently less extensive, powers are given.

(*o*) *A.-G.* v. *Manchester* (*Bishop*) (1867), L. R. 3 Eq. 436.

(*p*) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 2; and see Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 24. See also Church Building Act, 1840 (3 & 4 Vict. c. 60), ss. 2—4, whereby, subject to certain provisions that can hardly have any application in the case of a burial ground, a licence in mortmain is expressly made unnecessary in the case of conveyances under the Acts. These enactments do not validate a conveyance not authorised by the Acts (*A.-G.* v. *Manchester* (*Bishop*), *supra*). The Church Building Act, 1838 (1 & 2 Vict. c. 107, s. 6), provides a special statutory form of conveyance for the purposes of that Act and the Act of 1831.

(*q*) Church Building Act, 1822 (3 Geo. 4, c. 72), s. 28.

(*r*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 38.

this express provision extends to burial grounds provided under the other Church Building Acts (*s*).

SECT. 4. The Church Building Acts.

920. Land obtained for a burial ground under the Church Building Acts in most cases vests in the incumbent upon consecration (*t*); and, though in some cases the whole of the land

Property in land obtained for burial ground.

(*s*) See Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 23; and note (*c*), p. 436, *ante*.

(*t*) The provisions of the Acts on this subject are complicated. The Church Building Act, 1819 (59 Geo. 3, c. 134), by s. 38, provides that the freehold of land added to an existing churchyard or burial ground or appropriated for a new burial ground under that Act shall upon consecration vest in the person in whom the freehold of the ancient churchyard or burial ground of the parish or chapelry where the same is situated may be vested; and this section, though to a large extent superseded by the later enactments mentioned below, is apparently still operative in some cases.

The Church Building Act, 1822 (3 Geo. 4, c. 72), s. 29, provides, putting it shortly, that after the expiration of five years after the conveyance of any lands to the Church Building Commissioners (now the Ecclesiastical Commissioners), or to any person, for the use of any parish or place as a site for a church or chapel or a church or chapel yard or cemetery, whether by gift or grant, or upon a sale under that Act or the Acts of 1818 and 1819, although no church or chapel shall, before the expiration of the five years, have been built and consecrated upon the site, such lands shall become and remain vested in the Commissioners or person to whom the same were conveyed for the purposes of the Acts, free from adverse claims. Probably, however, this enactment did not affect the vesting of consecrated land in the incumbent etc. under the Act of 1819. It has been generally referred to in text-books as intended merely to make the title indefeasible. As to its effect in that respect, see *A.-G.* v. *Manchester (Bishop)* (1867), L. R. 3 Eq. 436.

The Church Building Act, 1824 (5 Geo. 4, c. 103), s. 14, provides that the site of a church built under that Act, with the cemetery belonging thereto, if any, shall vest in the persons named in the sentence of consecration as a body corporate; and the Church Building Act, 1831 (1 & 2 Will. 4, c. 38), s. 9, contains a somewhat similar provision as to the site of a church built under that Act, with the cemetery, if any, belonging thereto. See also ss. 17 and 18 of that Act as to the indefeasibility of the title. But a church so built may become the church of a new parish, in which case the provisions of the Act of 1856 referred to below would apparently vest the freehold in the incumbent. And, again, if the land had been conveyed to the Church Building Commissioners or Ecclesiastical Commissioners, the provisions of the Act of 1845 referred to below might apply to the exclusion of the provisions of the Act of 1824.

The Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 13, provides that the freehold of every burial ground of which the Church Building Commissioners (now the Ecclesiastical Commissioners) may have accepted or shall accept a conveyance under the Church Building Acts shall after consecration vest in the incumbent for the time being of the church to which the burial ground belongs, or if there is no such incumbent, then in such body or person as the Commissioners, with consent of the bishop, direct, until there is an incumbent, and then in such incumbent, for the use of the inhabitants of the place for which the burial ground was acquired. The same section provides that the freehold of the site of every church of which the Commissioners may have accepted or shall accept a conveyance under the Church Building Acts (as to any church not yet consecrated, when the same shall be consecrated) shall vest in the incumbent. Under this branch of the section it has been held that the whole vests in the incumbent, though only a portion has been consecrated (*Plumstead District Board of Works* v. *Ecclesiastical Commissioners*, [1891] 2 Q. B. 361; *Ex parte London County Council*, [1896] 1 Ch. 520).

Lastly, the New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 10, provides that (subject to a provision as to local Acts) the freehold of the site of the church of any new parish, and of the churchyard, burial ground, and vaults

SECT. 4. The Church Building Acts.

conveyed may vest in the incumbent where part only has been consecrated (*u*), in general the land until consecrated vests in the Ecclesiastical Commissioners or other persons to whom it was conveyed (*w*). The Ecclesiastical Commissioners have certain statutory powers for dealing with land obtained under the Acts but not consecrated (*a*).

Acquisition of land outside area.

921. Where land for a burial ground purchased by or under the authority of the Ecclesiastical Commissioners, or with money granted by them, under the Church Building Acts, is situate outside the area for which the ground is obtained, the ground upon consecration *ipso facto* becomes part of that area (*b*); and in all cases, if the Ecclesiastical Commissioners accept a conveyance of land for a new or additional burial ground under the Acts, they may declare that the land shall after consecration become part of the area on behalf of which it has been conveyed (*c*).

Chapel accommodation etc. for use of several areas

922. There are provisions under which, where a burial ground is provided under the Church Building Acts for two or more areas (*d*), a chapel and a lodge or other building may be provided for the common use of the several areas, subject to regulation by the bishop (*e*), and under which, in the case of such a burial ground, the bishop has power to dispense with the separate fencing of the parts of the ground belonging to the several parishes, and to authorise the inclosure of the whole of the land by a single fence (*f*). The repair of such chapel etc. and fence is to be provided for by means of a repair fund invested in the names of trustees, with regard to whose appointment etc. there are statutory provisions (*g*). The freehold of such a chapel when consecrated, and of any lodge, walks, or gates of the burial ground, vests in the bishop; and the

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belonging thereto, shall vest in the incumbent, and that lands conveyed for such purposes shall be discharged from adverse claims. See also New Parishes Acts and Church Buildings Acts Amendment Act, 1869 (32 & 33 Vict. c. 94), ss. 6, 7; Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), s. 5; and p. 444, *post*.

(*u*) See *Plumstead District Board of Works* v. *Ecclesiastical Commissioners*, [1891] 2 Q. B. 361.

(*w*) See Church Building Act, 1822 (3 Geo. 4, c. 72), s. 29; and note (*t*), p. 439, *ante*.

(*a*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 51; Church Building Act, 1822 (3 Geo. 4, c. 72), s. 34; Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 19.

(*b*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 22; Church Building Act, 1822 (3 Geo 4, c. 72), s. 26.

(*c*) Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 14.

(*d*) As appears from the provisions as to fencing in the Church Building (Burial Service in Chapels) Act, 1846 (9 & 10 Vict. c. 68), s. 3, *infra*, the case contemplated is that of a ground part of which constitutes the burial ground of one area and part of which constitutes the burial ground of another. The provision of a burial ground the whole of which is to be for the use of two areas does not appear to be authorised by the Acts.

(*e*) *Ibid.*, ss. 1, 2; and see s. 5, defining "parish." S. 1 contains special provisions as to burial fees.

(*f*) *Ibid.*, s. 3.

(*g*) *Ibid.*, s. 4. There is no provision as to the source from which the fund is to come. It is no doubt contemplated that it will be subscribed or the like.

preservation and custody thereof is placed in the hands of the trustees (*h*).

SECT. 4. The Church Building Acts.

SECT. 5.—*The New Parishes Acts.*

New Parishes Acts.

923. The New Parishes Acts do not authorise the grant of land or property for the purposes of a burial ground *eo nomine*; but they contain provisions of the widest scope authorising the grant by deed duly enrolled or devise of real property and the gift or bequest of personal property to the Ecclesiastical Commissioners for, *inter alia*, providing churches and chapels for the purposes of the Acts (*i*); and probably the expressions "church" and "chapel" may be taken for this purpose to include burial grounds attached thereto (*k*).

The Acts also provide for the vesting of the burial ground of a new parish in the incumbent (*l*).

SECT. 6.—*The Consecration of Churchyards Acts.*

Grants of land not exceeding one acre for enlargement of churchyard.

924. The powers for granting land to an extent not exceeding one acre as a site for a school conferred on limited owners by the School Sites Acts, 1841 and 1849 (*m*), are extended by the Consecration of Churchyards Acts to the grant of land for the enlargement of churchyards or burial-places, subject to provisions of which the effect is as follows (*n*).

The grant is not to be made otherwise than in fee simple, and may be made in a statutory form. A grant may be made by a tenant for life without the concurrence of the person next entitled in remainder in fee simple or fee tail, and the grant is good without licence in mortmain (*o*).

The conveyance is exempt from stamp duty (*p*), and after five years confers an indefeasible title on the person or corporation in whom the churchyard or burial-place enlarged is vested (*q*).

Reservation of exclusive right of burial.

925. When any land so added to a consecrated churchyard is the gift of any person, whether resident or not in the parish or ecclesiastical district in which the churchyard is situated, the giver of the land may reserve the exclusive right in perpetuity of burial and of placing monuments and gravestones in a part of the land

(*h*) Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 28.

(*i*) New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 22, amended and extended by New Parishes Act, 1844 (7 & 8 Vict. c. 94), s. 7; Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 24; and New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 4. See further, title ECCLESIASTICAL LAW.

(*k*) See *R.* v. *Abrey* (1854), 23 L. J. (M. C.) 154, *per* ERLE, J., at pp. 155, 156, as to the expression "church" including the burial ground.

(*l*) See note (*l*), p. 439, *ante*.

(*m*) 4 & 5 Vict. c. 38; 12 & 13 Vict. c. 49.

(*n*) Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), s. 4. By s. 2 of the Consecration of Churchyards Act, 1868 (31 & 32 Vict. c. 47), the Act of 1867 is declared applicable to burial grounds attached to or belonging to union houses.

(*o*) Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), ss. 4, 5. The statutory form expresses the grant to be "unto the person or persons, or corporation sole or aggregate, in whom" the churchyard or burial ground to be enlarged "is now vested, his or their heirs or successors."

(*p*) *Ibid.*, s. 6.

(*q*) *Ibid.*, s. 7.

SECT. 6. The Consecration of Churchyards Acts.

added, not exceeding one-sixth of the whole of such land. The part in which such right is reserved must be shown and coloured on the plan indorsed on the instrument declaring or recording the consecration of the added land; and a memorandum in a form prescribed (to be prepared and executed at the expense of the person making the reservation) must be written on such instrument and signed by the incumbent and churchwardens of the parish or ecclesiastical district in which the churchyard is situated. The memorandum so signed, after the land is consecrated, operates as an exclusive right in perpetuity in the land therein referred to (*r*).

Nature of rights reserved.

The exclusive rights above mentioned are to be considered to be the real estate of the giver, his heirs and assigns, and no body may be buried or monument or gravestone placed in the land in which such rights have been granted, except by consent of the owner thereof for the time being, save that such consent is not necessary for the burial of a deceased owner, or of a wife or widow of any deceased owner who has been or is about to be buried in such ground. But no such reservation gives the right to bury the body of any person not entitled to be buried in consecrated ground, and all powers of the bishop of the diocese and persons acting under his authority as to the placing and erection of monuments and gravestones and to the placing and removal of inscriptions in churchyards remain in force in the reserved ground (*s*).

Closing of reserved portion.

Such reserved portion is not to be included in any Order in Council under the Burial Acts for closing the churchyard to which it belongs, but it may be closed under a separate Order founded on a special report that the ground is in such a state as to render any further interments therein prejudicial to the public (*t*).

SECT. 7.—*The Places of Worship Sites Acts.*

Grants authorised.

926. The Places of Worship Sites Act, 1873 (*u*), and the Places of Worship Sites Amendment Act, 1882 (*a*), authorise the grant, conveyance, or enfranchisement by way of gift, sale, or exchange in fee simple or for a term of years, of any quantity, not exceeding one acre, of land, not being part of the demesne or pleasure ground attached to any mansion-house, as, *inter alia*, a site for a burial-place (*b*).

(*r*) Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), s. 9, as amended by Consecration of Churchyards Act, 1868 (31 & 32 Vict. c. 47), s. 1. The prescribed form of memorandum is as follows:—

"We, A. B. [rector, vicar, *or* incumbent] and C. D. and E. F., churchwardens, of , declare the piece of land [*here insert the description and measurement*], and coloured on this plan, to be the burial-place of G. H., the giver of the land added to the churchyard of , his heirs and assigns.

Signed A. B.,
C. D.,
E. F.,
in the presence of J. K.

"Dated this day of

(*s*) Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), s. 10, as amended by Consecration of Churchyards Act, 1868 (31 & 32 Vict. c. 47), s. 1.

(*t*) Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), s. 11. As to the closing of burial grounds under the Burial Acts, see pp. 525 *et seq.*, *post*.

(*u*) 36 & 37 Vict. c. 50.

(*a*) 45 & 46 Vict. c. 21.

(*b*) Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), s. 1. The other

This power is given, in the first place, to tenants in fee or in tail or for life or lives of freehold land beneficially interested and in possession, subject, in the case of a tenant for life or lives, to the consent of the person next entitled in remainder in fee simple or fee tail, special provision being made for cases where such person is under disability or is unborn or unascertained (*c*). Freeholds.

Secondly, the power is extended to the case of lands of copyhold or customary tenure, subject to the provisions of the Lands Clauses Acts (*d*) with respect to copyhold lands (*e*). Copyholds.

Thirdly, the power is made exercisable by persons equitably interested in lands without the concurrence of the trustees in whom the legal estate is vested, by married women with the concurrence of their husbands but without acknowledgment, and by guardians and committees on behalf of infants and lunatics (*f*). Persons in whom legal estate not vested.

Fourthly, the power is extended to any corporation, ecclesiastical or lay, whether sole or aggregate, and any officers, justices of the peace, trustees, or commissioners holding land for public, ecclesiastical, parochial, charitable, or other purposes or objects, subject to conditions of which the effect is shortly as follows:— Corporations etc.

In the case of an ecclesiastical corporation sole below the dignity of a bishop, the consent of the bishop is requisite. Consents required.

In the case of a municipal corporation the consent of the Treasury is requisite.

In the case of parochial property the consent of a majority of the ratepayers and owners of property in the parish assembled at a meeting convened in the manner prescribed by the Union and Parish Property Act, 1835 (*g*), and of the Local Government Board and of the guardians of the poor of the parish or of the union comprising the parish, is requisite.

In the case of property held on trust for charitable purposes the consent of the Charity Commissioners (or in some cases of the Board of Education (*h*)) is requisite (*i*).

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purposes authorised are sites for churches, chapels, meeting-houses, or other places of divine worship, and residences for ministers officiating in such places of worship or any places of worship within a mile of the site. See further, title ECCLESIASTICAL LAW.

(*c*) *Ibid.*; Places of Worship Sites Amendment Act, 1882 (45 & 46 Vict. c. 21), s. 2; and see *Re Salisbury (Marquis) and Ecclesiastical Commissioners* (1876), 2 Ch. D. 29, C. A.

(*d*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 95—98. For the Lands Clauses Acts, see title COMPULSORY PURCHASE AND COMPENSATION.

(*e*) Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), s. 1.

(*f*) *Ibid.*, s. 3. The section provides that upon such a conveyance the legal estate shall vest in the "trustees of such place of worship or residence," the draftsman having apparently forgotten the case of a burial ground.

(*g*) 5 & 6 Will. 4, c. 69. The Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 52 (1), which in the case of rural parishes substitutes the consent of the parish meeting for that of the ratepayers and owners of property for certain statutory purposes, does not affect the consent of owners and ratepayers required under the Places of Worship Sites Acts.

(*h*) See Board of Education (Powers) Order in Council, 1902, whereby the consent of the Board of Education is substituted for that of the Charity Commissioners in regard to educational endowments.

(*i*) Places of Worship Sites Amendment Act, 1882 (45 & 46 Vict. c. 21), s. 1.

SECT. 7. **The Places of Worship Sites Acts.**

927. One person may grant more than one site under the Acts, provided that each site does not exceed one acre in extent (*k*).

There are provisions as to the payment and application of the purchase-money or money received for equality of exchange (*l*), and for the apportionment of rent to which the land granted is subject, and savings for incumbrances (*m*); and there is a provision for the reverter of the land if not used for the statutory purposes (*n*).

Application of money etc. and right of reverter.

Conveyances for the purposes of the Acts may be made in a statutory form (*o*).

Form of conveyance.

Grants to Ecclesiastical Commissioners.

928. The persons authorised by the Acts to make grants may convey, by way of gift, sale, or exchange, any site or sites, not exceeding an acre in the case of any one site, for any of the purposes of the Church Building Acts (which purposes, as has been seen (*p*), include those of a burial ground), to the Ecclesiastical Commissioners, or as they may direct; and those Commissioners may act as trustees for the purpose of taking and holding any sites granted under the Acts. And all conveyances made under these provisions (*q*) are to be deemed to be made under the Church Building Acts, and the land conveyed is to vest in conformity with such conveyances and the Church Building Acts (*r*).

SECT. 8.—*Trustee Appointment Acts.*

Land vested in trustees.

929. The Trustee Appointment Acts, 1850 to 1890, contain provisions dealing with the appointment of new trustees when land for the purpose of, *inter alia*, a burial ground, has been acquired in trust for any congregation or society or body of persons associated for religious purposes, or by trustees in connection with any society or body of persons comprising several congregations or other sections or divisions or component parts associated together for any religious purposes, and provisions also to the effect that the conveyance or other assurance of the land shall not only vest the land in the parties named therein, but also in their successors in office duly appointed without further assurance.

Fines etc. in respect of copyholds.

If such land is of copyhold or customary tenure and liable to payment of any fine, with or without a heriot, on the death or alienation of the tenant thereof, a sum corresponding to such fine and heriot becomes due to, and may be recovered by, the lord of the manor on the next appointment of a new trustee or trustees thereof,

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(*k*) Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), s. 1.
(*l*) *Ibid.*, s. 2.
(*m*) *Ibid.*, s. 3.
(*n*) *Ibid.*, s. 1.
(*o*) *Ibid.*, s. 4. The section in terms authorises the use of the statutory form only in the case of a site for a place of worship or the residence of a minister, but the form itself, which is contained in the section, is adapted, *inter alia*, to the case of a burial-place. For a modification of the statutory form suitable in certain cases, see Encyclopædia of Forms, Vol. III., p. 122.
(*p*) See pp. 436 *et seq.*, *ante*.
(*q*) The words are "all conveyances made under this present enactment."
(*r*) Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), s. 5. As to the vesting of burial grounds under the Church Building Acts, see Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 13; and p. 439, *ante*.

and at the expiration of every period of forty years thereafter so long as such land is held in trust as before mentioned (*s*).

SECT. 8. Trustee Appointment Acts.

SECT. 9.—*Vesting of Property in Burial Grounds.*

Property in consecrated ground.

930. There is a general provision in the Burial Ground Act, 1816, that all ground which has been or shall be consecrated as burial ground shall after twenty years from the time of such consecration be considered as discharged from all adverse titles, claims, and demands whatsoever, and as absolutely vested in the trustee or trustees, if any, thereof, and if there should not be any such trustee or trustees, then in the vicar or perpetual curate, if any, for the time being, and if there should not be any vicar or perpetual curate, then in the rector for the time being, of each parish in which such burial ground is situate (*t*).

Part VI.—Provision of Burial Grounds under Burial Acts.

SECT. 1.—*Preliminary.*

SUB-SECT. 1.—*Introductory.*

931. It is proposed, in the present part of this title, to discuss the provision and maintenance of burial grounds by burial boards and other authorities under the Burial Acts, 1852 to 1906 (*u*), and matters connected therewith. The complexity of the subject renders some preliminary observations on the legislation necessary.

Application of Acts in metropolis.

932. The first of the group of Acts in question—the Burial Act, 1852 (*w*)—applied originally only to the metropolis as defined by that Act (*a*); and while most of its provisions were extended to the rest of the country by the Burial Act, 1853 (*b*), so that in the main the Act

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(*s*) Trustee Appointment Act, 1850 (13 & 14 Vict. c. 28); Trustee Appointment Act, 1869 (32 & 33 Vict. c. 26); Trustee Appointment Act, 1890 (53 & 54 Vict. c. 19). See further, title ECCLESIASTICAL LAW.

(*t*) Burial Ground Act, 1816 (56 Geo. 3, c. 141), s. 4. In *Westminster Corporation* v. *St. Martin-in-the-Fields* (*Vicar etc.*) (1907), 96 L. T. 491, land acquired under statutory powers in the early part of the eighteenth century for the enlargement of a churchyard and conveyed to trustees for that purpose and duly consecrated, together with a vestry room, not itself consecrated, built on the land, was held to have vested in the vicar under this enactment upon the presumed death of the last surviving trustee.

(*u*) The collective title of the Burial Acts, 1852 to 1906, is given to a group of fifteen Acts, beginning with the Burial Act, 1852 (15 & 16 Vict. c. 85), and ending with the Burial Act, 1906 (6 Edw. 7, c. 44), by the combined operation of the Short Titles Act, 1896 (59 & 60 Vict. c. 14), s. 2, Sched. II., the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 13, and the Burial Act, 1906 (6 Edw. 7, c. 44), s. 3.

(*w*) 15 & 16 Vict. c. 85.

(*a*) *Ibid.*, s. 53 and Sched. A.

(*b*) 16 & 17 Vict. c. 134, s. 7. Words referring to the metropolis in the sections of the Act of 1852 which were thus extended to the rest of the country were

SECT. 1. Preliminary.

of 1852 has since been of general application, a few of its provisions remain applicable only to the "metropolis" within the meaning of the Act, and the distinction between the "metropolis" and the rest of the country has been kept up to a slight extent in the later legislation (*c*).

Area of metropolis.

The area defined as constituting the "metropolis" for the purposes of the Act of 1852 (*d*) differs in some respects from that defined as the "metropolis" for the purposes of the Metropolis Management Acts (*e*), and now, with some alterations, constituting the administrative county of London. The result is that the "metropolis" for the purposes of the Burial Acts, that is to say, the area to which the exclusively metropolitan provisions of those Acts apply, is not co-extensive with the administrative county of London, but, speaking broadly, differs from that area in that it includes Willesden and excludes Eltham, Lee, Kidbrooke, and Lewisham. Penge, which was formerly in the administrative county of London, but is so no longer, is not in the "metropolis" for the purposes of the Burial Acts (*f*).

Establishment of burial boards.

933. The scheme of the Burial Acts, 1852 and 1853 (*g*), as regards the provision and maintenance of burial grounds, was to enable the vestry of a parish to pass a resolution for the provision of a burial ground, and to provide for the establishment, upon the passing of such a resolution, of a "burial board" elected by, and to some extent under the control of, the vestry, as the executive authority to provide the burial ground and otherwise carry the Acts into execution.

The initial simplicity of this scheme has, however, since been much modified.

(1) Areas other than parishes.

The later Burial Acts contain provisions enabling burial grounds to be provided, and elective burial boards established, for areas other than parishes in like manner as for parishes.

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repealed by the Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56), s. 1 and Sched. I., and are omitted in the Revised Statutes. In these circumstances, it has been thought sufficient in the present title to cite the sections of the Act of 1852 that are of general application without referring to the extending section of the Act of 1853.

(*c*) The operation of the Burial Acts in the administrative county of London differs very much from their operation elsewhere (see pp. 500 *et seq.*, *post*); but this is chiefly in consequence of the provisions of the London Government Act, 1899 (62 & 63 Vict. c. 14), and not of the distinction drawn in the Burial Acts between the "metropolis" and the rest of the country.

(*d*) The "metropolis" is defined by s. 53 of the Burial Act, 1852 (15 & 16 Vict. c. 85), as meaning and including the cities and liberties of London and Westminster, the borough of Southwark, and the parishes etc. mentioned in Sched. A to the Act.

(*e*) 18 & 19 Vict. c. 120 and the various amending Acts, for which see title METROPOLIS.

(*f*) It is not practicable to state the differences between the two areas with complete precision, as changes have taken place in the boundaries of many of the parishes and other areas referred to in the definition of "metropolis" in the Act of 1852, and it is not possible, without investigation of numerous particular cases, to say whether these changes have or have not altered the area constituting the "metropolis" for the purposes of that Act.

(*g*) 15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134.

SECT. 1. Preliminary.

Under provisions contained partly in the later Burial Acts and partly in other statutes, borough councils and other urban authorities, and in some cases the members of such an authority representing a particular ward, may be invested with the functions of elective burial boards, subject to some modifications.

(2) Urban authorities.

(3) Rural districts.

Important alterations in the operation of the Burial Acts are made by the Local Government Act, 1894 (*h*), particularly as regards parishes and other areas in rural districts. Thus, to mention only the more important of these alterations, the power of passing the initial resolution for the provision of a burial ground under the Burial Acts—or, in the phraseology of the Act of 1894, the power of "adopting" the Burial Acts—is, in the case of parishes and other areas in rural districts, transferred from vestries and like bodies to parish meetings; as also are, to a great extent, the other functions of vestries under the Burial Acts (*i*). The functions of burial boards already in existence for parishes and other areas wholly or partly in rural districts were in general transferred to parish councils, or in some instances to parish councils, parish meetings, and urban authorities, or some of such bodies, jointly, in which case the functions in question are discharged by a joint committee of the appointing authorities (*j*). Provision is made that, on the subsequent adoption of the Acts for a rural parish under a parish council, or for part of such a parish, the parish council shall act as the executive authority for the purposes of the Acts in lieu of an elective burial board (*k*); and there is a provision which enables the parish meeting of a rural parish not having a parish council to be constituted the executive authority for the purposes of the Acts (*l*).

(4) Metropolitan boroughs.

Under the London Government Act, 1899 (*m*), another method of "adopting" the Burial Acts is substituted in the case of areas in London for the passing of a resolution to provide a burial ground, and provision is made securing that the metropolitan borough councils, to the exclusion of any other form of authority, shall in London act as the executive authorities under the Acts (*n*).

(5) City of London.

Under special legislation, the Corporation of the City of London have, with some modifications, the functions of a burial board for the City (*o*).

Various burial authorities.

One result of these changes is that the functions of an elective burial board may now be found vested, subject to greater or less modification, in an urban authority, the members of an urban authority representing a particular ward, a parish council, a parish meeting, a joint committee appointed by parish councils, parish meetings, and urban authorities, or two or more of such bodies, or a metropolitan borough council, as well as in an elective burial

(*h*) 56 & 57 Vict. c. 73. For this Act see generally, title LOCAL GOVERNMENT.
(*i*) *Ibid.*, s. 7 (1), (3), (4), (8).
(*j*) *Ibid.*, ss. 7 (5), 53 (2); Local Government (Joint Committees) Act, 1897 (60 & 61 Vict. c. 40); and see pp. 499, 500, *post*.
(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (7); and see p. 493, *post*.
(*l*) *Ibid.*, s. 19 (10); and see pp. 493, 494, *post*.
(*m*) 62 & 63 Vict. c. 14.
(*n*) *Ibid.*, s. 4; and see pp. 500 *et seq.*, *post*.
(*o*) See p. 503, *post*.

SECT. 1. Preliminary.

board. All such executive authorities under the Burial Acts are, together with the Corporation of the City of London, in whom, as has been said, the functions of a burial board are vested, and local authorities maintaining burial grounds under certain other legislation, referred to in recent legislation as "burial authorities" (*p*).

It is proposed to confine attention in the next section mainly to the case of elective burial boards for parishes and other areas wholly comprised in urban districts. It will, however, be convenient to make occasional reference to other burial authorities.

Extension of the Acts to areas other than parishes.

The Burial Acts, 1852 and 1853, as has been said, contemplated the establishment of burial boards for parishes only (*q*). Subsequently, however, various other areas were put in the position of parishes for the purposes of the Acts. The result is that many of the enactments in the Acts of 1852 and 1853, and even in later Acts, which are expressed in reference to parishes, have a more general application. In the ensuing pages the language of these enactments has, whenever it has seemed possible to do so without substantial risk of inaccuracy, been generalised so as to state their effect as extended to areas other than parishes; but it has not been thought necessary on each occasion to cite the extending enactments as well as the original enactment.

SUB-SECT. 2.—*Definitions.*

Interpretation of terms used in Burial Acts.

934. The Burial Acts, 1852, 1853, 1854, 1855, 1857, 1859, 1871, and 1900, are incorporated with each other (*r*), and the interpretation of these Acts is governed by the following definitions (*s*), some of which are of great importance, and which, subject to what is said below, must be taken as governing the meaning of the defined expressions in passages in the text referring to those Acts.

"Parish."

"Parish" is defined as meaning, in effect, a poor law parish (*t*). But the expression is not, in fact, used in the Acts exclusively in this sense (*u*), and in the present part of this title the more definite

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(*p*) See p. 450, *post*.

(*q*) The Acts enabled two or more parishes to combine for the provision of a common burial ground, and provided that in such cases the burial boards of the several parishes should act together as a joint burial board (Burial Act, 1852 (15 & 16 Vict. c. 85), s. 23; see p. 456, *post*), but this is scarcely a real exception from the statement in the text.

(*r*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 21; Burial Act, 1857 (20 & 21 Vict. c. 81), s. 30; Burial Act, 1859 (22 Vict. c. 1), s. 2; Burial Act, 1871 (34 & 35 Vict. c. 33), s. 2; Burial Act, 1900 (63 & 64 Vict. c. 15), s. 13. The non-incorporation of the remaining Acts is not practically of much importance, as they are for the most part either very short or of special scope.

(*s*) The definitions referred to in the present paragraph are contained in s. 32 of the Burial Act, 1852 (15 & 16 Vict. c. 85).

(*t*) The definition is that "'parish' shall mean every place having separate overseers of the poor, and separately maintaining its own poor." This definition is inapt now that parishes in unions no longer maintain their own poor separately, but may be taken as equivalent to the definition of "parish" in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 5, *i.e.*, "a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed." See further, title LOCAL GOVERNMENT.

(*u*) Notwithstanding the definition, an ancient ecclesiastical parish which was not a poor law parish was, in *R.* v. *Sudbury Burial Board* (1858), E. B. & E. 284, held to be a parish for which a burial board could be established under

expression "poor law parish" will be used where it is intended to refer exclusively to a parish in that sense.

"Ratepayers"

"Ratepayers" is defined as meaning the persons for the time being assessed to and paying poor rates of the parish. It must, no doubt, be taken in the case of an area other than a poor law parish to mean persons rated to and paying poor rate in respect of property in the area. The expression includes an occupier whose rates are paid by the owner, or in lieu of whom the owner is rated (*b*), but not an owner who pays rates in lieu of the occupier by agreement, whether statutory or otherwise (*c*). Whether it includes an owner actually rated in lieu of the occupier under statutory provisions in that behalf is doubtful (*d*).

"Incumbent" and "minister"

"Incumbent" and "minister" are defined as meaning, in respect of any fee made payable to an incumbent or minister under the Burial Acts, the clergyman who would have been entitled to the fee had the body been buried in the churchyard or burial ground of the parish from which it came, or in the burial ground of the ecclesiastical district in case such district had a burial ground at the passing of the Burial Act, 1852; and it is provided that if any difference shall arise between two or more persons severally claiming to be the incumbent or minister under this provision, the difference shall be determined by the bishop of the diocese (*e*).

"Churchwardens"

"Churchwardens" is defined as meaning also chapelwardens or other persons discharging the duties of churchwardens.

"Overseers"

"Overseers" is defined as meaning also any persons authorised to make and collect or cause to be collected, the poor rate of the parish, and acting instead of overseers of the poor.

"Clerk"

"Clerk" is defined as meaning the clerk appointed pursuant to the Burial Act, 1852, by a burial board.

"Vestry"

"Vestry" receives a definition that will be given hereafter (*f*).

935. Some further expressions used in the present and ensuing parts of this title require explanation.

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the Act of 1852; but the decision has been doubted in view of the financial provisions of the Act, which do not appear to have been called to the attention of the court. See *R.* v. *Walcot Overseers* (1862), 2 B. & S. 555, particularly *per* CROMPTON, J., at p. 559; *R.* v. *Wright* (1862), 8 Jur. (N. S.) 260; *Hornby* v. *Toxteth Park Burial Board* (1862), 31 Beav. 52, where Lord ROMILLY, M.R., seems clearly to have thought that a burial board could not be established under the Act of 1852 for an area other than a poor law parish. There are, however, provisions in the Act of 1852, and in the later Acts, where "parish" is clearly used as including parishes that are not poor law parishes. See *Day* v. *Peacock* (1865), 18 C. B. (N. S.) 702.

(*b*) Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), ss. 7, 15, 19; Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 14; Assessed Rates Act, 1879 (42 Vict. c. 10). See further, title RATES AND RATING.

(*c*) *Mogg* v. *Clark* (1885), 16 Q. B. D. 79, C. A.; *A.-G.* v. *Croydon Corporation* (1889), 42 Ch. D. 178.

(*d*) See *R.* v. *Hampton* (1865), 6 B. & S. 923, 939; *Mogg* v. *Clark*, *supra*, *per* LINDLEY, L.J., at p. 84.

(*e*) The bishop has no jurisdiction to make any order as to the destination, as between different incumbents, of fees for the burial of non-parishioners in a burial ground provided under the Burial Acts (*Re Fulham Burial Fees* (1878), *Times* (November 26, 1878), *per* Dr. TRISTRAM).

(*f*) See p. 450, *post*.

SECT. 1. Preliminary.

"Adoption" of Burial Acts.

The initial resolution to provide a burial ground, which, or some equivalent proceeding, is necessary before the provision of a burial ground can be undertaken under the Burial Acts, is called in the Local Government Act, 1894 (*g*), the "adoption" of the Burial Acts; and the expression will be used in this title where it is found convenient.

"Burial authority."

The expression "burial authority" is defined in the Burial Act, 1900, as meaning any burial board, any council, committee, or other local authority having the powers and duties of a burial board, and any local authority maintaining a cemetery under the Public Health (Interments) Act, 1879 (*h*), or under any local Act (*i*). The unfortunate generality of this definition precludes employment of the expression to mean a burial board or other executive authority under the Burial Act, 1852, and the amending Acts; and recourse has therefore been had in this title to various circumlocutions to designate a burial authority of the latter character.

"Urban district" and "urban authority."

The expression "urban district" is used in the present title to include boroughs, whether county boroughs or not (*k*), and the expression "urban authority" to include municipal corporations of both county and other boroughs (*a*).

"Non-municipal urban district."

The expressions "non-municipal urban district" and "non-municipal urban district council" are used to designate urban districts other than boroughs and the councils of such districts.

SUB-SECT. 3.—*Vestries and Meetings in Nature of Vestry.*

Power of vestry.

936. Subject to the consent of the urban authority, the power of "adopting" the Burial Acts for a poor law parish in an urban district is enjoyed by the vestry of the parish, and that vestry has likewise the power of electing the burial board, and certain powers of control over the board; and like powers are enjoyed by the "vestry or meeting in the nature of a vestry" for the area in the case of the areas other than poor law parishes for which the adoption of the Acts is authorised (*b*).

Definition of "vestry."

937. The expression "vestry" is defined, for the purposes of the Burial Acts, as meaning the inhabitants of a parish lawfully assembled in vestry, or for any of the purposes for which vestries are holden, except in those parishes in which there is a select or

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(*g*) 56 & 57 Vict. c. 73, s. 7 (8).
(*h*) 42 & 43 Vict. c. 31.
(*i*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 11.
(*k*) This is the meaning of the expression both in the Public Health Acts, and generally in the Local Government Act, 1894 (56 & 57 Vict. c. 73). See *Kirkdale Burial Board* v. *Liverpool Corporation*, [1904] 1 Ch. 829; and title LOCAL GOVERNMENT.
(*a*) This is the meaning of the expression in the Public Health Acts. The expression "urban district council" is generally strictly equivalent to "urban authority," but is so commonly used as excluding municipal corporations, that it has been thought well to avoid the expression as far as possible as ambiguous.
(*b*) See Burial Act, 1855 (18 & 19 Vict. c. 128), ss. 11, 12; Burial Act, 1857 (20 & 21 Vict. c. 81), s. 5; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 62 (2).

other vestry elected under the Vestries Act, 1831 (*c*), or under any local Act for the government of any parish by vestries, in which parishes it means such select or other vestry (*d*).

General and select vestry co-existing.

If in any parish a general vestry co-exists with a select vestry appointed under a local Act, the powers of the vestry under the Burial Acts attach to the vestry which exercises the general management of the parish (*e*).

"Meeting in the nature of a vestry."

There is no explanation in the Burial Acts of the "meeting in the nature of a vestry" to which the functions of the vestry under the Acts are extended in the case of areas other than parishes for which there is no vestry.

Validity of proceedings.

938. No resolution or proceeding of any vestry, or meeting in the nature of a vestry, for the purposes of the Burial Acts is void or voidable by reason of any defect or irregularity of or in notice of the vestry or meeting, or any other error in form in calling the vestry or meeting, or in the proceedings thereat, unless notice in writing of such defect, irregularity, or error be given at the vestry or meeting, or within seven days thereafter, to the churchwardens or other persons to whom it belongs to convene the vestry or meeting, who are thereupon to call another meeting to consider the previous resolution or proceeding or the matter thereof (*f*).

SECT. 2.—*Elective Burial Boards in Urban Districts.*

SUB-SECT. 1.—*Establishment and Election of Burial Board.*

Consent of urban authority to adoption of Burial Acts.

939. The Burial Acts cannot be adopted—that is to say, the initial resolution for the provision of a burial ground cannot be effectively passed—for any part of an urban district without the consent of the urban authority (*g*).

Areas for which Acts may be adopted.

Subject to this restriction, and to the necessity in some cases for the sanction of the Local Government Board (*h*), the Acts may in urban districts be adopted, in each case by the vestry or meeting in the nature of a vestry for the area in question, and elective burial boards established accordingly, for the following areas (*i*):—

(1) A poor law parish (*k*).

(*c*) 1 & 2 Will. 4, c. 60. See title LOCAL GOVERNMENT.

(*d*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 52. The definition relates, of course, only to the vestry of a "parish" within the meaning of the Act. As to the meaning of "parish" for this purpose, see p. 448, *ante*.

(*e*) *R.* v. *Gladstone* (1857), 7 E. & B. 575, where the general vestry was held to be the proper vestry for this purpose; *R.* v. *Peters* (1856), 6 E. & B. 225, where the select vestry was held to be the proper one. For vestries in general, see title LOCAL GOVERNMENT.

(*f*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 27. The provisions of the Vestries Act, 1818 (58 Geo. 3, c. 69), s. 1, and the Acts amending the same, as to the notices of vestry meetings, do not apply to parishes created under the Church Building Acts etc. for ecclesiastical purposes only (*R.* v. *Barrow* (1869), L. R. 4 Q. B. 577).

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 62 (2).

(*h*) See pp. 452, 453, *post*.

(*i*) As to alteration of the area of a burial board, see p. 505, *post*.

(*k*) Burial Act, 1852 (15 & 16 Vict. c. 85), ss. 10, 11. The sections authorise the establishment of a burial board for a "parish," an expression that, as has been seen (p. 448, *ante*), is defined as meaning a poor law parish. As to the

SECT. 2. Elective Burial Boards in Urban Districts.

(2) Two or more parishes or places (whether poor law parishes or not) (i.) united for all or any ecclesiastical purposes, or (ii.) which heretofore have had a church or burial ground for their joint use, or (iii.) of which the inhabitants have been accustomed to meet in one vestry for purposes common to such several parishes or places (*l*).

(3) A parish, township, or other district, not being a poor law parish, which has heretofore had a separate burial ground (*m*).

(4) A parish, new parish, township, or other district not being a poor law parish, which has no separate burial ground. Where this provision is acted upon the powers of any other vestry or meeting and burial board (*i.e.*, other than the vestry or meeting and burial board of the area in question) cease and determine (*n*).

(5) The residue of a poor law parish for part of which a burial board has been established (*o*).

Where sanction of Local Government Board required.

940. The sanction of the Local Government Board (*p*) is, however, necessary for the establishment of a burial board in the case of—

(1) Two or more parishes or places united for ecclesiastical purposes, or which have had a church or burial ground for their

establishment of a burial board under the Act of 1852 for an ancient parish which was not a poor law parish, see note (*a*), p. 448, *ante*. Burial boards can now be established for such areas under the Burial Act, 1857 (20 & 21 Vict. c. 81); see *infra*. The fact that a poor law parish is divided into ecclesiastical parishes, for each of which a separate burial board may be established under the Act of 1857, does not preclude the establishment of a burial board for the poor law parish (*R.* v. *Walcot Overseers* (1862), 2 B. & S. 555).

(*l*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 11; and see *R.* v. *Coleshill Overseers* (1862), 34 L. J. (Q. B.) 96. The word "heretofore" probably refers to the date of the Act. See note (*m*), *infra*. As to joint burial boards for areas consisting of two or more parishes, see p. 456, *post*.

(*m*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 12. The word "heretofore" refers to the date of the Act (*R.* v. *Tonbridge Overseers* (1884), 13 Q. B. D. 339, C. A., *per* BRETT, M.R., at p. 341). Under this enactment a burial board may be established for an area forming part of a larger area for which a burial board has been already established, though the result is to place the former area under the jurisdiction of two burial boards (*ibid.*). The word "district" in the section has no statutory definition, but has generally been considered to mean an ecclesiastical district, as it is contemplated that it will have a vestry or meeting in the nature of a vestry.

(*n*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 5. As to the meaning of "district," see note (*m*), *supra*. Under this enactment a burial board may be established for an area forming part of a poor law parish, though a burial board has been already established for the whole poor law parish; and, though as regards the future, the smaller area will cease to be liable to contribute to the expenses of the burial board for the poor law parish, it remains liable to contribute to expenses and liabilities already incurred. See *R.* v. *Walcot St. Swithin Overseers* (1862), 2 B. & S. 571, in which case, however, the latter point was not actually decided, and the court expressed great doubt as to the proper construction of the section, but were generally of opinion to the effect here stated.

(*o*) *Viner* v. *Tonbridge Churchwardens* (1859), 2 E. & E. 9, where this was held to be the implied effect of the legislation authorising the establishment of a burial board for part of a poor law parish.

(*p*) The sanction required was formerly that of a Secretary of State (*i.e.*, in practice the Home Secretary), but that of the Local Government Board was substituted by the Burial Act, 1900 (63 & 64 Vict. c. 15), [illegible]

joint use, or of which the inhabitants have been accustomed to meet in one vestry, if any one or more of such parishes or places is a poor law parish, or has a separate burial ground (*q*); and

(2) Any parish or place which has been divided into two or more districts for all or any ecclesiastical purposes, if any one or more of such districts has a separate burial ground (*r*).

Conditions of Local Government Board sanction.

Where the sanction of the Local Government Board is thus required, no burial board may be appointed until the resolution of the meeting declaring the expediency of such appointment has been passed and sent to and approved by the Board; and the Board before giving such approval may require notice of such resolution, with particulars, to be published in such manner as may be deemed necessary for giving notice to persons interested (*a*).

Sanction as to part of area.

If, in the first of the cases above mentioned in which the sanction of the Local Government Board is required, it appear to the Board that any of the parishes or places in question has a sufficient burial ground, or that otherwise it would not be expedient that a burial board should be established for such parish or place, the Board may direct that parish or place to be excepted, and a burial board may then be established for the residue of the area (*b*).

Meetings for adoption of Acts.

941. The power of resolving upon the provision of a burial ground for a parish or other area in an urban district is, as has been said (*c*), in the vestry or meeting in the nature of a vestry for that parish or area.

Convening of meeting.

The churchwardens or other persons to whom it belongs to convene meetings of the vestry of a parish may at any time convene such a meeting on their own initiative to consider the question of providing a burial ground for the parish (*d*); and, though it is not expressly so provided, it is implied that like action may be taken by persons empowered to convene vestry meetings or meetings in the nature of vestry meetings for other areas for which burial grounds may be provided.

In the case of a parish, moreover, the churchwardens or other persons to whom it belongs to convene meetings of the vestry of the parish must convene a meeting of the vestry for the special purpose of determining whether a burial ground shall be provided under the Burial Acts for the parish either (1) upon the requisition in writing of ten or more ratepayers (*e*) of the parish to whom it appears that the place or places of burial in the parish are insufficient or dangerous to health (*f*), or (2) if and

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(*q*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 9.
(*r*) Burial Act, 1860 (23 & 24 Vict. c. 64), s. 4.
(*a*) Burial Act, 1871 (34 & 35 Vict. c. 33), s. 1. The section also validates approvals given before the Act, whether before or after the appointment of the burial board.
(*b*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 9.
(*c*) See p. 450, *ante*.
(*d*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 3. For form of notice convening such a meeting, see Encyclopædia of Forms, Vol. III., p. 100.
(*e*) As to the meaning of "ratepayers," see p. 449, *ante*.
(*f*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 10. For form of requisition see Encyclopædia of Forms, Vol. III., p. 99.

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when the Local Government Board (*g*) give notice that it is their intention to make a representation to His Majesty in Council that burials should be discontinued wholly or in part in any burial ground of the parish (*h*). And a similar obligation appears to be imposed by implication on the persons empowered to convene vestry and similar meetings for areas other than parishes.

Notice of vestry meeting.

942. Public notice of a vestry meeting convened to consider the question of providing a burial ground under the Burial Acts and of the place and hour of holding the same, and the special purpose thereof, must be given, in the usual manner in which notices of the meetings of the vestry are given, at least seven days before holding such vestry meeting (*i*).

Copy of resolution for Local Government Board.

If it be resolved at the meeting that a burial ground shall be provided, a copy of that resolution, signed by the chairman, must be sent to the Local Government Board (*k*).

Appointment of persons to form burial board.

943. When the resolution to provide a burial ground has been passed by the vestry, or meeting in the nature of a vestry, of any parish or other area in an urban district, and the sanction of the Local Government Board, when necessary, and of the urban authority has been obtained (*l*), the vestry or meeting are (unless as an alternative steps are taken to invest the urban authority, or certain members of that authority, with the powers of a burial board for the parish or area (*m*)) to appoint not less than three nor more than nine persons, qualified as is mentioned below, to be the burial board of the parish or other area (*n*).

Membership of burial boards.

944. The members of a burial board for a parish must be ratepayers (*o*) of the parish for which it is appointed, but the incumbent of the parish may be appointed and reappointed from time to time a member thereof though not a ratepayer (*p*). One-third, or as nearly as may be one-third (to be determined among themselves), of the members go out of office every year at such time as is from time to time fixed by the vestry, but outgoing members are eligible

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(*g*) Substituted for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I.

(*h*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 3.

(*i*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 10. The provisions of the section as to notice of a vestry meeting may no doubt be taken as applicable also, *mutatis mutandis*, to meetings in the nature of a vestry. For form of certificate of due publication of the notice, see Encyclopædia of Forms, Vol. III., p. 101. As to vestry meetings and their convening, see title LOCAL GOVERNMENT.

(*k*) *Ibid.*, s. 10, as amended, by the substitution of the Local Government Board for a Secretary of State, by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I. The following is suggested as a proper form:—"That a burial ground under the Burial Acts be provided for the parish [or district, etc.] of ." See Encyclopædia of Forms, Vol. III., p. 102.

(*l*) See pp. 451 *et seq.*, *ante*.

(*m*) See p. 489, *post*.

(*n*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 11. The section refers to the case of a parish only; but its provisions are extended to other areas by the enactments enabling burial boards to be established for other areas.

(*o*) As to the meaning of "ratepayers," see p. 449, *ante*.

(*p*) As to the eligibility of the incumbent, see, however, p. 455, *post*.

for immediate reappointment. Any member may at any time resign on giving notice to the churchwardens or persons to whom it belongs to convene the vestry (*q*). And these provisions apply, *mutatis mutandis*, to burial boards for other areas (*r*).

There is no special provision as to the method in which the appointment of members of a burial board is to be carried out, and the matter is accordingly regulated by the general law applicable to proceedings of the vestry or other meeting by whom the appointment is made (*s*).

Vacancies in burial boards.

945. Every vacancy in a burial board is to be filled up by the vestry or meeting appointing it within one month after the vacancy has happened, and immediately upon its occurrence the vacancy is to be notified by the board to the churchwardens or others to whom it belongs to convene the vestry or meeting. If the vestry or meeting neglect to fill up the vacancy, it may be filled by the burial board at any meeting thereof (*a*); but an election by the vestry or meeting is good though made after the expiry of the month if the burial board have not already filled the vacancy (*b*). Every person to be appointed to supply any vacancy must be a ratepayer of the parish or area for which the board is appointed, subject, it would seem, to the eligibility of the incumbent though not a ratepayer (*c*).

A burial board may act for any purpose notwithstanding any vacancies therein (*d*).

Expenses of poll of ratepayers.

946. The reasonable expenses incurred in taking a poll of the ratepayers of any parish or part of a parish on the occasion either of the appointment or reappointment by the vestry of persons to be the burial board for such parish or part of a parish, or of the filling up by the vestry of any vacancy or vacancies on such board, are to be defrayed by the board as if they were expenses incurred by the board in carrying the Burial Acts into execution (*e*).

(*q*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 11.

(*r*) See Burial Act, 1855 (18 & 19 Vict. c. 128), ss. 11, 12; Burial Act, 1857 (20 & 21 Vict. c. 81), s. 5.

(*s*) As to the proceedings of vestries, see title LOCAL GOVERNMENT.

(*a*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 4. A quorum of the board (*i.e.*, three members (see p. 457, *post*)) must be present to enable the board to exercise their power of filling vacancies. Hence if the number of members were reduced below three, the remaining members would be unable to fill the vacancies. See *Newhaven Local Board* v. *Newhaven School Board* (1885), 30 Ch. D. 350, C. A. There is no provision applicable to burial boards similar to the provision held in that case to validate the acts of the local board notwithstanding the irregularities in its constitution.

(*b*) *R.* v. *South Weald Overseers* (1864), 5 B. & S. 391.

(*c*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 4. The section provides that the person to be appointed shall be a ratepayer, but this provision can hardly be intended to override the provisions as to the eligibility of the incumbent referred to *supra*.

(*d*) *Ibid.* The board could not, however, act if reduced in number below a quorum. See *Newhaven Local Board* v. *Newhaven School Board*, *supra*.

(*e*) Burial Boards (Contested Elections) Act, 1885 (48 & 49 Vict. c. 21), s. 2 The Act is expressed, as appears in the text, as confined to the case of a burial board for a parish or part of a parish; but it would perhaps be held to apply generally. *Primâ facie* the expression "parish" in the Act, which is not

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947. A burial board is a body corporate by the name of "The Burial Board for the parish of , in the county of ," and by that name has perpetual succession and a common seal, and may sue and be sued, and may acquire and hold lands for the purposes of the Burial Acts without licence in mortmain (*f*).

Forgery of the seal of a burial board is a felony (*g*).

SUB-SECT. 2.—*Joint Burial Boards.*

Agreement for provision of common burial ground.

948. The vestries of any parishes which may have respectively resolved to provide burial grounds under the Burial Acts may concur in providing one burial ground for the common use of such parishes in such manner, not inconsistent with the Burial Acts, as they may agree, and may agree as to the proportions in which the expenses of such burial ground shall be borne by such parishes; and the proportions for each of the parishes will then be chargeable on and payable out of the poor rates of the parish accordingly.

Establishment of joint burial board.

In such case, according and subject to the terms agreed on, the burial boards appointed for the several parishes are for the purpose of providing and managing such one burial ground, and taking and holding land for the same, to act as one joint burial board (*h*) for all the parishes, and may have a joint office, clerk, and officers, and all the provisions of the Burial Acts will apply to such joint board accordingly. The accounts and vouchers of the joint board are to be audited by the auditors of each of the parishes; and any surplus money at the disposal of the joint board is to be paid to the overseers of the parishes respectively in the same proportions as those in which such parishes are liable to such expenses (*i*).

Corporate capacity of joint burial board.

949. A joint burial board established under the above provisions, which must not be confused with a joint committee appointed under the Local Government Act, 1894, to discharge the functions of a burial board (*k*), is a corporate body by the name of "The Burial Board for the parishes of and , in the county of ," and by that name has perpetual succession and a common seal, and power to hold land for the purposes of the Burial Acts (*l*).

Determination of union of parishes.

950. Where the vestries of two or more parishes have agreed to

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incorporated with the other Burial Acts, means poor law parish by virtue of the definition of "parish" in the Interpretation Act, 1889 (52 & 53 Vict. c. 53), s. 5.

(*f*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 24. The provisions enabling burial boards to be established for areas other than parishes of course imply that a proper modification of this title should be made in the case of burial boards for such areas.

(*g*) Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 36. See title CRIMINAL LAW AND PROCEDURE.

(*h*) It is thus contemplated that each parish will elect a burial board exactly as if it were acting independently, but that the persons elected for the several parishes will all sit together as a single joint board. There is nothing to indicate that the several boards retain independent capacities during the existence of the joint board.

(*i*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 23.

(*k*) 56 & 57 Vict. c. 73, s. 53 (2). As to such joint committees, see p. 499, *post*.

(*l*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 24.

provide one burial ground for the common use of such parishes, they may, at any time before such burial ground has been provided, determine the union between the parishes under the agreement; and upon the union being so determined, the provisions of the Burial Acts are to apply with regard to the parishes and their respective burial boards as if the union had not been formed, save that expenses already properly incurred by the joint board are to be defrayed as above stated (*m*).

Approval of vestries.

951. All acts authorised to be done by any burial board with the approval, sanction, or authority of the vestry of the parish for which it is constituted may be done by a joint burial board with the approval, sanction, or authority of the vestries of the majority of the parishes for which it is constituted (*n*).

Areas other than parishes.

952. The foregoing provisions as to joint burial boards may probably be taken to apply, *mutatis mutandis*, to areas other than parishes for which burial boards may be established as well as to parishes (*o*).

SUB-SECT. 3.—*Proceedings and Powers of Burial Boards.*

Meetings.

953. A burial board may meet at such times as are determined upon at any previous meeting; and it is at all times competent for any two members of the board, by writing under their hands, to summon, with at least forty-eight hours' notice, the board for any special purpose mentioned in such writing, and to meet at such time as is appointed therein. Meetings must be held at the office of the board, or at another convenient place previously publicly notified (*p*).

Quorum.

The quorum of the board is three (*q*).

Minutes of proceedings.

954. Entries of all proceedings of a burial board, with the names of the members who attend each meeting, are to be made in books to be provided and kept for that purpose, under the direction of the board, and are to be signed by the members present, or any two of them; and all entries purporting to be so signed are to be received as evidence without proof of any meeting of the board having been duly convened or held, or of the presence at any such meeting of the persons named in any such entry as being present thereat, or of such persons being members of the board, or of the signature of any person by whom the entry purports to be signed, all of which matters are to be presumed until the contrary be proved (*r*).

(*m*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 2.

(*n*) *Ibid.*, s. 1.

(*o*) It is, however, remarkable that the provisions of the Act of 1857 refer only to parishes, though when that Act was passed the establishment of burial boards for other areas had been authorised. In *R.* v. *Sudbury Burial Board* (1858), E. B. & E. 264, an ancient parish not being a poor law parish was held to be authorised to concur in the appointment of a joint burial board under the Act of 1852, on the ground that such a parish was a "parish" within the meaning of the Act of 1852. But see note (*a*), p. 448, *ante*.

(*p*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 13, as partially repealed by the Burial Act, 1855 (18 & 19 Vict. c. 128), s. 5.

(*q*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 14.

(*r*) *Ibid.*, s. 16. Though the minutes must be signed by two members who were present at the meeting to which they relate, it is not necessary that

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955. A burial board are required to keep accounts (*s*).

Inspection of books.

956. The minute books and books of account are to be at all reasonable times open to the examination of every member of the board, churchwarden, overseer, and ratepayer without charge; and these persons are entitled to take copies of and extracts from such books, also without charge. Penalties recoverable summarily are imposed in respect of refusal to permit such inspection or taking of copies or extracts (*t*). The court will not, however, grant a mandamus in aid of the right of inspection unless such inspection is sought for a *bonâ fide* purpose (*a*).

Audit.

957. The vestry or meeting in the nature of a vestry are yearly to appoint two persons, not being members of the burial board, to be auditors of the accounts of the board, and at such time in March in every year as the vestry or meeting appoint the board are to produce to the auditors their accounts, with sufficient vouchers for all moneys received and paid, and the auditors are to examine the accounts and vouchers and report thereon to the vestry or meeting (*b*).

they should be signed at that meeting. They may be signed at the next or probably a subsequent meeting. See *Southampton Dock Co.* v. *Richards* (1840), 1 Man. & G. 448; *Miles* v. *Bough* (1842), 3 Q. B. 845. The provisions of the Burial Act, 1852, as to minutes of burial boards are expressly declared to be inapplicable to borough councils constituted burial boards by Order in Council (Burial Act, 1854 (17 & 18 Vict. c. 87), s. 2). In *R.* v. *Wimbledon Urban District Council* (1897), 14 T. L. R. 146, it was assumed, without argument, that the provisions as to inspection of the minutes of a burial board contained in s. 17 of the Act of 1852, and referred to later in the text, applied to minutes with reference to transactions under the Burial Acts of a non-municipal urban district council invested (how, does not appear) with the functions of a burial board. It is submitted, however, that at any rate the provisions of s. 16 as to the minutes of burial boards do not in general (even in the absence of express enactment to the contrary) extend to other bodies discharging the functions of burial boards. It can hardly be intended, for instance, that one set of provisions as to authentication should apply to minutes of a parish council relating to transactions under the Burial Acts, and another set to minutes relating to other matters.

(*s*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 16, which requires the board to keep true and regular accounts of all sums of money received and paid for or on account of the purposes of the Act in the parish, and of all liabilities incurred by them for such purposes, and of the several purposes for which such sums are paid and such liabilities incurred.

(*t*) *Ibid.*, s. 17.

(*a*) *R.* v. *Wimbledon Urban District Council*, *supra*; and see note (*r*), *supra*.

(*b*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 18. This section may probably be regarded as confined to accounts of elective burial boards, though, except as regards borough councils invested with the functions of burial boards by Order in Council (see Burial Act, 1854 (17 & 18 Vict. c. 87), s. 2), and possibly as regards metropolitan authorities (as to which see s. 197 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), now repealed by the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 55 (2) and Sched. III.), there is nothing express to prevent its applying to other authorities exercising the functions of a burial board. The accounts of such authorities (except borough councils) are subject to an efficient audit by auditors appointed by the Local Government Board, and it cannot have been intended that the accounts should be also subject to the ineffectual audit provided for by s. 16 of the Act of 1852.

958. A burial board are required to appoint, and may remove at pleasure (*c*), a clerk and such other officers and servants as are necessary for the business of the board and the purposes of their burial ground, and, with the approval of the vestry or meeting in the nature of a vestry, may appoint reasonable salaries, wages, and allowances for such clerk, officers, and servants (*d*).

Officers and servants.

The burial board cannot by employing gravediggers deprive a sexton of his right to earn fees by digging graves in the consecrated part of the ground (*e*), nor are they justified in incurring expense in employing gravediggers to dig graves which it is the sexton's duty to dig (*f*).

Office.

959. A burial board, when necessary, may hire and rent a sufficient office for holding their meetings and transacting their business (*g*).

Contracts.

960. A burial board may contract with any person or company for building chapels and inclosing, laying out, and embellishing any burial ground, and for furnishing any materials and things, and for executing and doing other works and things necessary for the purposes of the Burial Acts. Such contracts are to specify the several works and things to be executed, furnished, and done, and the prices to be paid for the same, and the times when the works and things are to be executed, furnished, and done, and the penalties to be suffered in cases of non-performance. All such contracts or true copies thereof are to be entered in books kept for that purpose.

Notice of contracts over £100.

No contract above the value or sum of £100 is to be entered into by the burial board for the purposes of the Burial Acts unless

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(*c*) The officers of the board will therefore not be entitled to notice before dismissal, at any rate in the absence of express agreement entitling them to notice; and it is very questionable whether a binding agreement entitling them to notice can be made. See *Wood* v. *East Ham Urban District Council* (1907), 71 J. P. 129, C. A.; and compare *Wright* v. *Zetland* (*Marquis*), [1908] 1 K. B. 63, C. A.

(*d*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 15. It appears to be unnecessary for an authority acting in the execution of the Burial Acts, other than an elective burial board, to appoint a clerk specially for the purpose of their business under these Acts, and indeed questionable whether they have power to do so. The Local Government Board have held, on appeal from a district auditor, that a parish council acting in the execution of the Burial Acts have no power to appoint a clerk for the purposes of these Acts in addition to their general clerk. The officers and servants whom a burial board may appoint do not include a chaplain or sexton; and although the board may nominate a Nonconformist minister to perform such services as may be required, they have no power to make any payment to him other than of the fees specified in s. 3 of the Burial Act, 1900 (63 & 64 Vict. c. 15).

(*e*) As to this right, see pp. 469 *et seq.*, 473, *post*.

(*f*) *Gell* v. *Birmingham Corporation* (1864), 10 L. T. 497; *St. Margaret, Rochester, Burial Board* v. *Thompson* (1871), L. R. 6 C. P. 445, *per* KEATING, J., at p. 459.

(*g*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 15. The section is so expressed as to leave it doubtful whether the approval of the vestry is required for this purpose. The section, so far as it need be quoted, runs thus: "The board shall appoint and may remove . . . officers and servants, . . . and, with the approval of the vestry, may appoint . . . salaries . . . for such . . . officers and servants, and, when necessary, may hire and rent a sufficient office. . . ."

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previous to the making thereof fourteen days' notice has been given in one or more of the public newspapers published in the county or counties comprising the area of the board expressing the intention of entering into the contract, in order that any person willing to undertake the contract may make proposals for that purpose, to be offered to the board at a time and place to be mentioned in the notice. It is not, however, incumbent on the board to accept the lowest tender (*h*).

The above requirements as to contracts with a burial board are for the most part, if not wholly, directory (*i*), so that a contract made by or with a burial board in disregard of them would nevertheless be enforceable by either party thereto. Subject to extensive exceptions, however, a contract with a burial board not under the seal of the board would be void on the general principles applicable to the contracts of corporate bodies (*k*).

SUB-SECT. 4.—*Provision of Burial Ground, Acquisition etc. of Land.*

Duty to provide ground.

961. It is the duty of a burial board, subject to the alternative, referred to later, of contracting with cemetery owners, with all convenient speed to proceed to provide a burial ground for their area, and to make arrangements for facilitating interments therein; and in providing the burial ground the board are to have reference to the convenience of access thereto from the area for which it is provided (*l*).

The burial ground may be within or without that area; and, with the approval of a Secretary of State, the board may, if they see fit, provide more than one burial ground (*m*).

Purchase by agreement.

962. For the purpose of providing a burial ground the burial board, with the consent of the vestry or meeting in the nature of a vestry (*n*), may by agreement purchase any lands for the purpose of forming a burial ground or making additions thereto, or purchase from any company or persons entitled thereto any cemetery or cemeteries, or part or parts thereof, subject to the rights in vaults and graves and other subsisting rights which have been previously granted therein (*o*). For the purpose of such a purchase they may avail themselves of the provisions of the Lands Clauses

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(*h*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 31.

(*i*) See *Newell* v. *Worcester Corporation* (1854), 9 Exch. 457; *Soothill Upper Urban Council* v. *Wakefield Rural Council*, [1905] 2 Ch. 516, C. A. The non-observance of such requirements might, however, affect the right of the board to charge the amount of the contract upon the poor rate, which can only be done where the expenses so charged are incurred "in carrying this Act into execution." See s. 19 of the Burial Act, 1852 (15 & 16 Vict. c. 85).

(*k*) See *Stevens* v. *Hounslow Burial Board* (1889), 61 L. T. 839; and titles CONTRACT; CORPORATIONS.

(*l*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 25.

(*m*) *Ibid.*; Burial Act, 1857 (20 & 21 Vict. c. 81), s. 3, as amended by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 12.

(*n*) This consent may be dispensed with in certain cases. See p. 461, *post*.

(*o*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 26. For form of agreement for purchase, see Encyclopædia of Forms, Vol. III., p. 111; and for form of conveyance, see *ibid.*, p. 121.

Acts as to the purchase of land by agreement (*p*); but they have no powers for the compulsory acquisition of land (*q*).

Contract with cemetery owners.

963. Instead of providing a burial ground, the burial board may contract with any company or persons entitled to a cemetery for the burial therein, and either in any allotted part thereof, or otherwise, and upon such terms as the board think fit, of the bodies of persons who would have had rights of interment in the burial ground provided by the board if such ground had been provided (*r*).

Refusal by vestry of consent to expenditure.

964. There are provisions enabling the Local Government Board, in the event of the refusal of the vestry or meeting in the nature of a vestry to sanction the expenditure declared by the burial board to be necessary for providing and laying out a burial ground and building any necessary chapel thereon (*s*), to dispense with the need of such sanction as regards such expenditure and also as regards the borrowing of money, the purchase of lands or of a cemetery or part thereof, and the provision of a mortuary (*t*).

Alienation of land by burial board.

Sale with approval of vestry.

965. Subject to certain restrictions (*u*), a burial board have the following powers for the alienation of lands acquired by them (*a*):—

They may, with the approval of the vestry or meeting in the

(*p*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 27. This section incorporates the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), except the provisions with respect to "the purchase and taking of lands otherwise than by agreement," "the recovery of forfeitures, penalties, and costs," superfluous lands, and access to the special Act. For the purposes of the Burial Act, the "promoters of the undertaking" is to mean the burial board. As to the Lands Clauses Acts generally, see title COMPULSORY PURCHASE AND COMPENSATION.

(*q*) The powers of authorities acting in the execution of the Burial Acts other than elective burial boards as to the acquisition of land are in some cases more extensive than those of elective burial boards, and extend to the acquisition of land compulsorily; see pp. 497 *et seq.*

(*r*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 26. For form of such agreement, see Encyclopædia of Forms, Vol. III., p. 108.

(*s*) As to the building of chapels by burial boards, see p. 468, *post*.

(*t*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 6, as amended, by the substitution of the Local Government Board for a Secretary of State, by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4. As so amended, the section provides in effect that if the vestry of any parish refuse or neglect to authorise the expenditure of such sums as the burial board of the parish have declared to be necessary for providing and laying out a burial ground and building the necessary chapel or chapels therein, the burial board may represent such refusal or neglect to the Local Government Board, and if it appears to the Board after inquiry that the burial board are unable to provide such burial ground, or to proceed effectually in the execution of their duties, by reason of such refusal or neglect, the Board may authorise the burial board, without further authority, sanction, or approval of the vestry, to expend such sums for providing and laying out a burial ground, and building the necessary chapel or chapels thereon, and to borrow for all or any of such purposes, and to enter into and make such contracts and purchases and to do such other acts as under ss. 19, 20, 26, and 42 of the Burial Act, 1852 (15 & 16 Vict. c. 85), might have been expended, borrowed etc., with the authority etc. of the vestry, subject to such limitation of amount or other limitation or restriction as the Board may prescribe. See *R.* v. *Kilham, Yorkshire, Burial Board* (1885), 1 T. L. R. 678, C. A.

(*u*) See p. 462, *post*.

(*a*) In the case of authorities acting in the execution of the Burial Acts other than elective burial boards, other provisions applicable to the alienation of land acquired for a burial ground may come into play; see pp. 486, 492, 497, *post*.

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nature of a vestry, sell and dispose of any lands purchased by them under the Burial Acts, or any part thereof, in which no interment has taken place, and which it may appear to them may be properly sold and disposed of. The proceeds of sale are to be applied to such of the purposes of the Burial Acts as the board think fit (*b*). There are statutory provisions as to the form of the conveyance, and as to the receipt for the purchase-money where land is sold under this power (*c*).

Lease with approval of Local Government Board.

Again, the board may, with the sanction of, and subject to regulations approved of by, the Local Government Board, let any land purchased by them under the Burial Acts which has not been consecrated, and in which no body has been interred, and which is not for the time being required for the purposes of a burial ground, in such manner and upon such terms as the burial board see fit, so, however, that power is reserved to that board to resume possession of any such land which may be required for the purposes of burial on giving six months' notice (*d*).

Land once consecrated remains so.

Once land acquired by a burial board has been consecrated, however, it cannot be divested of its sacred character except by statute, and this circumstance would practically stand in the way of the sale of such land except for some purpose for which a faculty could be obtained (*e*).

Use of unconsecrated ground for other purposes.

Unconsecrated land which is maintained by a burial authority and set apart for the purposes of burial must not be applied to any other purpose except by leave of the Local Government Board (*f*).

Moreover, if the land has once been set apart for the purpose of interment, notwithstanding that it has never been used for that purpose, provisions operate which in general prevent its being used for building in the hands of the purchaser or lessee (*g*).

Appropriation of parish and charity lands.

966. A burial board have also certain powers for the appropriation of parish land and land held for parochial charities (*h*).

(*b*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 28.

(*c*) *Ibid.*; Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 132.

(*d*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 17, as amended, by the substitution of the Local Government Board for a Secretary of State, by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4.

(*e*) See p. 423, *ante*.

(*f*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 6. This would not prevent the conveyance or appropriation of the ground for an "open space" under the enactments referred to at pp. 533 *et seq.*

(*g*) See pp. 423, 424, 532, 533, *post*.

(*h*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 29: "Provided always, that any burial board under this Act, with the approval of the vestry and of the guardians of the poor of the parish (if any), and of the Poor Law Board [now the Local Government Board], may from time to time appropriate for the purposes of a burial ground for such parish, either alone or jointly with any other parish or parishes, any land vested in such guardians, or in the churchwardens, or in the churchwardens and overseers of the parish, or in any feoffees, trustees, or others, for the general benefit of the parish, or for any specific charity: Provided always, that where any land so taken and appropriated shall be subject to any charitable use, such land shall be taken on such conditions only as the Court of Chancery in the exercise of its jurisdiction over charitable trusts shall appoint and direct."

The section, occurring as it does in the Act of 1852, of course refers to the case of a burial board for a parish only, but it must doubtless be taken to be

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967. There are provisions enabling a transfer to be made to a burial board of a burial ground provided under the Church Building Acts, in respect of which there is an outstanding debt charged on the church rate, in consideration of the board paying off the debt, or such part thereof as may be agreed upon by creditors to whom two-thirds of the debt is due (*i*). But in view of the Compulsory Church Rate Abolition Act, 1868 (*j*), these provisions are becoming obsolete. Where they are acted upon the burial board may, with the approval of the vestry, enlarge the burial ground by the addition of unconsecrated ground (*k*).

Transfer of burial ground under Church Building Acts.

968. A burial board, with the approval of the vestry or meeting in the nature of a vestry, may purchase any cemetery closed by Order in Council which adjoins or is near to any land appropriated or about to be appropriated by the board for a burial ground, if the same appears to the board eligible for the purpose of appropriating or erecting buildings for or making approaches to their burial ground. The Order in Council, however, remains in force with regard to such cemetery notwithstanding such purchase (*l*).

Purchase of cemetery closed by Order in Council.

969. A burial board are required to redeem any tithe rent-charge to which land taken by them for the purpose of a burial ground is subject at twenty-five years' purchase, making the necessary application to the Board of Agriculture and Fisheries (*m*), as soon as they are in possession of the land, and before applying it to the purposes of a burial ground (*n*).

Redemption of tithe rent-charge.

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extended to other areas for which burial boards may be established. Probably guardians of a union comprising the parish are not guardians of the parish within the section. Property formerly vested in the churchwardens and overseers is now in the case of a rural parish vested in the parish council or the corporation of the chairman of the parish meeting and the overseers, as the case may be, under the Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 5 (2), 19 (7); and in the case of an urban parish is not infrequently vested in the overseers alone, or in the urban authority, under an order of the Local Government Board made pursuant to s. 33 of that Act.

The court will not entertain an application in respect of charity land under the section unless the leave of the Charity Commissioners or the Board of Education, as the case may be, to make the application has been obtained under s. 17 of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), though their approval of the objects of the application is not required (*Ex parte Watford Burial Board* (1856), 2 Jur. (N. S.) 1045). The court may impose the payment of a price as one of the conditions on which it will authorise the appropriation of the land (*Re Egham Burial Board* (1857), 3 Jur. (N. S.) 956). The consent of the vestry, when given under the erroneous belief that the land will be appropriated free of charge, is a nullity (*ibid.*).

(*i*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 7.

(*j*) 31 & 32 Vict. c. 109. It must be remembered, however, that compulsory church rates are not abolished by the Act where money is due upon security of them, and in some parishes payment of such rates is still enforced. See title ECCLESIASTICAL LAW.

(*k*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 7.

(*l*) *Ibid.*, s. 26.

(*m*) As successors of the Tithe Commissioners (Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2 (1) and Sched. I., Part II.; Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31). As to redemption of tithe rent-charge generally, see title ECCLESIASTICAL LAW.

(*n*) Tithe Act, 1878 (41 & 42 Vict. c. 42), s. 1; and see *ibid.*, ss. 2—8.

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970. A burial board may lay out and embellish any burial ground provided by the board in such manner as may be fitting and proper (*o*).

Use of ground within one hundred yards of dwelling-house.

971. No ground not used as or appropriated for a cemetery before August 14, 1855, may be used for burials under the Burial Acts (*p*) within the distance of one hundred yards from any dwelling-house without the consent in writing of the owner, lessee, and occupier of such dwelling-house; but (subject to an exception with regard to certain special rights acquired before November 27, 1906) such consent is not required where the dwelling-house is or was begun to be erected, or is or was erected or completed, after any part of the burial ground has or had been so used or appropriated (*q*).

Extent of prohibition.

The prohibition is against the actual interment of bodies. Land may be appropriated as part of the burial ground within the hundred yards so long as no actual interment takes place within that distance (*r*). The hundred yards are to be measured as the crow flies (*s*) from the walls of the dwelling-house itself, and not from the walls or boundary of the curtilage (*t*).

When objection cannot be raised.

A landowner who sells land for the purpose of a burial ground cannot afterwards object to the use of the land for burial within a hundred yards of a dwelling-house belonging to him on land which he retains (*a*).

Purchase of consent to use of ground.

It would appear to be legitimate for a burial board to purchase the

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(*o*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 30. The section contained further provisions which are now repealed by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 12 and Sched. II.

(*p*) Notwithstanding that the restriction is expressed to apply only to burials under the Burial Acts—the words of the section are, "under the said Act [the Burial Act, 1852] or this Act, or either of them"—it was held by MALINS, V.-C., in *Greenwood* v. *Wadsworth* (1873), L. R. 16 Eq. 288, to apply to burials in a burial ground provided by private enterprise; and it was afterwards assumed to have this general effect in *Cowley* (*Lord*) v. *Byas* (1877), 5 Ch. D. 944, C. A. It is, however, generally thought that the decision in *Greenwood* v. *Wadsworth*, *supra*, was wrong.

(*q*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 9; Burial Act, 1906 (6 Edw. 7, c. 44), s. 1. S. 9 of the Act of 1855 was held in *Godden* v. *Hythe Burial Board*, [1906] 2 Ch. 270, C. A., to apply with reference to dwelling-houses erected after the provision of the burial ground as well as any erected previously, and s. 1 of the Act of 1906, which is expressed to operate retrospectively—the words are that the consent "shall not be and shall be deemed never to have been required in any case" etc.—was enacted in consequence of that decision. The section is, however, subject to a proviso to the effect that nothing in the section shall affect any rights acquired before November 27, 1906, under any judgment or order of a court of competent jurisdiction or under any agreement in writing, but that in case of a dispute one of the parties to which is a burial authority within the meaning of the Burial Act, 1900 (63 & 64 Vict. c. 15) (see p. 450, *ante*), arising under an agreement as to any such right, the dispute shall, if either party so requires, be determined by the Local Government Board, either as arbitrators or otherwise at the option of the Board, in manner provided by the section.

(*r*) *Cowley* (*Lord*) v. *Byas*, *supra*.

(*s*) *Moufet* v. *Cole* (1872), L. R. 8 Exch. 32.

(*t*) *Wright* v. *Wallasey Local Board* (1887), 18 Q. B. D. 783.

(*a*) *Toms* v. *Clacton Urban District Council* (1896), 78 L. T. 712, decided on the principle that a man cannot derogate from his own grant.

consent of an owner, lessee, or occupier to the use of their burial ground for burial within a hundred yards of a dwelling-house.

Control of burial ground.

972. The general management, regulation, and control of any burial ground provided by a burial board are, by express enactment, subject to the provisions of the Burial Acts and any regulations made thereunder (*b*), vested in and exercisable by the burial board, but any question which arises touching the fitness of any monumental inscription in the consecrated part of the ground is to be determined by the bishop (*c*).

Rights and duties in respect of ground.

Moreover, as owners and occupiers of the land, the board are in general, and apart from express provision, entitled to the ordinary rights and subject to the ordinary duties of owners and occupiers of land (*d*).

Liability as "owners" under Public Health Acts etc.

Whether the burial ground of a burial board is *extra commercium*, so that the board escape statutory liabilities imposed on "owners" of property by such statutes as the Public Health Acts, appears not to have been decided, but probably it is not, at any rate while used for burials (*e*).

Rates.

973. A burial board are rateable in respect of their burial ground (*f*), subject to the limitation that land acquired by a burial

(*b*) As to regulations under the Burial Acts, the power to make which is now in the Local Government Board, see p. 537, *post*.

(*c*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 38. As to the effect of the section as regards the mutual rights of the burial board and grantees of exclusive rights of burial etc. in the burial ground, see *Ashby* v. *Harris* (1868), L. R. 3 C. P. 523, and *McGough* v. *Lancaster Burial Board* (1888), 21 Q. B. D. 323, C. A.; and p. 473, *post*. In case of dispute between the board and any person as to the fitness of an inscription in the consecrated part of the ground, the proper course is to apply to the chancellor of the diocese to hold a court to decide the question. Either party may so apply (*Dean of Carlisle's Case* (1866), *Times* (December 21, 1866).

(*d*) *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex. D. 5, where a burial board were held liable in damages for injury to a horse depastured in an adjoining field occasioned by its eating branches of yew trees planted by the board in their burial ground, which had been allowed to project over the field, affords an instance of the liability of a burial board in their capacity of the owners and occupiers of land. See titles AGRICULTURE, Vol. I., p. 296; BOUNDARIES, FENCES AND PARTY-WALLS, pp. 126, 127, *ante*.

(*e*) A parish churchyard appears to be *extra commercium*. See *Angell* v. *Paddington Vestry* (1868), L. R. 3 Q. B. 714, decided with reference to a church, and noticed in *Wright* v. *Ingle* (1885), 16 Q. B. D. 379, C. A. On the other hand, the cemetery of a cemetery company is not *extra commercium* (*St. Giles, Camberwell, Vestry* v. *London Cemetery Co.*, [1894] 1 Q. B. 699). And the burial ground of a burial authority in actual use would probably be held to be on the footing of the cemetery of a cemetery company in this respect. See *Westminster Corporation* v. *Johnson*, [1904] 2 K. B. 737, C. A. A burial ground no longer in use might, however, be held to be in a different position, particularly if closed by Order in Council and appropriated as an open space. See *London County Council* v. *Wandsworth Borough Council*, [1903] 1 K. B. 797, C. A.; but see *Herne Bay Urban District Council* v. *Payne*, [1907] 2 K. B. 130.

(*f*) That the burial ground is rateable is assumed in s. 15 of the Burial Act, 1855 (18 & 19 Vict. c. 128), referred to in note (*g*), p. 466, *post*. See also *London County Council* v. *Erith Overseers*, [1893] A. C. 562; *Liverpool Corporation* v. *West Derby Union* (1905), 69 J. P. 277, not followed on a point immaterial to the present question in *Hornsey School of Art* v. *Edmonton Union Assessment Committee* (1905), 70 J. P. 121, and distinguished in *Liverpool Corporation* v. *West Derby Union* (1908), 72 J. P. 228, affirmed 24 T. L. R. 701, C. A.; *North Manchester Overseers* v. *Winstanley*, [1908] 1 K. B. 835, C. A.

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board for a burial ground, with or without any building erected or to be erected thereon, may not, while used for such purposes, be assessed to any rates at a higher value than that at which it was assessed at the time when it was so acquired (*g*). A burial ground does not fall within the definition of "agricultural land" in the Agricultural Rates Act, 1896 (*h*), and is thus rateable to the poor rate at the full rate in the pound.

Apparently, however, the burial ground would cease to be rateable if it ceased to be used for burials, and were not used for any other purpose than that of an open space (*i*).

Protection of burial grounds.

974. The clauses of the Cemeteries Clauses Act, 1847 (*k*), with respect to the protection of the cemetery, are applicable to burial grounds provided by burial boards (*l*). These clauses impose penalties (*m*) on persons injuring the fences etc. of the burial ground, defacing tombstones, causing disturbance in the burial ground etc.

SUB-SECT. 5.—*Consecrated and Unconsecrated Portions of Burial Ground.*

Application for consecration.

975. A burial authority for any burial ground may, if they think fit, apply to the bishop to consecrate any portion of the burial ground approved in that behalf by the Secretary of State (*n*).

Omission to make application.

If the burial authority do not make the application within a reasonable time after a request in that behalf, the Secretary of State, if satisfied that a reasonable number of the persons for whom, or within the area for which, the burial ground is provided desire that a portion of it be consecrated, and that the consecration fees have been paid or reasonably secured, may make the application in respect of an approved portion of the ground, and the bishop may consecrate accordingly; and it is the duty of the burial board in such case to make such arrangements as may be necessary for the consecration (*o*).

(*g*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 15. As to the basis of assessment within this maximum, see title RATES AND RATING.

(*h*) 59 & 60 Vict. c. 16, s. 9. See title RATES AND RATING.

(*i*) See *Lambeth Overseers* v. *London County Council*, [1897] A. C. 625; *Manchester Corporation* v. *Chorlton Union Assessment Committee* (1897), 15 T. L. R. 327; *Liverpool Corporation* v. *West Derby Union* (1908), 24 T. L. R. 701, C. A.

(*k*) 10 & 11 Vict. c. 65, ss. 58, 59. See further, as to these sections, p. 523, *post*.

(*l*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 40.

(*m*) The sections do not themselves provide for the manner in which the penalties are to be enforced; but s. 62 of the Act of 1847, under which penalties are recoverable summarily in manner provided by the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 140—160, as modified by the Summary Jurisdiction Acts (see pp. 523, 524, *post*), would probably be held to apply with reference to the recovery of penalties under the sections incorporated with the Burial Acts.

(*n*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 1 (1). For form of application for Home Secretary's approval, see Encyclopædia of Forms, Vol. III., p. 123; for form of petition to the bishop, see *ibid.*, p. 125.

(*o*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 1 (2). Before the Act of 1900 it was obligatory in all cases upon a burial board to apply to the bishop to consecrate at least a portion of the burial ground, and their duty was enforceable by mandamus (*R.* v. *North Kelsey Burial Board* (1892), *Times* (March 22, 1892); *R.* v. *Basingstoke Burial Board* (1896), 60 J. P. 708). The Secretary of State has power to cause inquiries to be held with regard to the consecration of burial grounds. See p. 539, *post*.

No wall or fence need be erected or maintained between the consecrated and unconsecrated portions of a burial ground provided under the Burial Acts, but, in the case of any burial ground where there is no such wall or fence, the burial board must place and keep in repair such boundary marks of stone or iron as may be sufficient to show the boundaries of such portions respectively (*p*).

Refusal by bishop to consecrate.

976. If a burial board apply in writing to the bishop to consecrate a burial ground stating that the ground is in a fit and proper condition for the purpose of interment with the rites of the Church of England, and the bishop refuses to consecrate, the board may appeal to the archbishop, who is to decide the matter in dispute. If the archbishop decides that the ground is not in such fit and proper condition, the board must put it in a fit and proper condition; but if he decides that it is in a fit and proper condition and ought to be consecrated, he is to communicate such decision in writing to the bishop, and if the bishop do not within one calendar month thereafter consecrate the ground, the archbishop must under his hand and seal license the same for interments according to the rites of the Church of England, and such licence, until the ground is consecrated, operates to make lawful the use of the same as if it had been consecrated (*q*).

Use before consecration.

977. Where a Secretary of State certifies that all necessary provisions with regard to a burial ground provided under the Burial Acts have been complied with, it is lawful for the incumbent or incumbents of the parish or parishes for which the ground is provided, or his or their curate or curates, or such duly qualified person as any such incumbent may authorise, if such incumbent, curate, or person think fit, to bury in the burial ground before the decision of the bishop or archbishop upon the application for consecration (*r*).

Allotment of unconsecrated portion.

978. The unconsecrated part of a new burial ground provided under the Burial Acts must be allotted in such manner and in such portions as may be sanctioned by a Secretary of State (*s*). Portions may be allotted for the exclusive use of particular denominations (*t*).

(*p*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 11. Before this Act it was held that there was a sufficient "setting apart" of the unconsecrated part of the burial ground within the now repealed provisions of s. 30 of the Burial Act, 1852 (15 & 16 Vict. c. 85), where that part was separated from the consecrated part by a wall 12 inches high (*R.* v. *Tiverton Burial Board* (1858), 31 L. T. (o. s.) 233).

(*q*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 12, as amended by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 12.

(*r*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 13. A clergyman of the Church of England is now at liberty to use the burial service of the Church in any unconsecrated ground in which he might lawfully have used such service if such ground had been consecrated (Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41) s. 12); and see p. 427, *ante*.

(*s*) Burial Act, 1853 (16 & 17 Vict. c. 134), s. 7.

(*t*) See Burial Act, 1900 (63 & 64 Vict. c. 15), s. 2 (1), (2). For form of application to the Secretary of State, see Encyclopædia of Forms, Vol. III., p. 123.

SECT. 2. SUB-SECT. 6.—*Chapels.*

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Erection of chapels.

979. A burial authority may, at their own cost, erect on any part of their burial ground, which is not consecrated or set apart for the exclusive use of any particular denomination, any chapel which they consider necessary for the due performance of funeral services, but no chapel so erected after July 10, 1900, may be consecrated or reserved for the exclusive use of any denomination (*u*).

Erection of denominational chapels.

980. A burial authority may also, at the request and cost of the residents within their district belonging to any particular denomination, erect, furnish, and maintain a chapel for funeral services according to the rites of that denomination on the ground appropriated to their use. Where such a request is made, and the estimated costs are tendered to the burial authority or reasonably secured, then, if the burial authority refuse to grant the request or fail to give effect to it within a reasonable time, a Secretary of State may, if he thinks fit, by order in writing, require the burial authority to erect etc., or give facilities for erecting etc., such a chapel in accordance with directions given in the order, and the burial authority must comply with the order (*v*).

Use of chapel for adjoining burial grounds.

981. There are provisions enabling two burial boards who have provided separate burial grounds, if such burial grounds adjoin each other, to provide a chapel or chapels jointly for use in connection with burials in both grounds, or, with the sanction of a Secretary of State, to contract for the use by one of such boards of a chapel provided by the other (*a*).

SUB-SECT. 7.—*Rights of Sepulture, Duties of Incumbents etc.*

Right of burial in ground provided by burial board.

982. Where a burial ground is provided by a burial board for a parish, or for two or more parishes, such burial ground is to be deemed the burial ground of such parish or parishes, and the

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(*u*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 2 (1).

(*v*) *Ibid.*, s. 2 (2), (3). Before the Act of 1900 a burial board had power to erect a chapel for the performance of the burial service according to the rites of the Church of England, and also a chapel or chapels on the unconsecrated part of the ground for funeral services, and where they erected a chapel for the performance of the burial service according to the rites of the Church of England they were, in certain cases, bound also to provide chapel accommodation for the performance of a funeral service by persons not being members of that Church. See the portions of the Burial Act, 1852 (15 & 16 Vict. c. 85), s. 30, the Burial Act, 1853 (16 & 17 Vict. c. 134), s. 7, and the Burial Act, 1855 (18 & 19 Vict. c. 128), s. 14, repealed by the Act of 1900, s. 12 and Sched. II. A chapel erected before the Act of 1900 for the performance of the burial service according to the rites of the Church of England, and consecrated for that purpose, is for that purpose a substitute for the parish church (*St. Margaret, Rochester, Burial Board* v. *Thompson* (1871), L. R. 6 C. P. 445). The Secretary of State has power to cause inquiries to be held with regard to the building of chapels in burial grounds. See p. 539, *post*.

(*a*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 16. The section refers to burial boards for two parishes, but must doubtless be taken to extend to burial boards for other areas. It refers also to the powers of burial boards for the provision of chapels under the Burial Acts, 1852 (15 & 16 Vict. c. 85) and 1853 (16 & 17 Vict. c 134); but it must now, it seems, be read as referring to the substituted powers conferred by the Burial Act, 1900 (63 & 64 Vict. c. 15). See the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (1).

parishioners and inhabitants of such parish or parishes—and for this purpose persons dying in the parish are to be considered to be inhabitants (*b*)—have the like rights of sepulture in the burial ground as they would have had in the burial ground of their parish (*c*). And where a burial ground is provided by a burial board for any other area, the inhabitants of that area have the same right to be buried in such burial ground as the inhabitants of a parish have to be buried in their parish burial ground (*d*).

Performance of burial service etc.

983. There are provisions also putting the consecrated part of a burial ground provided by a burial board on the footing of a parish burial ground as regards the performance of the burial service by the incumbent and the functions of parish clerks and sextons.

Subject to what is said below as to the case of a "new parish," the effect of these provisions when the burial ground is provided for a poor law parish which is also an ecclesiastical parish, or for an ancient ecclesiastical parish, or for an area consisting of two or more such parishes, is shortly as follows: The incumbent of the parish or of each of the parishes, as the case may be, is required to perform the same duties and has the same rights and authorities for the performance of the burial service in the case of the burial of parishioners or inhabitants of his parish (including persons dying there), and the clerk and sexton are required and authorised to discharge the same functions in reference to such burials, as if the burial ground were the burial ground of their parish. But in more complicated cases difficulties may arise as to the application and effect of these provisions (*e*).

(*b*) See p. 413, *ante*.

(*c*) See the Burial Act, 1852 (15 & 16 Vict. c. 85), s. 32, discussed in note (*r*), *infra*. As to rights of sepulture in parish burial grounds, see pp. 413 *et seq.*, *ante*.

(*d*) This follows from the consideration that the Burial Acts subsequent to the Burial Act, 1852 (15 & 16 Vict. c. 85), while providing that burial grounds may be provided for areas other than "parishes," also enact that the Act of 1852 and such other Acts are to be read and construed together as one Act. See p. 448, *ante*.

(*e*) The principal enactment dealing with this matter is s. 32 of the Burial Act, 1852 (15 & 16 Vict. c. 85), which is as follows (the words in italics being now repealed by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 12): "*From and after the consecration as aforesaid of* any burial ground provided under this Act (*except any portion thereof intended not to be so consecrated*), *or where all or any part of such burial ground, by reason of the same having been already consecrated, shall not require to be consecrated, then from and after such time as the bishop of the diocese shall appoint, such burial ground* shall be deemed the burial ground of the parish for which the same is provided, and where the same is provided for two or more parishes such burial ground shall be in law as if such parishes were one parish, and as if such burial ground were the burial ground of such one parish; and every incumbent or minister of the parish or of each of the parishes (as the case may be) for which such burial ground is provided shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorise, perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, *and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received*; and the clerk and sexton of such parish or of each of such parishes shall (when necessary) perform and exercise the duties and functions in respect of the burial of the remains of parishioners

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The provisions as to "new parishes" above mentioned are to the effect that the incumbent, clerk, and sexton of a "new parish" constituted under the New Parishes Acts, and to which

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or inhabitants of the parish of which he is clerk or sexton in such burial ground or the consecrated portion thereof, *and shall be entitled to receive the same fees on such burials*, as he has previously performed and exercised *and received*, as if such burial ground were the burial ground of the respective parish of such incumbent or minister, clerk, and sexton respectively; and the parishioners and inhabitants of such parish or of each of such parishes shall have the same rights of sepulture in such burial ground as they respectively would have had in the burial ground or burial grounds in and for their respective parish, subject nevertheless to the provisions herein contained."

It will be remembered that the Act of 1852 contemplated the provision of burial grounds for "parishes" within the meaning of that Act, and through the medium of joint burial boards for areas consisting of two or more such parishes only. The directions, however, in the subsequent Burial Acts, that the Acts are to be read and construed as one Act, necessarily involve that the provisions of the section are to be taken to be extended, *mutatis mutandis*, to cases where a burial ground is provided by a burial board for an area other than a "parish." No difficulty in this respect occurs so far as regards rights of sepulture; but difficulties have arisen as to the application of the section in such cases with regard to the functions of the incumbent and the sexton and clerk.

In *Hornby* v. *Toxteth Park Burial Board* (1862), 31 Beav. 52, questions were raised as to the performance of burial service and rights to burial fees in the case of burials in the consecrated part of a burial ground provided by a burial board established for the poor law parish of T. It was in dispute whether T. was ecclesiastically extra-parochial or part of the parish of W. Three churches or incumbencies had been established in T. The first was established under a local Act of 1774. Under this Act a cemetery attached to the church was vested in the churchwardens of the church, who were authorised to sell burial places in it to any persons willing to purchase such places; and at burials in the cemetery fees double in amount of those payable in cases of burials at the parish church of W. were made payable, of which the one moiety was to be handed over to the vicar of W., and to be applied by him like fees for burials at that parish church. In 1844 a district was assigned to the church established under the Act of 1774 by Order in Council under the Church Building Acts. The second church or incumbency was established under a local Act of 1815, which contained provisions with regard to a cemetery attached to the church substantially, with reference to the questions in the case, to the same effect as those of the Act of 1774. The third incumbency was established in 1837 under the Church Building Acts by an Order in Council constituting a part of T. an ecclesiastical district. No burial ground was provided for this district. The burial board were established shortly after 1853, and part of the burial ground provided by them was consecrated in 1856. The vicar of W., who was one of the plaintiffs, had treated T. as not being part of the parish of W. It was held, without deciding whether T. was part of the parish of W. or not, that neither the vicar of W. nor the incumbent of any of the three incumbencies established in T. was entitled to burial fees in respect of interments in the burial ground. The vicar of W. could not claim fees as such even if T. were part of the parish of W., since, for the purposes of the Burial Acts, T. was a separate parish from W. Again, the vicar of W. could not be regarded as the incumbent of T., or if he was such incumbent *de jure*, he was not so *de facto*, and had enjoyed no fees on the burials of inhabitants of T. as vicar of T. The incumbents of the incumbencies established under the Acts of 1774 and 1815 were not entitled to fees because the burial grounds attached to their churches were not burial grounds in which inhabitants of T. had rights of sepulture, burial spaces in such burial grounds being simply saleable to any purchaser indifferently. *A fortiori* the third incumbent, to whose church no burial ground was attached, had no claim. No decision was given by the court in this case as to the duties of the incumbents to perform the service over bodies of inhabitants brought for burial in the burial ground, the decision being confined to their right to fees. Owing to the legislation contained in the Burial Act, 1900

New parishes.

those Acts or any of them may apply, and comprised in a parish or parishes for which a burial ground is provided under the Burial Acts (but not having a separate burial ground under those Acts), are, if the new parish contributes to the rates out of which the ground has been provided, to perform the like duties in respect of the burials of parishioners and inhabitants of the new parish in the consecrated part of the burial ground as if the burial ground were the burial ground of the new parish, subject, however, to a saving for the rights of existing incumbents etc. (*f*).

(63 & 64 Vict. c. 15), with regard to ministers' fees, the case has not the importance that it had before that Act.

In *Day* v. *Peacock* (1865), 18 C. B. (N. S.) 702, questions arose as to the rights to burial fees in the case of burials in the consecrated part of a burial ground provided by a local board acting as a burial board for the poor law parish of B. under the following circumstances: B. was an ancient parochial chapelry, and as such had had an ancient burial ground. An additional church was built in B. under the Church Building Acts and a burial ground provided in connection with it, and in 1831 part of B., known as the district of St. G., was, under those Acts, assigned to that church, the burial ground becoming the burial ground of that district. In 1844 a part of the district of St. G. was, under the Church Building Acts, made into a separate ecclesiastical district under the name of St. J., but no separate burial ground was provided for that district, and the inhabitants of St. J. accordingly retained their rights of sepulture in the burial ground of St. G. The ecclesiastical district of St. J. had not become a new parish under the New Parishes Acts. The ancient burial ground of B. and the burial ground of St. G. were closed by Order in Council in 1857. The local board were constituted a burial board in 1858, and a part of the burial ground provided by them was consecrated in 1861. It was held that the incumbent of St. J. was not entitled to burial fees in respect of the burials of persons belonging to that district, that the incumbent of St. G. was entitled to fees in respect of the burial of persons coming from St. G. as originally constituted (*i.e.*, including St. J.), and that the incumbent of the residue of B. was entitled to burial fees in respect of the burial of persons belonging to that part of B.

In *Stewart* v. *West Derby Burial Board* (1886), 34 Ch. D. 314, it was held that where a burial ground was provided by a burial board for a poor law parish which had been constituted a separate ecclesiastical parish by a local Act the incumbent of the parish was bound to perform the burial service on the burial of parishioners and inhabitants of the parish in the consecrated part of the ground, although the parish had never had any separate burial ground of its own, and that he was entitled to any fees which the burial board might collect in respect of the performance of such service by him. The case also raised questions as to incumbents' right to fees on such interments, turning on the provisions of the local Act in relation to the peculiar circumstances of the case; but these questions were not definitely decided, and appear to be of little or no general interest.

(*f*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 5. The section, after provisions, already referred to (p. 452, *ante*), authorising the establishment of a burial board and provision of a burial ground for "any parish, new parish, township, or other district" not being a poor law parish and having no separate burial ground, and making incidental provisions, continues as follows (the words in italics being repealed by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 12 and Sched. II.): "and until a burial ground shall be so provided as aforesaid *and consecrated* for any new parish or district created or to be created pursuant to" the New Parishes Acts, 1843, 1844, and 1856 (6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; 19 & 20 Vict. c. 104), "or any or either of them, and to which the said Acts, or any or either of them, may apply, the incumbent of such new parish or district (if any burial ground has been or shall be provided under the herein recited Acts [the earlier Burial Acts] for the burial of the dead, or any or either of them, for any parish or parishes out of rates to which such new parish or district, or any part thereof, shall have contributed or contribute or be liable, shall, with respect

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Exclusive character of incumbent's rights.

984. Where an incumbent is required and entitled, under the provisions of the Burial Acts above referred to, to perform the burial service over the remains of parishioners and inhabitants of his parish or district in the consecrated part of a burial ground provided by a burial board, it is unlawful, as being an offence against ecclesiastical law, for any person other than such incumbent or a person authorised by him to perform the burial service over the remains of such persons there, and the exclusive rights thus vested in the incumbent in the matter will be enforced by injunction. But the duties of the incumbent in question do not extend to the burial of strangers to the parish or district whom the burial board permit to be buried in the ground, though he has the right to prevent any other minister of the Church of England from performing the Church of England service over strangers in the consecrated part of any burial ground situate in his parish (*g*).

Arrangements in case of joint burial ground.

985. Where a burial ground is provided under the Burial Acts for the common use of two or more parishes, in case any question arise among the incumbents of such parishes as to the performance of the burial service by a chaplain to be paid by contributions from them or deductions from fees or sums payable to them, or otherwise touching the performance of service in the consecrated part of the

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to the burial in such last-mentioned burial ground of the remains of the parishioners or inhabitants of such new parish or district, or of such part thereof as shall have contributed or contribute as aforesaid, as the case may be, perform the same duties, and have the same rights, privileges, and authorities, *and be entitled to the same fees*, and also the clerk and sexton of such new parish or district shall, when necessary, respectively perform the same duties, *and be entitled to the same fees*, in respect of such burials, as if the said burial ground were exclusively the burial ground of such new parish or district, subject nevertheless to all provisions to which the incumbents, clerks, and sextons of original parishes are respectively subject in and by the said Burial Acts, or any or either of them: Provided also, that nothing herein contained shall affect the rights or privileges of any existing incumbent, clerk, or sexton without the consent of such incumbent, clerk, or sexton respectively."

Cronshaw v. *Wigan Burial Board* (1873), L. R. 8 Q. B. 217, and *Harris* v. *Lambeth Burial Board* (1883), 47 J. P. 501, are cases in which the section was held to entitle the incumbent of a district which had become a new parish within the New Parishes Acts to burial fees; and *White* v. *Norwood Burial Board* (1885), 16 Q. B. D. 58, is a similar decision with regard to sextons' fees. But in all these cases the contest was as to whether the district had become such a new parish. On this subject see *R.* v. *Perry* (1861), 3 E. & E. 640; *Jones* v. *Gough* (1865), 3 Moo. P. C. C. (N. S.) 1; and title ECCLESIASTICAL LAW. In *Ormerod* v. *Blackburn Burial Board* (1873), 28 L. T. 438, the section was held to extend to the sexton of a new parish which had never had a separate burial ground. It was held in *Haig* v. *Barlow* (1892), Trist. 149, that the section did not give the incumbent of such new parish any right to monumental fees, but only to fees for performing the service; but it has been doubted whether the Chancellor's decision in this case can be reconciled with the decision in *Cronshaw* v. *Wigan Burial Board*, *supra*.

(*g*) *Wood* v. *Headingley-cum-Burley Burial Board*, [1892] 1 Q. B. 713. There is some difficulty about the rights and duties of persons in holy orders as to the performance of the burial service in the consecrated part of the burial ground in cases where, as, for instance, in the case of the burial ground in question in *Hornby* v. *Toxteth Park Burial Board* (1862), 31 Beav. 52 (see note (*e*), p. 470, *ante*), or in the case of the burial of out-parishioners, the provisions of the Burial Acts above mentioned as to the rights and duties of the incumbent do not apply. *Primâ facie* it is unlawful by ecclesiastical law for any person other than the incumbent of the parish, or a person licensed by him, to perform

ground, the bishop of the diocese is required from time to time to confirm any arrangement approved by a majority or, in case of equal numbers, one-half of such incumbents, and such arrangement so confirmed is binding on all the parties concerned (*h*).

986. The burial board cannot deprive the sexton of his right to discharge the functions of his office in the case of burials in their burial ground and to earn the fees attached to the discharge of such functions (*i*) by appointing other persons to do the work usually done by a sexton (*k*).

Rights of sexton.

Among the duties of a sexton is that of tolling the bell, and if the chapel provided for the burial ground is consecrated, and furnished with a bell, the sexton has a right of entry to the chapel for the purpose of tolling it (*l*).

SUB-SECT. 8.—*Charges of Burial Board for Burial etc.*

987. A burial board may, under such restrictions and conditions as they think proper, sell the exclusive right of burial, either in perpetuity or for a limited period, in any part of their burial ground, and also the right of constructing any vault or place of burial, with the exclusive right of burial therein, in perpetuity or for a limited period, and also the right of erecting and placing any monument, gravestone, tablet, or monumental inscription in the burial ground (*m*).

Sale of exclusive rights of burial etc.

Such exclusive right of burial is analogous to the corresponding rights which may be acquired under faculty in a churchyard (*n*); but it is a statutory right, and is not to be extended beyond the words of the statute which authorise it. The grant of such a right, therefore, conveys to the grantee no freehold estate in any part of the ground, nor the right to erect a gravestone, though the latter right may be separately acquired (*o*). It may be granted to the

Nature of right of exclusive burial.

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the burial service in any consecrated ground in the parish. See *Wood* v. *Headingley-cum-Burley Burial Board*, [1892] 1 Q. B. 713; *Johnson* v. *Friend* (1860), 6 Jur. (N. S.) 280; *Moysey* v. *Hillcoat* (1828), 2 Hag. Ecc. 30. The provisions of the Burial Acts above referred to, in cases to which they apply, *pro tanto* override this rule; but in cases not provided for by the Burial Acts the rule prevails. See *Wood* v. *Headingley-cum-Burley Burial Board*, *supra*, and expressions to a similar effect by DR. TRISTRAM in *Re Fulham Burial Fees* (1878), *Times* (November 26, 1878).

(*h*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 39.

(*i*) As to these fees, see Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3 (1), (3), (5); and pp. 479, 480, 482, *post*.

(*k*) *Gell* v. *Birmingham Corporation* (1864), 10 L. T. 497; *St. Margaret, Rochester, Burial Board* v. *Thompson* (1871), L. R. 6 C. P. 444, at p. 459.

(*l*) *Ibid.*

(*m*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 33, as amended by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 12.

(*n*) See p. 419, *ante*.

(*o*) See *McGough* v. *Lancaster Burial Board* (1888), 21 Q. B. D. 323, C. A., where a grant of an exclusive right of burial with a right to erect a gravestone, subject, *inter alia*, to existing and future regulations issued by the board, was held by the Court of Appeal, partly in view of the terms of the grant and partly in view of the statutory control over the ground vested in the burial board under s. 38 of the Burial Act, 1852 (15 & 16 Vict. c. 85) (as to which see p. 465, *ante*), not to entitle the grantee to place a glass shade on the grave to protect a wreath in contravention of regulations made by the board. In

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grantee and his heirs, and in that case will descend accordingly (*p*). And there is no apparent reason why it should not be granted to the grantee and his family by analogy with the limitations in faculties (*q*). It does not appear to be an interest in land so as to be affected by the Statute of Frauds, but rather to be an incorporeal hereditament in the nature of an easement, and it therefore requires a deed to complete the title at law (*r*).

Fees chargeable by burial board.

988. A burial board are entitled to charge fees in respect of interments in their burial ground, as well as to make charges for the rights of exclusive burial etc., which they are empowered to sell as above mentioned (*s*).

Table of fees.

The board are required to fix and settle such fees and charges, subject to the approval of the Local Government Board; and, with the approval of that Board, and also of the vestry or meeting in the nature of a vestry, they may from time to time revise and alter such fees and charges. A table showing the fees and charges, and all other fees and payments in respect of interments in the burial ground (*t*), must be printed and published, and be affixed, and at all times continued, on some conspicuous part of that ground (*a*).

Receipt of fees on behalf of ministers.

The board, in addition to the fees and charges above mentioned which they receive on their own behalf, are required to receive fees on behalf of ministers of religion who perform funeral services in the ground, and in some cases also fees still payable to incumbents other than for services rendered (*b*).

SUB-SECT. 9.—*Finances of Burial Board.*

Control by vestry of expenditure of burial board.

989. Subject to a provision under which such authorisation may be dispensed with by the Local Government Board (*c*), the expenses of a burial board in providing and laying out a burial ground and building any necessary chapel thereon must not exceed such sum

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the earlier case of *Ashby* v. *Harris* (1868), L. R. 3 C. P. 523, a grant of similar rights, subject to a proviso to the effect that if the gravestone were not kept in repair according to such regulations as the burial board should make the grant should be void, was held to entitle the grantee to plant the grave with shrubs and flowers notwithstanding a regulation made by the board subsequently to the grant prohibiting planting in the burial ground by persons other than the board's employees; but the decision was doubted in *McGough* v. *Lancaster Burial Board* (1888), 21 Q. B. D. 323, C. A.

(*p*) *Matthews* v. *Jeffrey* (1880), 6 Q. B. D. 290, where it was contended, unsuccessfully, that although the grant was made to the grantee, his heirs and assigns, the right nevertheless passed on the death of the grantee intestate to the family of the grantee generally.

(*q*) See p. 419, ante.

(*r*) See *Bryan* v. *Whistler* (1828), 8 B. & C. 288, and generally, titles EASEMENTS AND PROFITS À PRENDRE; REAL PROPERTY AND CHATTELS REAL.

(*s*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 34, as amended by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 12.

(*t*) *E.g.*, the fees payable to ministers of religion for services rendered.

(*a*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 34; Burial Act, 1855 (18 & 19 Vict. c. 128), s. 7; Burial Act, 1900 (63 & 64 Vict. c. 15), ss. 4, 12. The approval of the Local Government Board was substituted for that of the Secretary of State by s. 4 of the Act of 1900. For form of table of fees, see Encyclopædia of Forms, Vol. III., p. [illegible].

(*b*) See pp. 479 *et seq.*, post.

(*c*) See p. 461, ante.

as the vestry or meeting in the nature of a vestry may authorise to be expended for the purpose (*d*). But their expenditure on other matters is not subject to the control of the vestry or meeting in the nature of a vestry.

Expenses of burial board for poor law parish.

990. The expenses of a burial board for a poor law parish in carrying the Burial Acts into execution are chargeable upon and are to be paid out of the poor rate of the parish; and the overseers or other officers making and levying the poor rate are, upon the receipt of a certificate under the hands of not less than three members of the board of the sums required from time to time for defraying any such expenses, to pay such sums out of the poor rate as the board direct (*e*).

Expenses of burial board for areas other than poor law parishes.

991. The provisions as to the manner in which burial boards for areas other than poor law parishes are to raise their funds are expressed in very confused language, but their effect is as follows;—

Subject to the one exception mentioned below, the board issue certificates, such as are above mentioned, calling for contributions from the overseers or other persons making and levying the poor rate of the poor law parish or poor law parishes constituting or comprising the area of the board. Where the whole of a poor law parish from which a contribution is thus sought is comprised within the area of the board, the certificate is to be met out of the poor rate; where part only of a poor law parish either constitutes or is comprised within the area of the board, then the overseers, or other persons levying the poor rate, are to meet the certificate by the levy of an addition to the poor rate or of a separate rate or rates in that part of the parish. The exception is that where the contribution is required from part of a poor law parish comprised in an incorporation or union maintaining its poor out of a common rate the certificate is to call for the contribution from the persons authorised to make and collect the common rate or cause it to be made and collected, and is to be met by those persons by the levy of an addition to the common rate or of a separate rate within the part of the parish in question (*f*).

Apportionment of contributions.

Where the burial board is established for united parishes etc. under s. 11 of the Burial Act, 1855, the contributions of the several parishes and places in question are to be proportionate to their rateable values (*g*). And where a joint burial board is

(*d*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 19.

(*e*) *Ibid.*, s. 19; and see *ibid.*, s. 14.

(*f*) Burial Act, 1855 (18 & 19 Vict. c. 128), ss. 11, 13. The financial provisions of these sections extend to cases where the burial board was originally constituted for a poor law parish, but, owing to subsequent alterations in parish boundaries, their area has ceased to be co-extensive with such a parish (*R.* v. *Keighley Overseers* (1897), Local Government Chronicle, 1897, p. 47).

(*g*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 11. The apportionment must be according to rateable values for the time being (*R.* v. *Coleshill Overseers* (1862), 31 L. J. (Q. B.) 219, affirmed, without dealing with this point, 34 L. J. (Q. B.) 96, Ex. Ch.). In the case of a burial board the contributions must still be apportioned according to rateable values notwithstanding the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16). See *Lancashire Asylums Board* v.

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established the matter is determined by the agreement for the establishment of the board (*h*). In other cases, however, there is no express provision as to how contributions are to be apportioned between different areas.

Levying of separate rate.

992. For the purpose of levying a separate rate on part of a parish to meet expenses of a burial board under the above provisions, the overseers or other persons levying the rate have the same powers, remedies, and privileges, and are to proceed in the same manner, as in the case of the poor rate, and any such rate may, notwithstanding any restriction in relation to the parish rate or common rate, be made and levied as may be necessary to provide for the payments required (*i*). The officers ordinarily employed in the collection of the poor rate must, if required by the overseers, collect such a separate rate, and are to receive out of the rate such remuneration for the additional duty as the overseers, with the consent of the vestry of the poor law parish (*k*), determine (*l*). The accounts of the overseers in relation to the rate are subject to audit by the district auditor (*m*).

Borrowing on security of rates.

993. A burial board may, with the sanction of the vestry or meeting in the nature of a vestry—which, however, may be dispensed with by the Local Government Board in certain cases (*n*)—and the approval of the Local Government Board (*o*), borrow any money required for providing and laying out a burial ground and building a chapel or chapels thereon on the security of the rates out of which their expenses are payable (*p*).

Manchester Corporation, [1900] 1 Q. B. 458, C. A. In the case of an urban authority exercising the financial powers of a burial board, however, the apportionment might have to be made according to assessable values by virtue of s. 3 of the Agricultural Rates Act, 1896. See title RATES AND RATING.

(*h*) See p. 456, *ante*.

(*i*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 13. The effect of this provision seems to be to apply to the rate in question the enactments for the time being applicable to the poor rate, and not the enactments applicable to that rate at the date of the Act of 1855. See *R.* v. *Lambert* (1854), 2 C. L. R. 883; *R.* v. *Wolferstan*, [1893] 2 Q. B. 451; but see *contrâ*, *Bird* v. *Adcock* (1878), 47 L. J. (M. C.) 123. Many of the enactments affecting the poor rate passed since the Act of 1855, moreover, apply in terms to local rates generally or to a class of such rates that would include a separate burial rate; and other such enactments may apply to the rate by virtue of s. 38 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), if not by virtue of s. 13 of the Act of 1855 itself. See generally, title RATES AND RATING.

(*k*) In the case of a rural parish the consent would be that of the parish council or parish meeting, as the case might be.

(*l*) Poor Law Act, 1879 (42 & 43 Vict. c. 54), s. 17.

(*m*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 37; and see the Orders of the Local Government Board of March 20, 1879, and September 8, 1903 (Statutory Rules and Orders Revised, 1904, Vol. X., "Poor, England," 379, 537).

(*n*) See p. 461, *ante*.

(*o*) Substituted for this purpose for the Treasury by the Local Authorities (Treasury Powers) Act, 1908 (8 Edw. 7, c. 33), s. 1 (1).

(*p*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 20. The section, the latter part of which, dealing with the discharge of the loan, is repealed, contemplates of course the case of a burial board for a parish only, and authorises borrowing on the security of the "future poor rates of the parish." The provisions as to the

There are provisions authorising burial boards to borrow at a lower rate of interest for the purpose of paying off securities bearing a higher rate of interest (*q*) and provisions enabling them to borrow for the purpose of paying off the principal of a previous loan at the time appointed for repayment if they are unable to pay off the same otherwise (*r*).

Methods of borrowing.

994. There are alternative methods of exercising their borrowing powers open to the burial board.

Mortgage of rates.

(1) They may borrow by mortgage of the rates chargeable in accordance with provisions in the Burial Acts (*s*). Where they adopt this course the clauses of the Commissioners Clauses Act, 1847 (*t*), with respect to mortgages to be executed by the commissioners, apply (*u*). And the board are, for the purpose of providing a sinking fund for paying off the principal, to set aside once in every year, out of the moneys charged, such sum as they think proper, being a sum equal to or exceeding one-fiftieth of the principal borrowed (*a*). The effect of the clauses of the Commissioners Clauses Act, 1847, as thus applied, is as follows (*b*):—The mortgage is to be by deed under the seal of the board duly stamped and stating the consideration, and may be in a form scheduled to the Act of 1847 or to the like effect (*c*). The

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security must, no doubt, be taken to be extended in the manner stated in the text. See *R.* v. *Coleshill Overseers* (1864), 34 L. J. (Q. B.) 96, where money borrowed by a burial board established under s. 11 of the Burial Act, 1855 (18 & 19 Vict. c. 128), for united parishes, each of which was a poor law parish, was held to be rightly charged on "the future rates to be made and levied" in the one poor law parish "and also on the future rates to be made and levied" in the other poor law parish.

(*q*) Burial Act, 1854 (17 & 18 Vict. c. 87), s. 4; Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), s. 80, as incorporated with the Burial Act, 1857 (20 & 21 Vict. c. 81), by s. 19 of that Act. S. 4 of the Act of 1854 is expressed to apply to burial boards established under the Burial Act, 1853 (16 & 17 Vict. c. 134), and borough councils constituted burial boards by Order in Council only, and, though its operation may be extended to some extent by the later Burial Acts, it cannot be regarded as of general application with regard to borrowing to pay off loans raised under the powers of the Burial Acts. S. 80 of the Commissioners Clauses Act, 1847, on the other hand, would appear to apply generally to loans raised under these powers. These reborrowing powers would not enable the burial board to pay off the mortgagee compulsorily before the time at which they were otherwise entitled to pay him off. See *West Derby Union* v. *Metropolitan Life Assurance Society*, [1897] A. C. 647.

(*r*) Burial Act, 1854 (17 & 18 Vict. c. 87), s. 5. The section is expressed to apply only to the burial boards and councils to which the previous section applies. See note (*q*), *supra*.

(*s*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 20. See note (*p*), p. 476, *ante*.

(*t*) 10 & 11 Vict. c. 16, ss. 75—88.

(*u*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 19.

(*a*) *Ibid.*, s. 20; and see Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), s. 84.

(*b*) The group of sections of the Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), headed "With respect to the Mortgages to be executed by the Commissioners," contains, in addition to the provisions referred to in the text, provisions with regard to the enforcement of the security by the appointment of a receiver (*ibid.*, ss. 86, 87); but these provisions appear to be inapplicable in the case of a burial board.

(*c*) Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), s. 75 and Sched. B.

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mortgagees are entitled to proportions of the rates charged according to the sums advanced by them without priority one above another by reason of priority as regards the date of the advance or mortgage (*d*). A register of mortgages is to be kept and to be open to inspection (*e*). The mortgages are transferable by deed, duly stamped and stating the consideration, which may be in a form scheduled to the Act of 1847 or a form to the like effect; and such transfers are to be registered (*f*). The interest, in the absence of other provision in the mortgage, is payable half-yearly (*g*). Money may be borrowed at a lower rate of interest in order to pay off mortgages bearing a higher rate of interest (*h*). A period for the repayment of the principal may be fixed, and if fixed is to be named in the mortgage; and in that case, upon the expiration of such period, the principal is to be repaid on demand at the place named in the mortgage, or, if no place is so named, at the office of the board (*i*). If no period for repayment is fixed, the principal is repayable, at the instance either of the board or the mortgagee, after the expiry of twelve months from the date of the mortgage, upon certain notice (*k*). Interest ceases to run as from the expiration of due notice on the part of the board to pay off the principal, unless the board fail to pay off such principal, with interest already due, accordingly (*l*). A sinking fund is to be established for the purpose of paying off the mortgages, and is to be applied for that purpose (*m*). Where the board are enabled to pay off one or more of the mortgages then payable, but not the whole of the mortgages of the same class, the order in which the mortgages are to be paid off is determinable by lot (*n*). The accounts of the board are to be open to inspection by the mortgagees (*o*).

Grant of terminable annuities.

(2) They may borrow by means of terminable annuities for a life or lives, or for any number of years not exceeding thirty (*p*).

(*d*) Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), s. 75.
(*e*) *Ibid.*, s. 76.
(*f*) *Ibid.*, ss. 77, 78, and Sched. C.
(*g*) *Ibid.*, s. 79.
(*h*) *Ibid.*, s. 80; and see p. 477, *ante*.
(*i*) *Ibid.*, s. 81.
(*k*) *Ibid.*, s. 82.
(*l*) *Ibid.*, s. 83.
(*m*) *Ibid.*, s. 84; and see p. 477, *ante*.
(*n*) *Ibid.*, s. 85.
(*o*) *Ibid.*, s. 88.
(*p*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 21. Whether the provisions of the Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), above mentioned, apply, so far as they are capable of applying where money is borrowed in this way, is not clear. S. 19 of the Act of 1857 incorporates the clauses of the Act of 1847, and enacts that these clauses shall apply to "mortgages and other securities" to be created by burial boards, and that the expression "the Commissioners" in those clauses shall for this purpose mean the burial board "acting in the execution of the said clauses and the Acts hereinbefore recited [*i.e.*, the earlier Burial Acts] or this Act"; s. 20 contains provisions as to a sinking fund in the case of money borrowed on "mortgages granted under any of the said Acts or this Act"; and s. 21 provides that "any burial board . . . may, for the purpose of raising money, instead of making mortgages under any of the said Acts, grant terminable annuities for a life or lives, or for any number of years not exceeding thirty years, to be paid out of the like moneys as provided with regard to the moneys secured by such mortgages." There is no further provision with

(3) They may borrow in accordance with the Local Loans Act, 1875 (*q*), by means of debentures or annuity certificates.

(4) The Public Works Loan Commissioners are authorised to advance money to burial boards and other burial authorities in accordance with the provisions of the Public Works Loans Acts (*r*).

Application of income.

995. The money raised for defraying the expenses of the burial board and the income derived from the burial ground, except fees for the application of which other provision is made, are to be applied by the burial board in or towards defraying their expenses under the Burial Acts. And whenever, after repayment of all moneys borrowed for the purposes of the Burial Acts and the interest thereof, and after satisfying all the liabilities of the board with reference to the execution of those Acts, and providing such balance as is deemed by the board sufficient to meet their probable liabilities during the ensuing year, there is at the time of holding the vestry or meeting at which the yearly report of the auditors is produced any surplus money at the disposal of the board, the surplus is in the case of a burial board established and acting for a poor law parish to be paid by the board to the overseers in aid of the poor rate, and in other cases is, no doubt, to be paid to the overseers or others raising the rates out of which the expenses of the board are payable in aid of such rates (*s*).

Such a surplus is assessable to income tax under Sched. D (*t*). Income tax.

SUB-SECT. 10.—*Fees of Ministers of Religion, Sextons etc.*

Minister's fees for services rendered.

996. Every burial authority are required to submit to the Secretary of State a table of fees to be received by them in respect of services rendered by any minister of religion or sexton, and the

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regard to such annuities. For form of terminable annuity, see Encyclopædia of Forms, Vol. III., p. 119.

(*q*) 38 & 39 Vict. c. 83. See ss. 4, 31. As to borrowing under this Act, see title LOCAL GOVERNMENT.

(*r*) The then Public Works Loan Commissioners were authorised to lend to burial boards by s. 21 of the Burial Act, 1852 (15 & 16 Vict. c. 85), and the section, which remains unrepealed, authorises loans by the present Public Works Loan Commissioners (Public Works Loan Act, 1875 (38 & 39 Vict. c. 89), s. 55). Burial grounds provided by burial boards are also mentioned among the purposes for which the Commissioners may lend (*ibid.*, Sched. I.). They have also, it may be added, power under the Public Works Loans Act, 1896 (59 & 60 Vict. c. 42), to lend for any purpose for which the council of a county, borough, district, or parish are authorised to borrow. Such loans must be repaid by instalments (in the form of an annuity or otherwise) within a period not exceeding thirty years (Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 11, as amended by the Public Works Loans Act, 1898 (61 & 62 Vict. c. 54), s. 5). As to loans from the Commissioners generally, see title LOCAL GOVERNMENT.

(*s*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 22. The section of course contemplates the case of a burial board for a poor law parish only, but must, it seems, be read as applicable in other cases with the modification suggested in the text. In *Scudding* v. *St. Pancras Burial Board*, [1889] W. N. 45, 120, C. A., a sum paid by a railway company to a burial board under an agreement for the reinterment in their burial ground of remains removed by the company from another burial ground which they had acquired under statutory powers was held to be payable in aid of the poor rate as surplus income.

(*t*) *Paddington Burial Board* v. *Commissioners of Inland Revenue* (1884), 13 Q. B. D. 9. See title INCOME TAX.

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Secretary of State may approve the table with or without modifications. The fees are to be of the same amount in respect of burial service in the consecrated and unconsecrated parts of the burial ground. And if the burial authority fail to submit such a table on being requested to do so by the Secretary of State, he may make a table of fees (*a*).

Collection of fees.

The fees fixed by the table are payable to, and are to be collected by, the burial authority, together with the other fees payable to them, and are to be paid by the burial authority to the minister or sexton in such manner as may be agreed on, or as, in default of agreement, may be directed by the Secretary of State (*b*). An incumbent, although he may be exclusively entitled to perform the burial service in the consecrated part of a burial ground, is not, however, entitled to be paid the fees fixed by such table in respect of any interments at which he does not personally or by authorised deputy officiate, and cannot recover from the burial authority any such fees collected by them in respect of interments at which a burial service was in fact performed by other persons without his knowledge or authority (*c*).

Abolition of fees other than for services rendered.

997. With the temporary exceptions mentioned in the next paragraph, no fee is payable to any incumbent of a parish in respect of any right of exclusive burial, or the erection of a monument, or any other matter whatsoever, in any burial ground maintained by a burial authority, except for services rendered by him. Nor is any such fee payable to the churchwardens of any parish or to trustees or other persons for any parochial purpose, or for the discharge of any debt or liability (*d*).

Temporary continuance of fees other than for services rendered.

998. If, however, at the passing of the Burial Act, 1900 (July 10, 1900), fees other than for services rendered were payable in respect of any matter arising in any burial ground attached to or used for the purposes of a parish, and laid out and used before that date, then (subject to the provisions for commutation mentioned in the next paragraph) the like fees are payable during the incumbency of the person who at that date was incumbent of the parish, or during a period of fifteen years from that date, whichever is longer, or if the fees were not paid to the incumbent or to any person claiming through or under him, then during the said period of fifteen years, and such fees are to be applied to the like purposes as before the above-mentioned date, and are to be collected by the burial authority and paid by them in like manner as the fees payable for services rendered (*e*).

(*a*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3 (1), (2). Having regard to s. 32 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), it seems that the powers of the burial authority and the Secretary of State could be exercised from time to time, so that the table would be capable of alteration.

(*b*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3 (3).

(*c*) *Williams* v. *Briton Ferry Burial Board*, [1905] 2 K. B. 565. As to the rights of incumbents and sextons in regard to burials in the consecrated part of a burial ground provided by a burial authority, see pp. 469 *et seq.*, *ante*.

(*d*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3 (4).

(*e*) *Ibid.*, s. 3 (4) (i.). In *Young* v. *Kingston-on-Thames etc. Joint Burials Committee*, [1907] 1 K. B. 416, C. A., it was held that the enactment did not give the

Fees other than for services rendered which are payable to the incumbent where the above exception applies are—

(1) The fees which were payable before the Act of 1900 to an incumbent on the sale by a burial board, or authority with the powers of a burial board, of an exclusive right of burial, or a right of constructing a vault or of placing a monument etc. in the burial ground (*f*).

What fees are continued.

(2) Fees which before the Act of 1900 were payable to the incumbent upon burial in the consecrated part of the burial ground without the burial service of the Church of England under the Burial Laws Amendment Act, 1880 (*g*).

Fees other than for services rendered are payable to churchwardens, trustees etc., in some cases where similar fees were formerly payable by custom or under a local Act (*h*).

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incumbent any right to fees other than for services rendered with regard to a piece of land added to their existing burial ground by a burial authority, but of which no part was consecrated, and in which no interment took place, till after the Act, though before that Act the wall separating the land from the existing burial ground had been removed, the sanction of the Home Secretary for its division into consecrated and unconsecrated portions had been obtained, and a petition for consecration had been sent to the bishop; and in *Anderson* v. *Wandsworth Borough Council*, [1908] 2 Ch. 81, it was held, on the ground that the enactment is intended only to preserve existing rights, that where, after the Act, the parish of T. G. and certain neighbouring parishes were amalgamated and formed into a single area for the purposes of the Burial Acts, so that the parishioners of T. G. became entitled to burial in burial grounds which had been provided for the neighbouring parishes before the Act, the rector of T. G. did not become entitled to fees other than for services rendered in respect of the burial of parishioners of T. G. in those burial grounds.

(*f*) S. 33 of the Burial Act, 1852 (15 & 16 Vict. c. 85), after the provisions referred to p. 473, *ante*, enabling burial boards to sell exclusive rights of burial etc., continued: "But there shall be payable to the incumbent or minister of the parish out of the fees or payments to be paid in respect of any rights acquired under this enactment in the consecrated part of such burial ground (in lieu of the fees or sums which he would have been entitled to on the grant of the like rights in the burial ground of his parish) such fees or sums as shall be settled and fixed by the vestry with the approval of the bishop of the diocese, or if no such fees or sums shall have been so settled then such fees as he would by law or custom have been entitled to on the grant of the like rights in the burial ground of his parish." These words are repealed by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 12; but while the repeal put an end to the power of the vestry to settle such fees, the right to fees conferred by the repealed words continues temporarily in the cases falling within s. 3 (4) (i.) of that Act. There is the usual difficulty about the application of the words in question where the area of the burial authority is not an ecclesiastical parish. As to rights to fees of the kind in churchyards and other like burial grounds, see p. 430, *ante*; and as to the incumbent entitled to the fees and the settlement of disputes where two or more persons severally claim to be incumbents so entitled, see the definition of "incumbent" in s. 52 of the Burial Act, 1852 (15 & 16 Vict. c. 85), referred to p. 449, *ante*.

(*g*) 43 & 44 Vict. c. 41, s. 5. See pp. 424 *et seq.*, *ante*. It seems, though the contrary has been suggested, that these fees fall within the description of fees "other than for services rendered," for it is difficult to see what services are rendered where, as may be the case, the funeral takes place without any service at all. The question was raised, but not decided, in *Williams* v. *Briton Ferry Burial Board*, [1905] 1 K. B. 565.

(*h*) See the Burial Act, 1852 (15 & 16 Vict. c. 85), ss. 36, 50. The first of these sections, which is repealed in general terms by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 12, provided that where fees payable on interments

SECT. 2. Elective Burial Boards in Urban Districts.

Commutation of fees other than for services rendered.

999. The Ecclesiastical Commissioners may, at the request and subject to the approval of the incumbent or other person interested, agree with any burial authority for a payment, periodical or otherwise, in commutation of the above-mentioned fees other than for services rendered, and an agreement so approved will be binding on the persons for the time being interested, and the burial authority may make accordingly any payment so agreed upon. Where the fees are paid to an incumbent, or person claiming through or under him, the Commissioners are to apply the commutation money in the first instance to such compensation of the existing incumbent as they may deem equitable, regard being had to all the circumstances of the case, and the residue, if any, for the augmentation of the benefice (*i*).

Abolition of fees to clerks etc.

1000. No fee other than fees payable to a sexton for services rendered by him (*k*) is payable to any clerk or other ecclesiastical officer in respect of interments in a burial ground maintained by a burial authority (*l*).

Fixed annual payments in lieu of fees.

1001. Before the Burial Act, 1900, the vestry or meeting in the nature of a vestry had power, with the consent of the bishop, to substitute a fixed annual sum for the fees payable under the Burial Acts to the incumbent, clerk, and sexton, and other persons and bodies respectively; and in such case the fees which would otherwise have been payable to the incumbent, clerk etc., became payable to the burial board, and the burial board were required to make the fixed payments to the person or persons entitled (*m*).

The Burial Act, 1900, repealed the enactment by which the foregoing provisions were made, but contains a sub-section applying

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or for any monument, gravestone etc., in the burial ground of any parish for which a burial ground was provided under the Act of 1852, were by law or custom payable to the churchwardens, or to trustees or others, for the payment of an annuity or stipend to the incumbent or minister, or any other parochial purpose, or the discharge of any debt or liability, like fees should be payable in the burial ground provided under the Act, and be collected and paid over by the burial board. In *R.* v. *St. Marylebone Vestry*, [1895] 1 Q. B. 771, C.A., burial fees applicable under a local Act to the repair of a parish church were held to come within s. 36 of the Act of 1852. S. 50 of the Act of 1852, which is repealed by the Act of 1900 as regards burial grounds under burial authorities, provided that "where under any local Act fees on interments in any burial ground of any parish are payable to the churchwardens of such parish, or to any trustees or other persons, for the purpose of enabling them to pay an annuity or stipend to the incumbent or minister, the fees which under this Act, or any Act relating to any cemetery company, would on the interment in the cemetery of any company of any body brought from such parish be payable to such incumbent or minister, shall be payable to the said churchwardens, trustees, or persons, and any surplus of such fees which may remain in their hands after payment of such annuity or stipend shall be paid to such incumbent or minister." The section is hopelessly ungrammatical, and its meaning far from clear.

(*i*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3 (4) (ii.).

(*k*) As to the sexton's fees for services rendered, see pp. 479, 480, *ante*.

(*l*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3 (5), which provides also for the payment of compensation to clerks and ecclesiastical officers suffering pecuniary loss in consequence of its provisions.

(*m*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 37, now repealed by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 12.

the provisions of the Act with regard to fees to the fixed payments in question (*n*). By virtue of this sub-section any clerk to whom such fixed payment had theretofore been made ceased as from the commencement of the Act of 1900, on January 1, 1901, to be entitled to the payment, but became entitled to compensation for his consequent loss (*o*); and any sexton to whom such a fixed payment had been made also ceased as from the same date to be entitled to further payment, and was thenceforth entitled to fees for services rendered by him only (*p*). The sub-section seems to preserve for a time the obligation of the burial board or other burial authority with the powers of a burial board to make the fixed payment in the case of an incumbent or of churchwardens or trustees, but its effect in this respect is very doubtful.

Borrowing.

1002. A burial authority may borrow for the purposes of the provisions above referred to as to the commutation of fees other than for services rendered, and the payment of compensation to clerks and other ecclesiastical officers, in like manner as for the provision of a burial ground (*q*).

SUB-SECT. 11.—*Conveyance of Body to Place of Burial.*

Arrangements for conveyance.

1003. A burial board may make such arrangements as they think fit for facilitating the conveyance of dead bodies from the parish or place of death to the burial ground provided by the board, or to any other place of burial, subject to the provisions of the Burial Acts and the regulations made thereunder (*r*); and certain cemetery companies, at any rate, are expressly authorised to undertake and carry into effect such arrangements subject to such provisions and regulations (*s*).

Turnpike tolls.

1004. There is a provision exempting persons attending the funeral of any person buried in a burial ground provided under

(*n*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3 (7), providing that "the provisions of this section, except those as to collection, shall apply to any fixed annual sum substituted for fees in pursuance of s. 37 of the Burial Act, 1852, in like manner as they apply to fees." The effect of sub-ss. (1)—(5) of the section has been already stated at pp. 480 *et seq.*, *ante*. The remaining sub-section, (6), merely gives borrowing powers for the purposes of the section.

(*o*) *Ibid.*, s. 3 (5), as applied by *ibid.*, s. 3 (7); see note (*n*), *supra*.

(*p*) *Ibid.*

(*q*) *Ibid.*, s. 3 (6), which gives borrowing powers for the purposes of the section in general terms. The purposes mentioned in the text appear to be the only purposes of the section for which it can be intended that money should be borrowed.

(*r*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 41. As to the power of making regulations under the Burial Acts (which is now vested in the Local Government Board), see p. 537, *post*. No general regulations with regard to the conveyance of bodies to burial grounds have been issued, but the matter was dealt with in a Home Office circular dated November, 1872 (Brooke Little, Law of Burial, 3rd ed., p. 708, Appendix A, No. 3).

(*s*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 41, which gives the power to "any of the aforesaid cemetery companies." The expression might, having regard to the reference to cemetery companies generally in s. 26, be taken as meaning any cemetery company, though this renders the word "aforesaid" superfluous; or, having regard to s. 7, it might be taken to mean the cemetery companies mentioned in Sched. B to the Act of 1852, though only "cemeteries," and not "cemetery companies," are mentioned in s. 7.

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statute for the parish etc. where he died from the payment of turnpike tolls (*t*). There are, however, it is believed, no longer any roads subject to turnpike tolls, and the provision appears, therefore, to be obsolete.

SECT. 3.—*Urban Authorities with Powers of Burial Boards.*

SUB-SECT. 1.—*Introductory.*

Methods of investing urban authorities of burial boards.

1005. Urban authorities, that is to say, borough councils and non-municipal urban district councils, may be invested with the functions, more or less modified, of a burial board in the following different ways:—

(1) By Order in Council investing the authority with the functions of a burial board. There are two distinct sets of provisions in this behalf, the one applicable to borough councils, the other to non-municipal urban district councils;

(2) By a resolution of the vestry of a parish in the district under s. 49 of the Local Government Act, 1858 (*u*), as re-enacted in the Public Health Act, 1875 (*v*);

(3) By the transfer of the functions of a burial board to the urban authority under s. 44 of the Sanitary Act, 1866 (*w*), as re-enacted in the Public Health Act, 1875 (*x*);

(4) By the transfer of the functions of a burial board to the urban authority under s. 62 of the Local Government Act, 1894 (*y*);

(5) By provision in a local Act or in a statutory order dealing with local boundaries.

These various methods of investing an urban authority with the functions of a burial board, and the consequences that ensue where they are adopted, which differ in important respects according to the method adopted, will be discussed in order.

SUB-SECT. 2.—*Order in Council investing Borough Council with Powers of Burial Board.*

When Order in Council may be made.

1006. If it appears to His Majesty in Council, upon the petition of a borough council stating that an Order in Council has been made for closing all or any of the burial grounds of one or more parishes wholly or partly within the borough, that there is difficulty or inconvenience in providing under the powers of the Burial Act, 1853 (*a*), requisite places of burial for the inhabitants of such parish or parishes, His Majesty may, by Order in Council, order that powers shall be vested in the borough council for providing such places of burial (*b*).

Notice of petition.

Notice of the petition and of the time when it will be taken into consideration by the Privy Council must be published in the *London*

(*t*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 14. See further, title HIGHWAYS, STREETS AND BRIDGES.
(*u*) 21 & 22 Vict. c. 98, s. 49.
(*v*) 38 & 39 Vict. c. 55, s. 343 and Sched. V.
(*w*) 29 & 30 Vict. c. 90, s. 44.
38 & 39 Vict. c. 55, s. 343 and Sched. V.
56 & 57 Vict. c. 73, s. 62.
16 & 17 Vict. c. 134.
Burial Act, 1854 (17 & 18 Vict. c. 87), s. 1. For form of petition, see Encyclopædia of Forms, Vol. III. 106.

Gazette, and in one of the newspapers usually circulating in the borough, one month at least before the petition is so considered (*c*).

SECT. 3. Urban Authorities with Powers of Burial Boards.

1007. The effect of the Order is that, if the borough council decide upon providing one or more burial grounds, they become a burial board (*d*) for that purpose, and the provisions of the Burial Acts apply accordingly, subject to some exceptions and modifications, to the borough and the borough council, and to any burial ground and any places for the reception of the bodies of the dead previously to interment (*e*) which may be provided by the council under the Burial Acts, in like manner as they apply to any parish and the burial board thereof, and to any burial ground and places for the reception of bodies previously to interment provided by such burial board (*f*).

Effect of Order.

The express exceptions as regards the application of the Burial Acts are that the provisions of those Acts as to the constitution, incorporation, meetings, entries of proceedings, and accounts of burial boards are not to apply, and that no approval, sanction, or authorisation of the vestry of any parish is to be requisite (*g*). Some further modifications (particularly as regards finance) are impliedly made by the provisions noticed below.

Exceptions from application of Burial Acts.

The borough council act in the exercise of their functions as a burial authority in like manner as in the exercise of their functions under the Municipal Corporations Act, 1882 (*h*).

1008. The burial ground or grounds provided for the borough are to be deemed to be provided for such parish or parishes wholly or partly within the borough as the borough council may determine (*i*); but if, before the Order in Council is made, it appears to His Majesty in Council, upon the petition of the borough council or otherwise, that any parish wholly or partly within the borough is provided with a sufficient burial ground, the Order in Council may direct that no part of such parish shall be assessed towards defraying the expenses of the execution of the Burial Acts in the borough, and in such case no burial ground provided for the borough is to be deemed to be provided for such parish (*k*).

Parishes for which burial ground provided.

1009. Where the Order in Council provides that a parish wholly or partly in the borough is not to be assessed towards the expenses

Expenses of borough council.

(*c*) Burial Act, 1854 (17 & 18 Vict. c. 87), s. 1.

(*d*) It is to be observed that the form of expression employed is not that the borough council shall have the powers etc. of a burial board, but that they "shall be a burial board." This unfortunate turn of expression, however, probably means little or nothing more than that they shall have the functions of a burial board.

(*e*) As to the provision of mortuaries under the Burial Acts, see pp. 564, 565, *post*.

(*f*) Burial Act, 1854 (17 & 18 Vict. c. 87), s. 2.

(*g*) *Ibid.*

(*h*) *Ibid.*, s. 6; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 242 [illegible] Sched. IX., whereby a reference to that Act is substituted for a reference to the Municipal Corporations Act, 1835 (5 & 6 Will. 4. c. 76), mentioned in s. 6 of the Burial Act, 1854. See generally, title LOCAL GOVERNMENT.

(*i*) Burial Act, 1854 (17 & 18 Vict. c. 87), s. 7.

(*k*) [illegible]

SECT. 8. Urban Authorities with Power of Burial

of the execution of the Acts in the borough, the expenses of the council in the matter are to be met by the levy of a separate rate, similar in all respects to a borough rate, in the residue of the borough. In other cases the council may either defray the expenses out of the borough fund and borough rate, or may levy a separate rate, similar in all respects to a borough rate, for the purpose (*l*).

Loans.

1010. Loans raised by the borough council for the purposes of the Burial Acts are to be charged on the moneys out of which their expenses in the execution of the Acts are to be paid, and the provisions of the Burial Acts as to loans of burial boards are to be construed accordingly (*m*). The council have thus exactly the same borrowing powers as an elective burial board, except that, no sanction from any vestry or like meeting being required (*n*), the only sanction necessary is that of the Local Government Board. The purposes for which the council may borrow are also the same as those for which an elective burial board may borrow (*o*).

Application of surplus moneys.

1011. Any surplus of borrowed money or of income from any burial ground provided by the council which, if the same were provided by a burial board for a parish, would be applicable in aid of the poor rate (*p*) is to be applied in aid of the borough fund or rates, or if a separate rate has been levied in parts only of the borough by reason of the exemption of any parish or parishes by the Order in Council as above mentioned, such surplus must be applied rateably towards payment or satisfaction of so much of any borough rate or burial rate as is leviable in such parts of the borough (*q*).

Acquisition and sale of land.

1012. The corporation of the borough are empowered to hold land for the purposes of the Burial Acts; and where land is purchased for those purposes, the conveyance is to be taken in the name of the corporation. The provisions of the Municipal Corporations Act, 1882, as to the sale of corporate land, apply to the sale of such land (*r*).

(*l*) Burial Act, 1854 (17 & 18 Vict. c. 87), ss. 3, 9; Burial Act, 1857 (20 & 21 Vict. c. 81), s. 22. The provisions of these sections as to the expenses of the council are expressed in very lengthy language, but seem to mean no more than is stated in the text. The provisions of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), as to the borough rate are substituted by s. 242 and Sched. IX. of that Act for those of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), referred to in the Burial Acts.

(*m*) Burial Act, 1854 (17 & 18 Vict. c. 87), s. 3.

(*n*) See p. 485, *ante*.

(*o*) See pp. 476, 477, *ante*. Ss. 4 and 5 of the Burial Act, 1854 (17 & 18 Vict. c. 87), as to borrowing at a lower rate of interest to pay off existing loans, and borrowing to pay off mortgages falling due, extend in terms to a borough council constituted a burial board by Order in Council.

(*p*) See p. 479, *ante*.

(*q*) Burial Act, 1854 (17 & 18 Vict. c. 87), s. 3, as amended by Burial Act, 1857 (20 & 21 Vict. c. 81), s. 22.

(*r*) Burial Act, 1854 (17 & 18 Vict. c. 87), s. 6. The provisions of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), are substituted by s. 242 and Sched. IX. of that Act for those of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), referred to in the Act of 1854. It is expressly provided by s. 6 of the Act of 1854 in reference to s. 28 of the Burial Act, 1852 (15 &

SECT. 3. **Urban Authorities with Powers of Burial Boards.**

1013. The borough council may appropriate for the purposes of the Burial Acts any land belonging to the corporation of the borough, or vested in feoffees, trustees, or others for the general benefit of the borough, or for any specific charity, but if the land is subject to a charitable use, it can be taken on such conditions only as the Chancery Division of the High Court, in the exercise of its jurisdiction over charitable trusts, may direct (*s*). Appropriation of land.

SUB-SECT. 3.—*Order in Council investing Non-municipal Urban District Council with Powers of Burial Board.*

1014. If it appears to His Majesty in Council, upon the petition of a non-municipal urban district council stating that their district is co-extensive with a district for which it is proposed to provide a burial ground, that no burial board has been appointed for such district, and that an Order in Council has been made for closing all or any of the burial grounds within the district, His Majesty may, by Order in Council, order that the district council shall be a burial board for their district, and thereupon the council become a burial board for their district accordingly, and the powers and provisions of the Burial Acts, with some exceptions, extend to the district and to the council thereof, and to any burial ground and places for the reception of the bodies of the dead previous to interment (*a*) which may be provided by the council, in like manner as to any parish or parishes and the burial board thereof and any burial ground and places for the reception of the bodies of the dead pending interment provided by such board (*b*). When Order in Council may be made.

Notice of the petition and of the time when it will be taken into consideration by the Privy Council must be published in the *London Gazette* and a local newspaper one month at least before the petition is so considered (*c*). Notice of petition.

The express exceptions with regard to the application of the Burial Acts are that the provisions as to the constitution or Exceptions from application of Burial Acts.

16 Vict. c. 85), that the signature of members of the council to the conveyance of the land sold shall not be necessary, and that the receipt of the borough treasurer for the purchase-money shall be a sufficient discharge.

(*s*) Burial Act, 1854 (17 & 18 Vict. c. 87), s. 11; and see p. 462, *ante*. As to the appropriation of land for the purpose, see further p. 492, *post*.

(*a*) As to the provision of mortuaries under the Burial Acts, see pp. 564, 565, *post*.

(*b*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 4. The section refers in terms only to districts of improvement commissioners and of local boards of health established under the repealed Public Health Act, 1848 (11 & 12 Vict. c. 63). It thus, besides applying to non-municipal urban districts constituted as Improvement Act districts, certainly extends to all non-municipal urban districts constituted as local government districts under the Public Health Act, 1875 (38 & 39 Vict. c. 55), or the earlier Acts repealed by s. 343 and Sched. V. of that Act. See s. 6 of the repealed Local Government Act, 1858 (21 & 22 Vict. c. 98), and s. 313 of the Public Health Act, 1875. And it is probable that the section would be construed as extending to urban districts constituted under the Local Government Acts, 1888 and 1894 (51 & 52 Vict. c. 41; 56 & 57 Vict. c. 73). See *R.* v. *Barnes Overseers* (wrongly reported as *R.* v. *Barnes and others*), *Ex parte Ratcliffe* (1896), 13 T. L. R. 25; and compare the provisions of the Tramways Act, 1870 (33 & 34 Vict. c. 78, s. 3, and Sched. A), defining "local authority," which are always treated as including non-municipal urban district councils under the Acts of 1888 and 1894.

(*c*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 4.

SECT. 8. **Urban Authorities with Powers of Burial Boards.**

appointment and resignation of members of burial boards are not to apply, and that no approval, sanction, or authorisation of any vestry is to be requisite (*d*). Some further modifications (particularly as regards financial matters) are made by the provisions mentioned below.

Expenses of district council.

1015. Money required by the council for defraying the expense of executing the Burial Acts, or for paying any moneys borrowed or annuities granted under the authority of those Acts, or any interest thereon, or for providing a sinking fund for the repayment thereof, may, if the council so think fit (except in the case of a council originally constituted as improvement commissioners), be paid out of the general district rates leviable in the district for which they are constituted a burial board (*e*); and the council may levy as part of the general district rate, or by a separate rate under the name and designation of a burial rate to be assessed and recovered in like manner as a general district rate within the district for which they act as a burial board, such sums of money as are from time to time necessary for such purposes (*f*).

Precisely similar provisions apply in the case where the council were originally constituted as improvement commissioners, with the substitution of the improvement rate for the general district rate (*g*). But a provisional order under the Public Health Act, 1875 (*h*), substituting a general district rate for an improvement rate for the purposes of the expenses of such a council, might have the effect of casting the expenses of the council under the Burial Acts on the general district rate.

Accounts, audit and surplus income

1016. The council are to keep distinct accounts of their receipts and expenditure as a burial board, and such accounts are to be audited by the district auditor (*i*); and there are provisions for the application of surplus income in aid of the rate out of which the expenses of the council are payable (*k*).

Loans.

1017. Where the expenses of the council are payable out of an improvement rate or burial rate in the nature of an improvement

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(*d*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 4.

(*e*) The council cannot, as has been seen, be constituted a burial board by Order in Council for any area other than their entire district. The provisions referred to in the text, however, deal also with cases where the council are constituted a burial board under s. 49 of the Local Government Act, 1858, repealed and re-enacted by Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343 and Sched. V. (see p. 489, *post*), under which a council may be constituted a burial board for part of the district only.

(*f*) Burial Act, 1860 (23 & 24 Vict. c. 64), s. 1. The section appears to leave it open to the council, at their option, to defray their expenses, like an elective burial board, out of the poor rate.

(*g*) *Ibid.*, s. 2.

(*h*) 38 & 39 Vict. c. 55, s. 208.

(*i*) Burial Act, 1860 (23 & 24 Vict. c. 64), s. 3. The provisions of this section as to audit apply only where the council defray their expenses in accordance with the provisions of that Act. But, having regard to s. 58 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), the accounts of the council in relation to the execution of the Burial Acts would in any case be subject to audit in the usual way.

(*k*) Burial Act 1860 (23 & 24 Vict. c. 64), s. 3.

rate, the council are expressly authorised to borrow on mortgage of such rate, with the approval of the Local Government Board (*l*), for the purposes of the Burial Acts; and the clauses of the Commissioners Clauses Act, 1847 (*m*), with respect to the mortgages to be executed by the Commissioners, are made applicable to such mortgages (*n*).

SUB-SECT. 4.—*Urban Authority invested with Powers of Burial Board under s. 49 of the Local Government Act, 1858.*

When vestry may require district council etc. to act as burial board

1018. In the case of some non-municipal urban districts, the vestry of a parish (*o*) in the district, if they resolve to appoint a burial board, have under a modified version of s. 49 of the Local Government Act, 1858, contained in Sched. V. of the Public Health Act, 1875, the option, instead of electing a burial board in the usual way, of requiring the district council, or in some instances the members of the council representing a particular ward of the district, to act as a burial board for the parish (*p*).

(*l*) Substituted for the Treasury by the Local Authorities (Treasury Powers) Act, 1906 (6 Edw. 7, c. 33), s. 1.

(*m*) 10 & 11 Vict. c. 16, ss. 75—88. See pp. 477, 478, *ante*.

(*n*) Burial Act, 1862 (25 & 26 Vict. c. 100). The preamble to the Act states that it was passed to remove doubts. It must therefore not be taken as showing that other councils have not power to borrow on the security of the rates applicable to their expenses under the Burial Acts by virtue of the enactments enabling elective burial boards to borrow.

(*o*) As to the meaning of "parish" for this purpose, see the next note.

(*p*) S. 49 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), as it originally stood, was, shortly, to the following effect: In any "district"—*i.e.*, the district of any local board—if the vestry of any one or more parish or place comprised therein having a known or defined boundary adopted the Burial Act, 1857 (20 & 21 Vict. c. 81), the "local board"—an expression that would include a municipal corporation or improvement commissioners acting as local board under the Act—might, at the option of the vestry, be the burial board for such parish or parishes etc.; and the expenses were to be defrayed out of rates in the nature of general district rates levied in the particular area. But the enactment was subject to a proviso to the effect that if the area in question were a ward or wards for the election of members of the local board, then the members for such ward or wards should constitute the burial board. By the Burial Act, 1860 (23 & 24 Vict. c. 64), the provisions already noticed as to the expenses of local boards constituted burial boards, and matters incidental thereto, were made (see p. 488, *ante*), and, as appears by the preamble to that Act, these provisions applied to local boards constituted burial boards under s. 49 of the Act of 1858, as well as to local boards constituted burial boards by Order in Council. By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343 and Sched. V., the Act of 1858 was repealed, but s. 49 of the Act of 1858 was "re-enacted" in the following much modified form: "When a vestry of any parish comprised in a local government district resolves to appoint a burial board, the local board may at the option of the vestry be the burial board for such parish, and all expenses incurred by such burial board shall be defrayed out of a rate to be levied in such parish in the same manner as a general district rate. Provided, that if such parish has been declared a ward for the election of members of the local board, such members shall form the burial board for the parish, and shall be deemed to be a burial board elected under the Burial Acts for the time being in force."

As the section in its present form is confined to parishes comprised in local government districts, it can hardly be taken to extend to non-municipal urban districts constituted as Improvement Act districts; and there seems much doubt as to its applicability to non-municipal urban districts constituted since the Local Government Act, 1894 (56 & 57 Vict. c. 73), or even under the Local

SECT. 8. Urban Authorities with Powers of Burial Boards.

Expenses of district council.

1019. The expenses of a council acting as a burial board by virtue of s. 49 of the Local Government Act, 1858, may in all cases be paid out of a rate to be levied in the same manner as a general district rate in the area for which the council act as a burial board. The council may, in some cases at least, have the option of paying the expenses out of the actual general district rate, provided that the incidence of the expenses is confined to the proper area; but they have not the option which they would apparently have if constituted a burial board by Order in Council of defraying them out of the poor rate (*q*).

Control by vestry.

1020. A council, or the members of a council for a ward, acting as a burial board by virtue of s. 49 of the Local Government Act, 1858, would appear to be subject to the control of the vestry in the same manner as an elective burial board (*r*).

SUB-SECT. 5.—*Urban Authority invested with Powers of Burial Board under s. 44 of the Sanitary Act, 1866.*

Transfer of powers of burial board to urban authority by agreement.

1021. The burial board of any district which is included in or conterminous with an urban district may by resolution of the vestry, and by agreement of the burial board and urban authority, transfer to that authority all their estate, property, rights, powers, duties, and liabilities, and the council will thereafter have such powers etc. as if they had been duly appointed a burial board under the Burial Acts (*s*).

Government Act, 1888 (51 & 52 Vict. c. 41), between the commencement of that Act and the commencement of the Act of 1894. The circumstance that the enactment did not extend to all kinds of non-municipal urban districts before the Acts of 1888 and 1894 differentiates the case in this respect from that considered at p. 487, *ante*. The expression "parish" in the enactment must apparently be confined in meaning to poor law parish. See the definition of the expression in s. 4 of the Public Health Act, 1875.

The provisions under which the members of the council representing a particular ward may be appointed a burial board give rise to numerous questions of difficulty—*e.g.*, as to the sources whence their expenses are to be defrayed, as to the position that arises if the boundaries of the ward are altered, as to whether the members constitute an independent corporation—which it seems useless to discuss in the absence of any authority as to the lines on which these provisions should be interpreted. The functions of such a body of members could now apparently be transferred to the council as a whole by a resolution of the council under s. 62 of the Local Government Act, 1894, referred to at p. 491, *post*.

(*q*) See note (*p*), p. 489, *ante*.

(*r*) An urban authority may, however, be themselves invested with such of the functions of the vestry under the Burial Acts as would in the case of a rural parish be exercisable by the parish council by an order of the Local Government Board under s. 33 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), though they cannot be invested with such of the functions of the vestry as would in the case of a rural parish attach to the parish meeting. As to the powers of the vestry that in the case of rural parishes attach to the parish council and parish meeting respectively, see pp. 494, 495, *post*.

(*s*) Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 44, as re-enacted in an amended form by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343 and Sched. V. Whether the meaning of the section is that after the transfer the urban authority are to have the functions they would have if constituted a burial board by Order in Council or those of an elective burial board is uncertain. As the section originally stood it referred to "local boards" (at that time a municipal

SUB-SECT. 6.—*Urban Authority invested with Powers of Burial Board under s. 62 of the Local Government Act*, 1894.

SECT. 3. **Urban Authorities with Powers of Burial Boards.**

1022. Where there is a burial board for an area co-extensive with, or comprised in, an urban district, the urban authority may resolve that the powers, duties, property, debts, and liabilities of the burial board shall be transferred to the urban authority as from the date specified in the resolution, and upon that date the same become transferred accordingly, and the burial board cease to exist, and the urban authority become their successors (*t*).

Transfer of powers of burial board on resolution of urban authority.

1023. An urban authority invested with the functions of a burial board in this way, except so far as the difference in constitution of the two bodies prevents it, stand exactly in the position of the burial board to whose functions they have succeeded. Thus, their expenses are payable out of the same rates as those of the burial board, *i.e.*, the poor rate or a like rate, and not out of the rates on which the expenses would fall if the urban authority were constituted a burial board by Order in Council (*u*). Again, the authority are subject to the control of the vestry or meeting in the nature of the vestry, like the burial board whom they have succeeded (*w*).

Effect of transfer.

SUB-SECT. 7.—*Miscellaneous.*

1024. Urban authorities not infrequently have the functions of a burial board by virtue of provisions in local Acts, or in statutory orders dealing with local boundaries (*a*).

Local Acts and statutory orders.

1025. There is a provision in the Burial Act, 1855, the effect of which seems to be that an urban authority formed as a local board

Additional powers of certain urban authorities.

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corporation might be a local board), and provided that after the transfer the local board should have the like functions as if they had been constituted a burial board under s. 4 of the Burial Act, 1857 (20 & 21 Vict. c. 81). The dropping of the latter provision in the re-enactment of the section may have been due to the consideration that s. 4 of the Act of 1857 does not extend to boroughs and Improvement Act districts, and not to an intention to put the authority in the position of an elective burial board. If the proper view is that the transfer puts the authority in the position of an urban authority constituted a burial board by Order in Council, it is a far more satisfactory method of transferring the functions of an elective burial board to an urban authority than that next to be mentioned.

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 62 (1). The section uses the expressions "urban district" and "council of an urban district," which include not only non-county boroughs and their councils (*ibid.*, s. 21 (3)), but also county boroughs and county borough councils (*Kirkdale Burial Board* v. *Liverpool Corporation*, [1904] 1 Ch. 829). The doubt as to county boroughs arose from the provisions of s. 35 of the Act of 1894.

(*u*) *R.* v. *Connah's Quay Overseers*, [1901] 2 K. B. 174.

(*w*) See note (*r*), p. 490, *ante*.

(*a*) Provisions of the kind are very commonly made in provisional orders for the extension of borough boundaries. Such provisions usually place the borough council in the like position as if they had been constituted a burial board by Order in Council. Similar provisions are sometimes inserted in orders under the Local Government Acts constituting or altering non-municipal urban districts. As to such orders, see generally title LOCAL GOVERNMENT. S. 19 of the Burial Act, 1855 (18 & 19 Vict. c. 128), contains a saving for the powers etc. of "any local board of health being the burial board of a borough created or to exist under or by virtue of any local Act of Parliament."

an area comprising the whole or part of a rural parish and extending beyond the limits of that parish.

SECT. 4. Burial Authorities under the Burial Acts in Rural Areas.

Procedure for adoption of Burial Acts.

1028. Not less than fourteen days' notice must be given of a parish meeting at which it is proposed to adopt the Burial Acts (*k*), and any one parochial elector may demand a poll on the question (*l*). A simple majority of those present and voting at the assembly of the parish meeting, or, if a poll is taken, of those voting, is sufficient to carry the resolution (*m*). The resolution should in strictness take the form of a resolution that a burial ground be provided for the parish or other area (*n*).

A copy of the resolution adopting the Acts must be sent to the Local Government Board (*o*).

Authority to execute Acts.

1029. Where the Burial Acts are in force for an entire rural parish having a parish council, the parish council act as the burial authority, and have, subject to the modifications mentioned below, the functions of an elective burial board for the parish (*p*).

Where the Acts have been adopted after the appointed day under the Local Government Act, 1894 (*q*), for part of a rural parish having a parish council, the council act as the authority for the execution of the Acts in all cases (*r*).

Where the Acts are in force for part of a parish having a parish council, but were adopted for that part before the appointed day under the Local Government Act, 1894, the burial board continue to act as the burial authority, unless their functions have been transferred to the parish council. Such a transfer may be effected by a resolution either of the burial board, or of a parish meeting held for the part of the parish in which the Acts are in force (*s*).

Where the Acts are in force for the whole of a rural parish not having a parish council, whether the Acts were adopted before or after the appointed day, it seems that the parish meeting may, by

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(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), Sched. I., Part I., r. 3. For form of notice, see Encyclopædia of Forms, Vol. III., p. 101.

(*l*) *Ibid.*, r. 7 (e).

(*m*) A simple majority of the vestry is sufficient under the Burial Acts to carry a resolution for the provision of a burial ground, and s. 7 (2) of the Local Government Act, 1894 (56 & 57 Vict. c. 73), requiring a special majority for the adoption of certain of the adoptive Acts, is therefore inapplicable to the Burial Acts.

(*n*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (8). A resolution to adopt the Acts would, however, doubtless be effective. For form of resolution, see Encyclopædia of Forms, Vol. III., p. 102.

(*o*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 10, as amended, by the substitution of the Local Government Board for a Secretary of State, by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4.

(*p*) Where there was a burial board in existence for the parish before the Local Government Act, 1894 (56 & 57 Vict. c. 73), the functions etc. of the board were transferred to the parish council on the coming into office of that council by s. 7 (5) of that Act. Where the Acts have been adopted since the Act of 1894, the parish council are the authority for the execution of the Acts by virtue of s. 7 (7).

(*q*) The "appointed day" fell at or towards the end of 1894 (*ibid.*, s. 81).

(*r*) *Ibid.*, s. 7 (7).

(*s*) *Ibid.*, s. 53 (1).

SECT. 4. Burial Authorities under the Burial Acts in Rural Areas.

means of an order of the county council, be invested with the powers of a parish council under the Burial Acts, and thus become themselves the burial authority (*t*). If this is not done, the Acts must be executed by a burial board elected by the parish meeting, and any vacancies in such board will be filled up by the parish meeting (*a*).

The Acts may theoretically be in force for part only of a rural parish not having a parish council, or for the whole or part of a rural parish grouped with another parish or parishes under a common parish council. These cases, if they exist at all, are very exceptional, and the position in the latter case would greatly depend on the terms of the grouping order.

Committee of parish council.

1030. In some cases a parish council, acting as the burial authority for part only of their parish, are required to appoint a committee for the purpose of the exercise of their powers as burial authority.

In the first place, where the powers, duties, and liabilities of a burial board for part of the parish are transferred to the parish council by resolution of the burial board or of a parish meeting for the part of the parish in question under the provisions already referred to (*b*), the transfer may be made subject to any conditions with respect to the execution thereof by means of a committee as to the burial board or parish meeting may seem fit, and any such conditions may be altered by any such parish meeting (*c*).

Again, whenever a parish council have any powers and duties which are to be exercised in a part only of the parish, or in relation to property held for the benefit of part of a parish, and that part has a defined boundary, the parish council must, if required by a parish meeting held for that part, appoint annually to exercise such powers and duties a committee consisting partly of members of the council and partly of other persons representing the part of the parish in question (*d*); and this provision would, no doubt, apply in the case of a parish council acting as burial authority for part of their parish.

The council can, in any case, appoint a committee for the exercise of any of their powers as burial authority under their general powers for the appointment of committees (*e*).

Execution of functions of vestry.

1031. Where the Burial Acts are in force for the whole of a rural parish having a parish council the parish meeting are substituted for the vestry in cases where under those Acts the consent or

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(*t*) S. 19 (10) of the Local Government Act, 1894 (56 & 57 Vict. c. 73), enables the county council, upon the application of the parish meeting of a rural parish not having a parish council, to confer on that meeting any of the powers conferred on a parish council by the Act. Numerous technical difficulties arise where an unincorporate body is invested with powers, like those of a burial board, for the proper execution of which corporate capacity, or special provisions supplying the want of corporate capacity, seem almost essential.

(*a*) The power to elect the burial board and to fill up vacancies therein is in the parish meeting as successors of the vestry (*ibid.*, s. 19 (4)).

(*b*) *Ibid.*, s. 53 (1); and see p. 493, *ante*.

(*c*) *Ibid.*

(*d*) *Ibid.*, s. 56 (2).

(*e*) *Ibid.*, s. 56 (1). As to committees of parish councils generally, see title LOCAL [illegible]

approval of, or other act on the part of, the vestry is required in relation to any expense or rate (*f*). The other functions of the vestry attach to the parish council themselves (*g*), and are thus practically abrogated (*h*).

By whom, in the case where the Burial Acts are in force for part only of a parish having a parish council, the functions of the vestry or meeting in the nature of a vestry are now exercisable is uncertain (*i*).

Control of parish council by parish meeting for part of parish.

1032. Where it is proved to the satisfaction of the county council that any part of a rural parish has a defined boundary, and has any property or rights distinct from the rest of the parish, the county council may order that the consent of a parish meeting held for that part of the parish shall be required for any such act or class

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (3).

(*g*) *Ibid.*, s. 6 (1) (a), whereby the civil functions of the vestry, other than those transferred to other bodies, were transferred to the parish council.

(*h*) The functions of the vestry under the Burial Acts comprise (in addition to their power to adopt the Act and elect the burial board)—(i.) the determination of the expenses to be incurred in providing a burial ground etc. (Burial Act, 1852 (15 & 16 Vict. c. 85), s. 19; see p. 475, *ante*); (ii.) approving officers' emoluments and (*quære*) the hire of an office (*ibid.*, s. 15; see p. 459, *ante*); (iii.) approving the borrowing of money (*ibid.*, s. 20; see p. 476, *ante*); (iv.) approving contracts for the purchase of lands or of a cemetery (*ibid.*, s. 26; see p. 460, *ante*); (v.) approving the alienation of land (*ibid.*, s. 28; see pp. 461, 462, *ante*); (vi.) approving the appropriation of parish land (*ibid.*, s. 29; see note (*h*), p. 462, *ante*); (vii.) revising fees (*ibid.*, s. 34; see p. 474, *ante*); (viii.) approving the provision of a mortuary (*ibid.*, s. 42; see p. 564, *post*); (ix.) appointing auditors (*ibid.*, s. 18; see p. 458, *ante*); (x.) approving the addition of unconsecrated ground to a burial ground provided under the Church Building Acts, and transferred to the burial authority (Burial Act, 1857 (20 & 21 Vict. c. 81), s. 7; see p. 463, *ante*); (xi.) approving the purchase of a closed cemetery (*ibid.*, s. 26; see p. 463, *ante*). Of these (i.), (ii.), and (iii.) clearly relate to an expense or rate, but, in view of the provisions as to borrowing by parish councils for the purposes of the adoptive Acts referred to in note (*r*), p. 496, *post*, (iii.) appears to have no application to borrowing by a parish council for the purposes of the Burial Acts. Which, if any, of the other powers fall within this category is far from clear. (ix.) may probably be regarded as a power impliedly abolished except as regards elective burial boards. See note (*b*), p. 458, *ante*.

(*i*) There is no provision in the Local Government Act, 1894 (56 & 57 Vict. c. 73), referring in terms to any power of a vestry or meeting in the nature of a vestry for part of a rural parish under the Burial Acts except that of adopting the Acts. It is most difficult to construe s. 6 (1) (a) of the Act, whereby the civil functions of the vestry "of a rural parish" are, with some exceptions, transferred to the parish council, as effecting a transfer of the functions of a vestry or meeting in the nature of a vestry for part of a parish; and it is scarcely less difficult to construe s. 7 (3) of the Act, whereby the powers of the vestry (including in that expression any meeting of ratepayers or voters) "of a rural parish" under the adoptive Acts, so far as they relate to any expense or rate, are transferred to the parish meeting, as effecting a transfer of powers of a vestry or meeting in the nature of a vestry for part of a parish. At the same time, in view of the provisions of s. 7 (4) of the Act, whereby the power of adopting the Burial Acts for part of a rural parish (where that part is an area for which the adoption of the Acts is authorised) is transferred from the vestry or meeting in the nature of a vestry to a parish meeting for the part of the parish, it may be that the Act of 1894 should be construed as effecting by implication a transfer of some at least of the other powers of such a vestry or meeting in the nature of a vestry, particularly where the Acts have been adopted since the coming into operation of the Act of 1894.

SECT. 4. Burial Authorities under the Burial Acts in Rural Areas.

of acts of the parish council affecting the said property or rights as is specified in the order (*k*). A parish council acting as burial authority for part of their parish may thus be subjected to any extent that may be thought desirable to the control of a parish meeting for that part of the parish.

Expenses of parish council.

1033. A parish council acting in the execution of the Burial Acts raise the funds they require to meet expenditure under the Acts by means of precepts or certificates to the overseers (*l*), which the overseers meet out of the poor rate, or, where the Acts are in force for part of the parish, out of an addition to the poor rate or a separate rate in the nature of a poor rate, in the same way as if the precept or certificate were that of a burial board (*m*).

Limitation on expenses of parish council.

A parish council must not, without the consent of a parish meeting, incur expenses or liabilities which will involve the raising by a rate in any local financial year of a sum greater than a rate of threepence in the pound would have produced if the Agricultural Rates Act, 1896 (*n*), had not passed (*o*), or which will involve a loan (*p*).

Besides the above-mentioned limitation on the expenses and liabilities that may be incurred by a parish council, there is a limitation on the amount of the rate that may be levied to meet such expenses and liabilities. But expenses under the adoptive Acts are expressly excluded from the operation of this limitation (*q*).

Borrowing powers of parish council.

1034. The provisions regulating the borrowing of money by a burial board are not applicable to a parish council acting in the execution of the Burial Acts, but the council may borrow for purposes of these Acts in the same way that they may borrow for other purposes (*r*).

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 37.

(*l*) It is not clear whether the power of the council to issue such precepts or certificates is to be regarded as derived from the provisions of the Burial Acts authorising the issue of certificates to the overseers by a burial board (see p. 475, *ante*), or from the provisions of the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 11, giving the parish council a general power to raise the funds they require by means of precepts to the overseers. The question becomes of practical importance where it is necessary to enforce the precept, as under s. 11 of the Act of 1894 the council have a remedy of a summary character.

(*m*) This follows from *ibid.*, s. 7 (6), which provides that the Act shall not alter the incidence of charge of any rate levied to defray expenses incurred under any of the adoptive Acts, and that any such rate shall be made and charged as heretofore.

(*n*) 59 & 60 Vict. c. 16.

(*o*) *I.e.*, if agricultural land were still rateable to the poor rate and other like rates at the same rate in the pound as other property. See title RATES AND RATING.

(*p*) The statement in the text gives what appears to be the effect of s. 11 (1) of the Local Government Act, 1894 (56 & 57 Vict. c. 73), as amended by s. 8 of the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16). It is to be observed that the prohibition is against the incurring of expense, not against the raising of a rate. The distinction may be very important as regards the consequences where the prohibition is infringed, and also as regards the effect of the prohibition in regard to liabilities, *e.g.*, in damages for tort, involuntarily incurred.

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 11 (3), amended by the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), s. 8.

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 12, which, in conjunction with *ibid.*, s. 11, regulates the borrowing of money by a parish council.

SECT. 4.
Burial Authorities under the Burial Acts in Rural Areas.

Acquisition of land.

Alienation of land.

1035. The general provisions of the Local Government Act, 1894, enabling a parish council to acquire land, including the provisions enabling the land to be acquired compulsorily if need be, are available to the council with reference to land required by them for the purposes of the Burial Acts (*s*).

The general provisions with regard to the alienation by a parish council of land acquired by such a council under the powers of the Local Government Act, 1894 (*t*), are applicable to land acquired under those powers for any purpose, including the purposes of the Burial Acts, and it is questionable whether the powers of the last-mentioned Acts for the alienation of land have any application to land so acquired (*a*).

Parish councils have general powers for the alienation of land vested in them, but not acquired under the powers of the Local Government Act, 1894 (*b*); and these powers would seem to be applicable to land held by them for the purposes of the Burial Acts (*c*). But the provisions of the Burial Acts as to the alienation of land also apply to land held by a parish council which was acquired under the powers of those Acts.

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gives the council borrowing powers—(a) for purchasing land etc.; "(b) for any purpose for which the council are authorised to borrow under any of the adoptive Acts"; and (c) for any permanent work or other thing which the council are authorised to execute or do, and the cost of which ought, in the opinion of the sanctioning bodies, to be spread over a term of years. The Act further provides that a parish council shall not borrow for the purposes of any of the adoptive Acts otherwise than in accordance with the Act of 1894, but that the charge for the purpose of any of the adoptive Acts shall ultimately be on the rate applicable to the purposes of that Act (*ibid.*, s. 12 (3)). The Local Government Board regard the parish council as authorised by this section to borrow for purposes of the adoptive Acts for which borrowing is not authorised by those Acts.

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9. See title LOCAL GOVERNMENT.

(*t*) See the modified version of s. 11 of the Allotments Act, 1887 (50 & 51 Vict. c. 48), scheduled to the order of the Local Government Board of May 22, 1895, made pursuant to s. 9 of the Local Government Act, 1894 (56 & 57 Vict. c. 73) (Stat. R. and O., 1894, p. 568).

(*a*) As to the powers of the Burial Acts for the alienation of land, see pp. 461, 462, *ante*. The question whether those powers apply to land acquired for the purposes of the Acts under the powers of the Act of 1894 is perhaps merely academic, since so far as the provisions of the modified version of s. 11 of the Allotments Act, 1887 (50 & 51 Vict. c. 48), referred to in the preceding note, are inconsistent with those of the Burial Acts, they would clearly override them in the case of land acquired under the powers of the Act of 1894. It might be difficult to determine in a particular case whether land acquired voluntarily by a parish council for the purposes of the Burial Acts had been so acquired under the powers of those Acts or of the Act of 1894.

The restrictions in reference to the alienation of land that has once formed part of a burial ground referred to p. 462, *ante*, apply, no doubt, under whichever power the land was acquired.

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (2). The application of this sub-section to land acquired under the powers of the Act of 1894 seems clearly subject to the modified version of s. 11 of the Allotments Act, 1887 (50 & 51 Vict. c. 48), referred to in note (*t*), *supra*.

(*c*) The restrictions referred to p. 462, *ante*, would, no doubt, apply with reference to the alienation under these powers of land held for the purposes of the Burial Acts.

SECT. 4. **Burial Authorities under the Burial Acts in Rural Areas.**

1036. The position of a parish meeting acting as burial authority for their parish by virtue of an order of the county council investing them with the powers of a parish council in that behalf differs in some respects from that of a parish council acting as a burial authority.

The parish meeting raise the funds they require for the purposes of the Burial Acts by means of precepts to the overseers, which the overseers meet out of the poor rate (*d*).

Parish meeting acting as burial authority.

Limitation on expenditure.

The expenditure of the parish meeting is limited by a provision in the Local Government Act, 1894 (*e*), which must now apparently (*f*) be read as enacting that the sum raised by means of a rate for defraying the expenses of the parish meeting (when added to expenses under any of the adoptive Acts) must not exceed in any local financial year the amount which a rate of sixpence in the pound would have produced if the Agricultural Rates Act, 1896, had not passed.

Borrowing powers, dealings with land.

In the absence of express provision in the order of the county council dealing with the matter, doubt might arise as to how far the investing of the parish meeting with the powers of a parish council under the Burial Acts necessarily had the effect of investing them with the powers of a parish council as to borrowing money and dealing with land (*g*).

Committee.

The parish meeting may appoint a committee for the purposes of their powers as burial authority under their general powers for the appointment of committees (*h*).

Burial board for entire rural parish.

1037. The position of a burial board for an entire rural parish not having a parish council appears to be exactly the same as that of an elective burial board for an urban parish, except that all the powers under the Burial Acts exercisable by the vestry in the case of an urban parish, including the power of electing the burial board, attach to the parish meeting (*i*), and that possibly the expenses of the burial board must be included in computing the maximum amount which may be raised to meet the expenses of the parish meeting under the provisions referred to in the preceding paragraph.

Burial board for part of rural parish.

The position of a burial board for part of a rural parish under a parish council appears to be exactly that of an elective burial board for part of an urban parish, save that some of the functions which would attach to the vestry or meeting in the nature of a vestry of part of an urban parish might be held to be exercisable by the

(*d*) As in the case of the parish council, it is doubtful whether the power of the parish meeting to issue such precepts should be regarded as derived from the Burial Acts or from the provisions of the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 11, giving the parish meeting through their chairman a general power to raise funds. See note (*l*), p. 496, *ante*.

(*e*) 56 & 57 Vict. c. 73, s. 19 (9).

(*f*) Having regard to s. 8 of the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16).

(*g*) The intrinsic difficulties attendant on dealing with land by a parish meeting consequent on its not being a body corporate are partially, though inadequately, met by provisions in s. 19 (6), (7) of the Local Government Act, 1894 (56 & 57 Vict. c. 73).

(*h*) *Ibid.*, s. 19 (3).

(*i*) *Ibid.*, s. 19 (4).

parish meeting for the part of the parish or possibly by the parish council (*k*).

SECT. 5.—*Joint Committees with Powers of Burial Boards.*

Transfer to joint committee.

1038. Where the area under a then existing burial board was not after the appointed day under the Local Government Act, 1894 (*l*), comprised within one rural parish, the powers and duties of the board were transferred to the parish councils of the rural parishes wholly or partly comprised in that area, or where the area was partly comprised in an urban district to those parish councils and the urban authority, and became exercisable by a joint committee appointed by those councils; and where any such rural parish has not a parish council, the parish meeting is for this purpose substituted for the parish council (*m*).

Constitution and proceedings of joint committee.

1039. If any difference arises as to the constitution of such a joint committee, it may be determined by order of the Local Government Board (*n*).

The quorum, proceedings, and place of meeting of the committee, whether within or without the area for which they act, may be determined by regulations of the appointing bodies, but, subject to any such regulations, are to be such as the committee direct. The chairman at any meeting of the committee has a second or casting vote (*o*).

Finances of joint committee.

1040. Where such a committee for the purposes of the Burial Acts is appointed, any expenses incurred in carrying out those purposes are to be defrayed, any money borrowed for those purposes is to be borrowed, and any receipts arising from those purposes are

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(*k*) See p. 495, *ante*.

(*l*) 56 & 57 Vict. c. 73. The "appointed day," for the purposes of the Act, occurred at different dates, all at or towards the end of 1894, in different localities and for different purposes (*ibid.*, s. 84).

(*m*) *Ibid.*, s. 53 (2), which provides that the powers etc. shall be exercisable by the joint committee "until other provision is made in pursuance of this Act." Such other provision may be made in various ways, *e.g.*, by an order dealing with local boundaries, by an order grouping parishes under a common parish council, by an order under s. 69, or possibly by an order under s. 53 (4), of the Act (as to which see p. 505, *post*), altering the area for which the Burial Acts are in force. Most of the joint committees established by s. 53 (2), however, continue in existence. In some instances similar joint committees have been established since 1894 by provisions in orders dealing with local boundaries. It is to be observed that, in the absence of such provisions, an order dealing with local boundaries, and leading to a state of things similar to that contemplated by s. 53 (2), will not bring that sub-section into operation. As to the consequences of the transfer effected by the sub-section as regards property etc., see p. 504, *post*.

(*n*) Local Government (Joint Committees) Act, 1897 (60 & 61 Vict. c. 40), s. 1 (2). S. 57 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), which deals generally with joint committees for the purposes of that Act, is inapplicable to a joint committee established under s. 53 (2) for purposes of the Burial Acts; and the provisions stated in the text are the only provisions as to the constitution of such committees.

(*o*) Local Government (Joint Committees) Act, 1897 (60 & 61 Vict. c. 40), s. 1 (1) (c), applying Part IV. of Sched. I. of the Local Government Act, 1894 (56 & 57 Vict. c. 73), to the committee. The text states what appears to be the effect of that Part as so applied.

SECT. 5. Joint Committees with Powers of Burial Boards.

to be divided, by the appointing bodies in such proportion as they may agree on, or, in default of agreement, as may be determined by the county council, or, if one of the appointing bodies is the council of a county borough, by the Local Government Board (*p*).

Borrowing powers.

The consent of the Local Government Board is required to the borrowing by any of the appointing bodies for the purposes of the Burial Acts; that consent is conclusive as to the power of the body in question to borrow; and no other consent is required either under the Burial Acts, or the Local Government Act, 1894, or any other Act. And where a parish meeting are an appointing body, they have the same power of borrowing for the purposes of the Burial Acts as a parish council would have (*q*).

Exercise of functions of vestry.

1041. There is no provision as to the body by which the functions of the vestry or meeting in the nature of a vestry under the Burial Acts are to be exercised in cases where the functions of a burial board are exercised by a joint committee; and the question in whom these functions are vested is completely uncertain (*r*).

SECT. 6.—*Burial Authorities under Burial Acts for Areas in London.*

Areas in which Acts in force.

1042. In London, outside the City, the Burial Acts were by the London (Adoptive Acts) Scheme, 1900 (*s*), declared to be as from the

(*p*) Local Government (Joint Committees) Act, 1897 (60 & 61 Vict. c. 40), s. 1 (1) (a). Though the appointing bodies are thus to contribute to the expenses of the execution of the Acts, there is no express provision giving those bodies power to obtain money for the purpose. Probably each appointing body must be taken to have, as regards so much of the area for which the Burial Acts are in force as is within their jurisdiction, the same powers of raising money that they would have if the functions of the burial board had been transferred to them alone. See Jenkin, Overseers' Manual, 3rd ed., p. 344, referring to an unreported case of *R.* v. *Gainsborough Overseers* (1901).

(*q*) Local Government (Joint Committees) Act, 1897 (60 & 61 Vict. c. 40), s. 1 (1) (b), (3). In the case of a parish council or parish meeting the ordinary borrowing powers of a parish council are clearly available, subject to the circumstance that no sanction save that of the Local Government Board is required, since a parish council borrow in the same way whether their power to borrow is derived from the Burial Acts or not. See p. 496, *ante*. In the case of an urban authority there is some difficulty; but probably the urban authority must be taken to have the borrowing powers of the burial board whose functions were transferred to them jointly with the other appointing bodies, except, of course, that no consent to the exercise of those powers save that of the Local Government Board will be required, and that the loan must be raised on the security of, and repaid out of, the rates out of which the contributions of the authority towards the current expenses of the execution of the Burial Acts are payable.

(*r*) The considerations bearing on the question differ in different cases. Where the burial board were originally constituted for a poor law parish which, being partly urban and partly rural when the Local Government Act, 1894 (56 & 57 Vict. c. 73), came into operation, was divided as from that time into two poor law parishes either by the direct operation of that Act or by order under it—and this is the commonest case—a plausible, if not very logical, view is that the functions of the vestry are to be exercised jointly by the parish council or parish meeting of the rural parish and by the vestry of the urban parish. But it would be difficult to arrive at a similar result if the area of the burial board was not a poor law parish, but, say, an ecclesiastical parish forming part of a poor law parish. Again, the case of a joint burial board presents special features. The control of the vestry over the borrowing powers of the burial authority is abrogated by the provisions as to borrowing referred to *supra*.

(*s*) Made under the London Government Act, 1899 (62 & 63 Vict. c. 14), and

appointed day under the London Government Act, 1899 (*t*), in force throughout certain specified metropolitan boroughs, to be in force in specified parts of other metropolitan boroughs, and not to be in force in any part of the remaining metropolitan boroughs.

In the case of a metropolitan borough in which the Burial Acts were thus declared not to be in force, or to be in force in part of the borough only, the Acts may be brought into force throughout the borough or in the residue of the borough, as the case may be, by Order in Council in the same way that they may be put in force by Order in Council in a municipal borough (*u*); and it seems that, speaking generally (*a*), this is the only way in which the Acts can be brought into force in any area in the county of London in which they were declared not to be in force by the above-mentioned scheme (*b*).

Burial authorities.

1043. Partly by the London (Adoptive Acts) Scheme, 1900, referred to in the preceding paragraph, and partly by the London Government Act, 1899, the functions etc. of the then existing authorities acting in the execution of the Burial Acts in London outside the City were, as from the appointed day under that Act (*c*), transferred to the councils of the metropolitan boroughs for which, or for parts of which, the Acts were by that scheme declared to be in force (*d*).

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confirmed by Order in Council of August 7, 1900 (Stat. R. and O. Rev., 1904, Vol. VIII., London County, p. 28). See art. 4 (1) and Sched. V. Schemes under the Act so confirmed have statutory force. See s. 16 (3) of the Act of 1899; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 213 (5); *Institute of Patent Agents* v. *Lockwood*, [1894] A. C. 347.

(*t*) The appointed day under the Act for this purpose was November 9, 1900. See Metropolitan Boroughs (First Election and First Meeting) Order in Council, 1900, arts. 4, 7 (1), and two Orders of the Lord President of the Council of October 18, 1900 (Stat. R. and O. Rev., 1904, Vol. VIII., London County, p. 37; Stat. R. and O., 1900, p. 385).

(*u*) See p. 484, *ante*.

(*a*) No doubt alterations in an area in which the Acts are in force might be effected by incidental provisions in an order altering parish boundaries or the like.

(*b*) The London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4, provides that "any of the adoptive Acts may be adopted in a metropolitan borough in like manner as in a borough outside London, and not otherwise, and where any of the adoptive Acts adopted before the appointed day does not extend to the whole borough, the Act may be adopted in the rest of the borough in like manner as if it were a separate borough and the borough council were the council thereof." Any doubt as to the method of adopting the Burial Acts intended to be introduced in London by this sub-section seems to be removed by a provision in art. 4 (2) of the London (Adoptive Acts) Scheme, 1900 (see note (*s*), p. 500, *ante*), that for the purposes of the Act of 1899 and of the scheme "the making of an Order in Council pursuant to a petition by the council of a metropolitan borough under s. 1 of the Burial Act, 1854 [17 & 18 Vict. c. 87], as applied by the Act, shall be deemed an adoption of the Burial Acts."

(*c*) See note (*t*), *supra*.

(*d*) The provisions of the Burial Acts referred to pp. 451, 452, *ante*, under which elective burial boards could be established for parishes and other areas, applied in London outside the City substantially as elsewhere; and (except in Woolwich, where the local board acted as a burial board) there was before the Local Government Act, 1894 (56 & 57 Vict. c. 73), no enactment enabling any form of executive authority for the purposes of the Burial Acts other

SECT. 6. **Burial Authorities under Burial Acts for Areas in London.**

On the adoption of the Acts for a metropolitan borough or the residue of a metropolitan borough in part of which the Acts are already in force the metropolitan borough council become the burial authority (*e*).

Consequently, in all cases where the Burial Acts are in force in London outside the City, the metropolitan borough council are the burial authority, and as such have, with some modifications, the functions of an elective burial board.

Where the Acts are in force in part only of a metropolitan borough, councillors representing wards in which the Acts are not in force must not be members of any committee of the council appointed for the purposes of the Acts (*f*).

Powers of vestry.

1044. In most, if not in all, cases, a metropolitan borough council, acting in the execution of the Burial Acts, are free from the control of any vestry or like meeting (*g*).

Expenses of metropolitan borough council.

1045. The expenses of a metropolitan borough council in the execution of the Burial Acts fall on the general rate, subject, however, to provisions securing that the incidence of such expenses shall be confined to the area for which the Acts are in force (*h*).

Borrowing powers.

The council of a metropolitan borough in which, or in any part of which, the Burial Acts are or were for the time being in force, have, and are to be deemed always to have had, power to borrow for any purpose for which burial boards are authorised to borrow, and in like manner and subject to the like consent and approval,

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than an elective burial board to be established in London outside the City. S. 33 of the Local Government Act, 1894, was, however, rightly or wrongly, regarded as authorising the substitution of administrative vestries for burial boards in London by orders of the Local Government Board; and before the London Government Act, 1899 (62 & 63 Vict. c. 14), the execution of the Burial Acts was in many cases in the hands of administrative vestries under orders of the kind. The transfer of the functions of those vestries to the metropolitan borough councils by the Act of 1899 included, of course, their functions under the Burial Acts. The transfer in the case of the remaining elective burial boards was effected by the scheme above referred to in pursuance of s. 4 (2) of the Act of 1899.

(*e*) *Ibid.*, s. 4 (2).

(*f*) London (Adoptive Acts) Scheme, 1900, art. 6.

(*g*) Where the Acts were in force before the London Government Act, 1899 (62 & 63 Vict. c. 14), for a parish with an elective vestry, which was the normal case, the functions of the vestry under the Burial Acts attached to the elective vestry (see Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 8), and consequently passed, under the Act of 1899, to the metropolitan borough council. In cases where the Burial Acts were in force before the Act of 1899 for an area other than such a parish, it is difficult to find any express provision transferring to the borough council or abrogating the functions of the vestry or meeting in the nature of a vestry. Provisions in that behalf may, however, be contained in a scheme under the Act of 1899 relating to the particular borough, and, even in the absence of such provisions, it might be held that the controlling powers of the vestry or meeting had been impliedly abolished. In the case where the Acts are brought into force by Order in Council under the provisions above referred to, there can be little doubt that the metropolitan borough council are free from control by any body in the nature of a vestry.

(*h*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10; London (Rating) Scheme, 1901, confirmed by Order in Council of March 9, 1901 (Stat. R. and O. Rev., 1904, Vol. VIII., London County, p. 84).

but upon the security of the general rate of the parish or parishes in which the Acts are or were at the date of the borrowing in force. But this provision is not to be construed as requiring the consent or approval of any vestry to any borrowing for the purposes of the Burial Acts (*i*).

Acquisition of land.

1046. It seems that a metropolitan borough council cannot, under the general provisions enabling them to acquire land (*j*), obtain power to take land compulsorily for the purposes of the Burial Acts (*k*). The powers of the council for the acquisition of land for those purposes appear, therefore, to be those of an elective burial board only.

City of London.

1047. The Corporation of the City of London, as successors of the City of London Commissioners of Sewers (*l*), have the functions of a burial board for the City under special legislation to which it is beyond the scope of this title to refer in detail (*m*).

SECT. 7.—*Miscellaneous.*

Provisions on transfer of functions under Local Government Act, 1894.

1048. The Local Government Act, 1894 (*n*), comprises several sections containing general provisions as to the consequences of a transfer of functions from one body to another under that Act (*o*). These provisions apply where a transfer of the functions of a burial board to a parish council, or to a parish council or parish

(*i*) London Adoptive Acts (Borrowing) Scheme, 1904, made under the London Government Act, 1899 (62 & 63 Vict. c. 14), and confirmed by Order in Council of January 29, 1904 (Stat. R. and O. Rev., 1904, Vol. VIII., p. 548). As to the statutory force of the scheme, which is expressed to have been framed for the removal of doubts, see note (*s*), p. 500, *ante*.

(*j*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2) and Sched. II., Part II., applying s. 65 of the Local Government Act, 1888 (51 & 52 Vict. c. 41).

(*k*) This is the view taken by the Local Government Board on this subject.

(*l*) Under the City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.).

(*m*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 43; City of London Burial Act, 1857 (20 & 21 Vict. c. 35), some provisions of which are repealed by the Burial Act, 1900 (63 & 64 Vict. c. 15); and see the City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.). Provisions as to churchyards and burial grounds in the City are contained in the City of London Sewers Acts, 1848 and 1851 (11 & 12 Vict. c. clxiii., s. 110; 14 & 15 Vict. c. xci., ss. 32—36). See title METROPOLIS.

(*n*) 56 & 57 Vict. c. 73.

(*o*) It is beyond the scope of this article to discuss these sections, as to which see title LOCAL GOVERNMENT. The matters with which they deal are briefly as follows:—S. 67 provides for the automatic transfer of property and liabilities upon the transfer of powers and duties by the Act. S. 68 provides for the adjustment of property etc. by agreement or arbitration between authorities affected by the Act or things done under the Act. S. 69 gives county councils and county borough councils large powers for dealing with matters arising out of any alteration of area made by the Act. These powers were held in *R.* v. *Durham County Council* (1897), Local Government Chronicle, 1897, p. 70, to extend to altering an area for which the Burial Acts were in force. S. 70 provides a summary method for the determination of questions as to whether powers etc. are or are not transferred. S. 81 contains provisions as to existing officers of bodies whose functions are transferred, including provisions for the compensation of officers suffering pecuniary loss in consequence of the Act or things done under it. And ss. 85—88 contain savings for current rates and precepts, and the like, pending legal proceedings, existing securities, debts, and contracts, existing bye-laws, orders, and regulations, etc.

SECT. 7. Miscellaneous.

meeting jointly with another authority or other authorities, was effected by the direct operation of the Act (*p*); and some of them apply also where a transfer of the functions of a burial board to a parish council, parish meeting, or urban authority was or is effected in pursuance of the Act (*q*), though not by its direct operation (*r*).

Property etc. to be credited to same area notwithstanding transfer of powers.

The Act further contains a special provision that the property, debts, and liabilities of any authority under any of the adoptive Acts (among which the Burial Acts are included (*s*)) whose powers are transferred in pursuance of the Act shall continue to be the property, debts, and liabilities of the area of that authority, and the proceeds of the property shall be credited, and the debts and liabilities and the expenses incurred in respect of the powers, duties, and liabilities shall be charged, to the account of the rates or contributions levied in that area, and where that area is situate in more than one parish the sums credited to and paid by each parish shall be apportioned in such manner as to give effect to the provision (*t*).

Provisions on transfer to metropolitan borough councils.

1049. General provisions as to the consequences of transfer of functions from other bodies to the metropolitan borough councils under the London Government Act, 1899 (*a*), of the same character as the general provisions of the Local Government Act, 1894, mentioned in the preceding paragraph, and applicable with reference to the transfer of the functions of burial authorities in London

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(*p*) By the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (5) or 53 (2). See pp. 493, 494, *ante*.

(*q*) Under *ibid.*, s. 53 (1) or s. 62 (1), or by an order of the county council investing a parish meeting with the powers of a parish council for the purposes of the Burial Acts under *ibid.*, s. 19 (10). See pp. 491, 493, 494, *ante*.

(*r*) How far the enactments expressed to apply where a change is effected "by" the Act apply where the change is effected by an order made or resolution passed in pursuance of the Act is not clear. In *R.* v. *Connah's Quay Overseers*, [1901] 2 K. B. 174, Lord ALVERSTONE, C.J., at p. 178, expressed the opinion that s. 67 applied in a case where the functions of a burial board were transferred to an urban authority by resolution under s. 62; but the point was not seriously argued, nor did the decision turn on it.

(*s*) See p. 492, *ante*.

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 53 (3). The sub-section probably applies to all cases where the functions of a burial board have been or are transferred either by the direct operation of the Act or by resolution or order under the Act, though, occurring as it does after sub-sections dealing specifically with cases where on or as from the appointed day any of the adoptive Acts were in force for part only of a rural parish, or for an area comprising the whole or part of a rural parish and extending beyond that parish, it might be construed as confined to those cases. As property cannot be vested in an "area," the only construction to be placed on the sub-section which can give it due effect is that the property of the burial board which became vested in the authority or authorities to whom the powers and duties of the burial board were transferred is to be administered for the benefit of the inhabitants of the area. No property vests in a joint committee established under s. 53 (2) of the Act of 1894, and therefore the grant of exclusive rights of burial in the burial ground over which the committee exercise powers, being the grant of an incorporeal hereditament (see p. 474, *ante*), must be made by the councils etc. appointing the committee, and not by the committee, though the committee may enter into a valid contract for the grant.

(*a*) 62 & 63 Vict. c. 14.

to the metropolitan borough councils (*b*), are contained in that Act and in orders and schemes made under that Act (*c*).

Provisions as to burial authorities in orders as to boundaries.

1050. Provisions dealing with burial authorities and their areas may be, and frequently are, inserted as consequential provisions in orders dealing with the boundaries of parishes and county districts made by county and county borough councils and confirmed by the Local Government Board under the Local Government Acts, and in provisional orders of the Local Government Board under those Acts dealing with borough and county boundaries (*d*).

Alteration of Burial Acts areas.

County councils, and possibly county borough councils, have also powers independently of other alterations of area for altering an area for which the Burial Acts are in force (*e*).

(*b*) As to this transfer, see p. 501, *ante*.

(*c*) See London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 29—31, 33 (2); London (Adaptation of Enactments) Order in Council, 1900, of August 7, 1900; London (Miscellaneous) Scheme, 1900, approved by Order in Council of August 7, 1900; London (Financial Arrangements) Scheme, 1900, approved by Order in Council of August 7, 1900; London (Existing Officers) Scheme, 1900, approved by Order in Council of August 7, 1900 (Stat. R. and O. Rev., 1904, Vol. VIII., London County, pp. 21, 26, 75, and 139). The provisions of these schemes are in many cases supplemented in regard to a particular metropolitan borough by a special scheme under the Act of 1899 relating to that borough.

(*d*) As to such orders, see title LOCAL GOVERNMENT. The power to insert consequential provisions in the orders is derived from s. 59 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), and has been held to extend to dealing with burial authorities (*R.* v. *Durham County Council* (1897), Local Government Chronicle, 1897, p. 70). Provisions of the kind are very usual in provisional orders extending boroughs. In *R.* v. *Keighley Overseers* (1897), Local Government Chronicle, 1897, p. 47, part of one of two parishes together forming the area of a burial board was transferred to a third parish by an order of a county council containing a provision that nothing therein should "affect the area under the jurisdiction of any burial board"; and afterwards another part of the same parish was transferred to the same third parish by a provisional order containing no reference to burial boards. It was held that neither order had affected the area subject to the jurisdiction of the burial board.

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 53 (4): "The county council on the application of a parish council may, by order, alter the boundaries of any such area if they consider that the alteration can properly be made without any undue alteration of the incidence of liability to rates and contributions or of the right to property belonging to the area, regard being had to any corresponding advantage to persons subject to the liability or entitled to the right." The expression "such area" probably means any area under the adoptive Acts, though it may be read as confined to the cases, particularly dealt with in the earlier part of the section, where the area under the adoptive Acts on the appointed day either formed part only of a rural parish, or, comprising such a parish or part thereof, extended beyond the confines of the parish. The expression "county council" in the Act includes a county borough council (*ibid.*, s. 75). An urban authority, metropolitan borough council, or parish meeting may be invested with the power of making an application under the sub-section (*ibid.*, ss. 19 (10), 33).

Part VII.—Cemeteries under Public Health (Interments) Act, 1879.

SECT. 1.

Provision of Cemetery.

Power to provide cemetery.

Local authority become a "burial authority."

Provision of cemetery for part of district.

SECT. 1.—*Provision of Cemetery.*

1051. Any local authority within the meaning of the Public Health Acts—*i.e.*, any urban authority or rural district council—may, and if required by the Local Government Board must, provide a cemetery under the Public Health (Interments) Act, 1879 (*f*).

A local authority maintaining a cemetery under the Act of 1879 are a "burial authority" within the Burial Act, 1900 (*g*), and subject to the provisions of that Act as to burial authorities accordingly (*h*).

1052. An urban authority may provide a cemetery under the Act of 1879 for a part only of their district, and for that purpose may divide their district into parts, and from time to time abolish or alter such divisions, and may make a separate assessment on the

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(*f*) 42 & 43 Vict. c. 31. The Act consists of three sections only. S. 1 provides that the Act shall be construed with the Public Health Act, 1875. S. 2 provides, by sub-s. (1), that "the provisions of the principal Act [the Public Health Act, 1875], as to a place for the reception of the dead before interment, in the principal Act called a mortuary, shall extend to a place for the interment of the dead, in this Act called a cemetery; and the purposes of the principal Act shall include the acquisition, construction, and maintenance of a cemetery." The remaining sub-sections of s. 2 provide that the cemetery may be constructed either within, or subject to certain conditions without, the district of the local authority (see *infra*), and empower the local authority to accept donations of land etc. for the purposes of the cemetery (see p. 507, *post*). S. 3 provides, without more, that "the Cemeteries Clauses Act, 1847 [10 & 11 Vict. c. 65], shall be incorporated with this Act." The provisions of the Act of 1875 as to mortuaries are contained in ss. 141 and 142 of that Act; but of these the only provisions capable of application to a cemetery are the following provisions in s. 141: "Any local authority may, and if required by the Local Government Board shall, provide and fit up a proper place for the reception of dead bodies before interment (in this Act called a mortuary), and may make bye-laws with respect to the management and charges for the use of the same." The Public Health Act, 1875, does not apply to London (*ibid.*, s. 2), nor consequently does the Act of 1879.

The most important consequences of the incorporation of the Act of 1879 with the Act of 1875 and the provision that the purposes of the Act of 1875 shall be deemed to include the acquisition etc. of a cemetery under the Act of 1879 are that the expenses of the local authority in connection with a cemetery under that Act are defrayable as expenses under the Act of 1875, and that the provisions of the Act of 1875 and the amending Acts as to the acquisition etc. of land, including those as to the compulsory acquisition of land, and as to the borrowing of money, are available with reference to the cemetery.

The Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), which, subject to important exceptions introduced by the Burial Act, 1900 (63 & 64 Vict. c. 15), applies to cemeteries under the Act of 1879, by virtue of its incorporation with that Act, is discussed at pp. 514 *et seq.*, *post*, and its provisions as applicable to cemeteries under the Act of 1879 are accordingly referred to very shortly in the present Part of this title.

(*g*) 63 & 64 Vict. c. 15, s. 11.

(*h*) The provisions of the Act applicable to burial authorities generally are dealt with pp. 450, 462, 466 *et seq.*, 479 *et seq.*, *ante*, and are accordingly only referred to shortly in the present Part.

SECT. 1.
Provision of Cemetery.

part for which the cemetery is provided for the purposes of the cemetery (*i*).

Situation of cemetery.

1053. The local authority may acquire, construct, and maintain a cemetery under the Act of 1879 either wholly or partly within or without their district. If, however, the local authority propose to construct the cemetery or any part of it without their district, they must give notice a certain time before commencing operations, and owners and occupiers of property and others may thereupon take objection, in which case the work is not to be carried out unless sanctioned by the Local Government Board after inquiry (*k*).

The cemetery must not in any case be constructed within one hundred yards of a dwelling-house without the consent of the owner, lessee, and occupier (*l*).

Donation of land or money for cemetery.

1054. The local authority may accept a donation of land or the purposes of a cemetery under the Act of 1879, and a donation of money or other property for enabling them to acquire, construct, or maintain such a cemetery (*m*).

Acquisition of land.

The provisions of the Public Health Act, 1875 (*n*), as to the acquisition of land, including those as to the compulsory acquisition of land (*o*), apply to the acquisition of land by a local authority for the purposes of a cemetery under the Act of 1879 (*p*). And where s. 95 of the Public Health Acts Amendment Act, 1907 (*q*), is in force, the local authority may, with the approval of the Local Government Board, and subject to the provisions of that section, appropriate for the purposes of such a cemetery land acquired by the local authority for other purposes, but not required for those purposes.

Alienation of land.

The provisions also of the Public Health Act, 1875, as to the alienation of land, apply to land acquired by a local authority for

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(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211 (4). It is not altogether clear that a rural district council can provide a cemetery under the Act of 1879 for part only of their district. The Local Government Board, however, take the view that the council can provide a cemetery for a particular contributory place, or, no doubt, for two or more such places, for in the Board's circular on the Act of August 19, 1879, they say that if the cemetery were provided for a separate contributory place, it would be competent for the Board to order the expenses to be special expenses, in which case they would be borne by such contributory place.

(*k*) Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), s. 2 (2), applying Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 32—34, which relate to the construction of sewage works by a local authority without their district. See further, as to these sections, title SEWERS AND DRAINS.

(*l*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 10, as amended by the Burial Act, 1906 (6 Edw. 7, c. 44), s. 2; and see p. 515, *post*.

(*m*) Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), s. 2 (3).

(*n*) 38 & 39 Vict. c. 55.

(*o*) S. 6 of the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), contains provisions as to the application of the Lands Clauses Acts where the compulsory acquisition of land for the purpose of a cemetery is authorised, but it is questionable whether the section is applicable with regard to a cemetery under the Act of 1879, and whether, if applicable, it adds anything to the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55).

(*p*) See note (*f*), p. 506, *ante*.

(*q*) 7 Edw. 7, c. 53, s. 95.

SECT. 1. Provision of Cemetery.

the purposes of a cemetery under the Act of 1879 (*r*); and there are enactments which in some cases authorise the appropriation of the land by the local authority for other purposes, if not required for the purposes of the cemetery (*a*). The powers of the local authority for the alienation or appropriation of land acquired for a cemetery are, however, subject to some restrictions.

Restrictions as to consecrated land.

In the first place, there is a statutory provision to the effect that if the land has been consecrated or used for the burial of the dead, it must not be sold or disposed of, or used for any purpose other than that of a cemetery (*b*); but this prohibition is to some extent overridden by later legislation (*c*). Again, consecrated land cannot be divested of its sacred character except by statute, and this doctrine operates to prevent the use of the land for purposes other than those for which a faculty can be obtained (*d*).

Unconsecrated ground set apart for burial.

There is also a statutory provision to the effect that unconsecrated ground which is maintained by a burial authority and set apart for burial must not be applied to any other purpose except by leave of the Local Government Board (*e*).

Lastly, if the land has once been set aside for the purposes of interment, even though never actually used for that purpose, statutory provisions apply which in general prevent its being used for building either in the hands of the local authority or their assignees (*f*).

Maintenance of cemetery.

1055. The local authority may lay out and embellish the cemetery, and are required to maintain it. They have powers for the construction and improvement of roads in connection with the cemetery. They are required to drain the cemetery, and have special powers for this purpose, and they are subjected to heavy liabilities if they permit water to be fouled by offensive matter from the cemetery (*g*).

Damage in exercise of powers.

1056. In the exercise of their statutory powers as to the cemetery the local authority must do as little damage as possible, and they are to make compensation for damage done in the exercise of those powers (*h*).

Bye-laws.

1057. The local authority may, in accordance with the provisions of the Public Health Act, 1875, as to bye-laws (*i*), make bye-laws

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(*r*) See note (*f*), p. 506, *ante*.

(*a*) *E.g.*, Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 95; Electric Lighting Clauses Act, 1899 (62 & 63 Vict. c. 19), Schedule, s. 8.

(*b*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 9, as applied by the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31); and see p. 515, *post*.

(*c*) *E.g.*, by the provisions of the Open Spaces Act, 1906 (6 Edw. 7, c. 25), as to which see pp. 533 *et seq.*, *post*, authorising the conveyance or utilisation of a burial ground for the purpose of an open space.

(*d*) See pp. 423, 424, *ante*.

(*e*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 6.

(*f*) See pp. 532, 533, *post*.

(*g*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), ss. 11—14, 16, 18—22; and see pp. 516, 517, *post*.

(*h*) *Ibid.*, s. 17; and see p. 516, *post*.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 182—186. As to these sections, which regulate the method of making bye-laws under the Act of 1875

with respect to the management of the cemetery and the charges for its use (*k*). The Local Government Board have issued a series of model bye-laws of the kind (*l*); and the bye-laws in force with regard to cemeteries under the Act of 1879 usually closely follow the model series.

Rating.

1058. There is no special enactment as to the rating of cemeteries under the Act of 1879 similar to that applicable to burial grounds under the Burial Acts, and the rating of such cemeteries is accordingly entirely governed by the general law (*m*).

SECT. 2.—*Burials in Cemeteries, Consecration etc.*

Consecration of portion of cemetery.

1059. The local authority may apply to the bishop to consecrate any portion of the cemetery approved by the Secretary of State; and if they do not so apply upon request, the Secretary of State may make the application in their stead (*n*). There is not, however, as in the case of a burial ground under the Burial Acts (*o*), any provision for appeal if the application is rejected by the bishop.

Allotting unconsecrated portion.

1060. In the case of a cemetery provided since the Burial Act, 1900, the unconsecrated part of the cemetery must be allotted by the local authority in such manner and in such portions as may be sanctioned by the Secretary of State (*p*).

Erection of chapel.

1061. The local authority may at their own expense erect a chapel (not to be consecrated or reserved for a particular denomination) in any part of the cemetery which is not consecrated or reserved exclusively for a particular denomination, and further chapel accommodation may be provided at private expense (*q*).

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and the Acts incorporated therewith, and, *inter alia*, render the bye-laws subject to confirmation by the Local Government Board, see title LOCAL GOVERNMENT.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 141, as applied by the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), s. 2 (1). See note (*f*), p. 506, *ante*.

(*l*) Series 14. See Encyclopædia of Forms, Vol. III., p. 130. The subject-matters dealt with in the model bye-laws are—the structure of vaults; the prohibition of the burial at one time of more than one body in one grave, except in the case of members of one family; the minimum period within which graves may be reopened for fresh burials; the depth of graves; the separation of coffins from one another; the closing of vaults after burial therein; the turfing or other covering of graves after burial; the prevention of the interruption of burials by violent or indecent behaviour; the charges to be made by the local authority in respect of burials.

(*m*) Subject to what is stated in the text, the observations as to the rating of burial grounds under the Burial Acts (see pp. 465, 466, *ante*), and on the question whether burial grounds are *extra commercium* (see p. 465, *ante*), apply also to cemeteries under the Act of 1879.

(*n*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 1; Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), ss. 23, 24; and see p. 466, *ante*; p. 517, *post*.

(*o*) See p. 467, *ante*.

(*p*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 9, applying s. 7 of the Burial Act, 1853 (16 & 17 Vict. c. 134). The effect of these provisions is fully stated at p. 467, *ante*. See also Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 35; and p. 519, *post*.

(*q*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 2; and see p. 468, *ante*. Formerly a local authority providing a cemetery under the Act of 1879 were required, if any part of the cemetery was consecrated, to provide a chapel on the consecrated

SECT. 2. Burials in Cemeteries, Consecration etc.

Ministers' fees.

1062. A table of fees payable for services rendered in the cemetery by any incumbent or minister of religion is to be settled by the local authority subject to the approval of the Secretary of State, or may be settled by the latter on default of the local authority; and the fees so settled are to be collected by the local authority and paid over by them (*r*).

Incumbents' obligation to perform service.

1063. The incumbent of any ecclesiastical parish situate wholly or partly within the area for which a cemetery is provided under the Act of 1879 is with respect to his own parishioners and persons dying in his parish under the same obligation to perform funeral services in the cemetery as he is to perform funeral services in a burial ground provided under the Burial Acts (*s*).

Chaplains appointed before 1900.

Before the Burial Act, 1900, a local authority maintaining a cemetery under the Act of 1879 of which any part was consecrated were required to appoint a chaplain to officiate in that part of the cemetery; and the chaplain was, when required, to perform the burial service over bodies buried there (*t*). The power to appoint a chaplain is abrogated by the Act of 1900 (*a*); but that Act makes no provision with regard to chaplains previously appointed, and there may, accordingly, be cases where a chaplain appointed for a cemetery under the Act of 1879 before the Act of 1900 is still in office.

Performance of service by other person in holy orders.

Any clerk in holy orders not under ecclesiastical censure, nor prohibited by the bishop, at the request of the executor of the deceased or other person having charge of the burial, and with the consent of the chaplain, if any, or otherwise of the bishop, may perform the burial service in the consecrated part of the ground (*b*).

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part for the performance of the burial service according to the rites of the Established Church by s. 25 of the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), but this obligation was abolished by s. 2 (4) of the Act of 1900. S. 11 of the Act of 1847 contains a general provision authorising the erection of chapels in the cemetery at the expense of the "company"; but this provision must now, in the case of a cemetery under the Act of 1879, be read subject to the provisions of s. 2 of the Burial Act, 1900. As to the use of unconsecrated chapels in the cemetery, see Cemeteries Clauses Act, 1847, s. 36; and p. 519, *post*.

(*r*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3 (1)—(3); and see pp. 479, 480, *ante*. These sub-sections extend in terms to fees payable to sextons as well as incumbents and ministers; but, as sextons are not required or entitled to officiate in cemeteries under the Act of 1879, the reference to sextons' fees should perhaps be taken as impliedly confined to burial grounds under the Burial Acts. The provisions of s. 3 of the Burial Act, 1900, as to fees other than for services rendered, are inapplicable to cemeteries under the Act of 1879, as fees of the kind were never payable in the case of such cemeteries.

(*s*) *Ibid.*, s. 7. As to the obligation of an incumbent to perform funeral services in a burial ground provided under the Burial Acts, see pp. 469 *et seq.*, *ante*. An incumbent performing a service will be entitled to the fee prescribed under s. 3 of the Act of 1900.

(*t*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), ss. 27, 28; and see p. 518, *post*. As to the chaplain's stipend, see *ibid.*, ss. 30, 31; and p. 518, *post*.

(*a*) 63 & 64 Vict. c. 15, s. 7.

(*b*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 29. It appears to be implied that the burial service cannot be lawfully performed in the consecrated part of the cemetery except by the chaplain, if any, or by a person in

1064. Burials may take place in the consecrated part of the cemetery without the performance of the burial service according to the rites of the Church of England, in like manner and subject to the same provisions and conditions as such burials may take place in a burial ground provided by a burial board (*c*).

Various powers of local authority.

1065. The local authority may appoint gravediggers and other servants for the purposes of the cemetery (*d*), and, apparently, a clerk to assist in the performance of the burial service in the consecrated part of the cemetery (*e*). They must make regulations for securing the proper conduct of burials in the cemetery (*f*); they may set apart a portion of the cemetery for the purpose of granting exclusive rights of burial therein, and may sell such rights and also rights of placing monuments etc. in the cemetery or in a chapel or building therein (*g*); and they may remove monuments etc. placed in the cemetery without their consent (*h*).

Bishop's rights as to monumental inscriptions.

The bishop has, however, a certain control over monumental inscriptions in the consecrated part of the cemetery (*i*).

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holy orders acting with the consent of the chaplain or bishop, as stated in the text, or, in the case of his own parishioners and persons dying in his parish, by the incumbent of an ecclesiastical parish situate in the area for which the cemetery is provided. In the absence of statutory authority, it would be contrary to ecclesiastical law for any person to officiate other than the incumbent of the parish in which the cemetery is situate or his licensee. See note (*g*), p. 472, *ante*. And the rights of the incumbent of that parish as such appear to be impliedly abrogated to the extent above indicated. It has been doubted whether s. 29 of the Act of 1847 is not impliedly repealed as regards cemeteries under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), by s. 7 of the Burial Act, 1900 (63 & 64 Vict. c. 15), which casts upon incumbents of parishes situate within the area for which the cemetery is provided the *obligation* to perform funeral services stated in the text, but does not in terms confer upon them the *right* to perform such services which is conferred upon incumbents by s. 32 of the Burial Act, 1852 (15 & 16 Vict. c. 85). As the earning of the fee depends upon performing the service, it may be thought that the incumbent upon whom the statutory obligation of performing the service is cast has a right to earn the fee. On the other hand, it may be considered that the necessity of obtaining the bishop's consent is a sufficient safeguard to the incumbent, as the bishop might make it a term of his consent that the officiating minister should pay over the fee for services rendered to the incumbent who would otherwise perform the service.

(*c*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 9, applying the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), as amended, to cemeteries provided by a local authority. For the provisions of the Act of 1880, see pp. 424, *et seq.*, *ante*.

(*d*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 37; and see p. 519, *post*. Sextons of parishes within the area for which a cemetery is provided by a local authority have no rights in respect of burials in the cemetery corresponding with those of sextons of parishes for which a burial ground is provided under the Burial Acts, as to which see pp. 469 *et seq.*, 473, *ante*.

(*e*) *Ibid.*, s. 34; and see p. 519, *post*.

(*f*) *Ibid.*, s. 38; and see p. 519, *post*. The power to make regulations is in addition to their power, referred to at p. 508, *ante*, to make bye-laws.

(*g*) *Ibid.*, ss. 40—49; and see pp. 520, 521, *post*. These sections contain detailed provisions as to the form and effect of grants of the kind and the registration thereof.

(*h*) *Ibid.*, s. 50; and see p. 522, *post*.

(*i*) *Ibid.*, s. 51; and see p. 522, *post*.

SECT. 2. Burials in Cemeteries, Consecration etc.

Burials are not to take place in any vault under or within fifteen feet of a chapel of the cemetery (*k*).

SECT. 8.—*Protection of Cemetery; Accounts of Local Authority etc.*

Liability of offenders.

1066. Persons injuring the cemetery etc. or guilty of various forms of misconduct therein are subject to penalties recoverable in a summary way (*l*), and the offender is liable to immediate arrest if his name and address are not known (*m*).

Publication of particulars of offences.

The local authority are required to publish on notice boards particulars of the offences punishable summarily under the statutes and bye-laws applicable to the cemetery, and failure on their part in this respect precludes the recovery of penalties in respect of such offences (*n*).

Accounts.

1067. The local authority are required, under penalties, to send a copy of their accounts in relation to the cemetery to the clerk of the peace annually (*o*).

Part VIII.—Private Cemeteries.

Establishment of private cemeteries.

1068. Any person may provide and keep a cemetery for the interment of the dead, though in some localities not without the sanction of the Local Government Board (*p*), provided that no nuisance is caused thereby (*q*); and burial grounds, especially for the use of particular religious communities other than the Church of England, are frequently provided without statutory authority. As, however, it would not be practicable to obtain the consecration of any cemetery so established by a private person or by a company without any safeguards for its proper maintenance and regulation, it is necessary, when it is desired that any part of the cemetery should be consecrated, to obtain a private Act authorising its establishment.

Altogether between thirty and forty Acts of the kind, besides amending Acts, have been passed (*r*). The Acts passed since 1847

(*k*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 39; and see p. 519, *post*.

(*l*) *Ibid.*, ss. 58, 59; and see *ibid.*, s. 62, and the provisions of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 140—160, as thereby incorporated. See pp. 523 *et seq.*, *post*.

(*m*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 154, incorporated with the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), as stated in the preceding note; and see pp. 524, 525, *post*.

(*n*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 143.

(*o*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 60; and see p. 523, *post*.

(*p*) See pp. 525 *et seq.*, *post*.

(*q*) See *Cowley* (*Lord*) v. *Byas* (1877), 5 Ch. D. 944, C. A. In that case it was assumed, as had been decided by MALINS, V.-C., in *Greenwood* v. *Wadsworth* (1873), L. R. 16 Eq. 288, that actual interment in a private cemetery within a certain distance of a dwelling-house was prohibited by s. 9 of the Burial Act, 1855 (18 & 19 Vict. c. 128); but the correctness of this decision is generally doubted. See note (*p*), p. 464, *ante*.

(*r*) The first Act of the kind appears to be the statute 2 & 3 Will. 4, c. cx., passed

all incorporate the Cemeteries Clauses Act, 1847 (*s*), with some modifications and additions; and the earlier Acts contain provisions of the same character as those in that Act.

Liabilities of companies maintaining cemeteries to rates etc.

1069. A company maintaining a cemetery under a local Act of the usual type are the "occupiers" of the cemetery, including parts thereof consisting of plots conveyed to purchasers for graves, and liable to be rated as such (*t*). They are also "owners" of the land within statutes such as the Metropolis Management Acts and the Public Health Acts, for the purposes of which "owner" is defined in effect as meaning the person receiving the rack-rent of the premises, or who would receive the rack-rent if the premises were let at a rack-rent, and are liable to statutory burdens imposed on "owners" of land by such statutes accordingly (*a*).

Liability to income tax.

If a cemetery company receive lump sums in any year by way of commutation of annual payments for keeping graves in repair, such lump sums are assessable to income tax under Sched. A, No. 3, r. 3, of the Income Tax Act, 1842 (*b*), as being part of the annual profits of the company (*c*).

Registration of burials.

1070. A cemetery company must provide for the due registration of burials in their cemetery (*d*).

Fees payable to churchwardens etc. for incumbent's stipend.

1071. Where under any local Act fees on interments in any burial ground of any parish other than a burial ground maintained by a burial authority are payable to the churchwardens of such parish, or to any trustees or other persons, for the purpose of enabling them to pay an annuity or stipend to the incumbent or minister, the fees which under any Act relating to any cemetery company would on the interment in the cemetery of any company of any body brought from such parish be payable to such incumbent or minister are payable to the said churchwardens, trustees, or persons, and any surplus of such fees which may remain in their hands after payment of such annuity or stipend is payable to such incumbent or minister (*e*).

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to authorise the formation of Kensal Green Cemetery, and the last the statute 18 & 19 Vict. c. clix.

(*s*) 10 & 11 Vict. c. 65. This Act, which is incorporated not only with a certain number of private Acts, but also with the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31) (as to which see pp. 506 *et seq.*, *ante*), is discussed at pp. 514 *et seq.*, *post*. The Act applies only when expressly incorporated with some subsequent Act, differing in this respect from some of the other "clauses" Acts.

(*t*) *R.* v. *St. Mary Abbot's, Kensington* (*Inhabitants*) (1840), 12 Ad. & El. 824; *R.* v. *Abney Park Cemetery Co.* (1873), L. R. 8 Q. B. 515.

(*a*) *St. Giles, Camberwell, Vestry* v. *London Cemetery Co.*, [1894] 1 Q. B. 699 (liability of frontagers to contribute to the expenses of paving new streets under the Metropolis Management Acts).

(*b*) 5 & 6 Vict. c. 35. See title INCOME TAX.

(*c*) *Paisley Cemetery Co., Ltd.* v. *Reith* (*Surveyor of Taxes*) (1898), 63 J. P. 806. But it might be otherwise if the company contracted to set aside the lump sum and apply the interest arising therefrom in keeping the graves in order (*ibid.*).

(*d*) See p. 559, *post*.

(*e*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 50, as extended by the Burial Act, 1853 (16 & 17 Vict. c. 134), s. 7, and restricted by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 12, and Sched. II.

Part IX.—The Cemeteries Clauses Act, 1847.

SECT. 1. *Application and Construction of Act.*

Application and Construction of Act.

1072. The Cemeteries Clauses Act, 1847 (*f*), which was passed, like other "clauses" Acts, with the object of providing a statutory code which could be applied in particular cases by special legislation, is in force only where and so far as it is incorporated with some subsequent Act. Its clauses, where and as so incorporated, are to be read with the clauses of the incorporating Act as one Act (*g*).

Incorporation with other Acts.

The Act has been incorporated with all the local Acts authorising the establishment of cemeteries subsequently passed (*h*); it is also incorporated with the Public Health (Interments) Act, 1879 (*i*), and thus applies, subject to important modifications made by legislation subsequent to the Act of 1879, to cemeteries provided by local authorities under that Act (*k*).

Like the other "clauses" Acts passed about the same time, the Act of 1847 contains a number of groups of clauses each with a heading stating generally the subject-matter with which the clauses therein comprised deal; and parts of the Act may be incorporated by reference to such headings (*l*).

Definitions.

1073. Besides definitions of a formal character (*m*), the Act of 1847 contains the following definitions (*n*), to which it is necessary to refer:—

"Special Act" is defined as meaning the incorporating Act.

"Prescribed" is in effect defined as meaning prescribed by the special Act.

"The lands" is defined as meaning the lands by the special Act authorised to be taken or used for the purposes thereof.

"The company" is defined as meaning the person by the special Act authorised to construct the cemetery.

"The cemetery" is defined as meaning the cemetery or burial ground, and the works connected therewith, by the special Act authorised to be constructed.

In the ensuing account of the provisions of the Act, the language of the Act is followed, so that the above expressions must be understood to be used in accordance with the above definitions.

(*f*) 10 & 11 Vict. c. 65.

(*g*) *Ibid.*, s. 1. The section is wordy, but seems to mean no more than is stated in the text.

(*h*) See pp. 512, 513, *ante*.

(*i*) 42 & 43 Vict. c. 31.

(*k*) As to such cemeteries generally, see pp. 506 *et seq.*, *ante*.

(*l*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 5.

(*m*) The expressions defined in addition to those mentioned in the text are "person," "lands," "month," "superior courts," "oath," "Established Church," "county," "justice," "two justices," and "quarter sessions." The Act also contains provisions of the usual kind as to the construction of words importing the singular or plural and words importing the masculine gender.

(*n*) *Ibid.*, ss. 2, 3.

SECT. 2.—*Making of Cemetery* (*o*).

SECT. 2. Making of Cemetery.

Compulsory acquisition of land.

1074. Where by the special Act the company are empowered, for the purpose of making the cemetery, to take or use lands otherwise than with the consent of the owners and occupiers thereof, they are, in exercising the power so given to them, subject to the provisions and restrictions contained in the Act of 1847 and the Lands Clauses Consolidation Act, 1845 (*p*), and are to make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the special Act, or injuriously affected by the construction of the works thereby authorised, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, or other parties, by reason of the exercise as regards such lands of the powers vested in the company by the Act of 1847 or the special Act, or any Act incorporated therewith, and, except where otherwise provided by the Act of 1847 or the special Act, the amount of such compensation is to be determined in manner provided by the Lands Clauses Consolidation Act, 1845 (*q*), for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of the Act of 1845 are applicable to determine the amount of such compensation, and to enforce payment or other satisfaction thereof (*r*).

Correction of errors in special Act.

1075. Provision is made for the correction by a certificate of justices of omissions and errors in the special Act as regards lands described therein as intended to be taken, and for the proof of such certificates (*s*).

Land used for burials not to be used for other purposes.

1076. The company may not sell or dispose of any land which has been consecrated or used for burial, or make use of such land for any purpose other than such as is authorised by the Act of 1847 or the special Act or any Act incorporated therewith (*t*).

Proximity to dwelling-house.

1077. No part of the cemetery may be constructed nearer to any dwelling-house than the prescribed distance, or if no distance is prescribed, 200 yards, except with the consent in writing of the owner, lessee, and occupier of such house (*a*). The distance is to

(*o*) Ss. 6—17 of the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), are headed "With respect to the Making of the Cemetery."

(*p*) 8 & 9 Vict. c. 18. See further, title COMPULSORY PURCHASE AND COMPENSATION.

(*q*) *Ibid.*

(*r*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 6.

(*s*) *Ibid.*, ss. 7, 8.

(*t*) *Ibid.*, s. 9. As to the application of the section in the case of a local authority acquiring land for the purposes of the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), see p. 508, *ante*.

(*a*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 10. In the case of a cemetery under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), the prescribed distance is now 100 yards (Burial Act, 1906 (6 Edw. 7, c. 44), s. 2). The prohibition is against construction of the cemetery, and not, like the corresponding prohibition in the case of a burial ground under the Burial Acts (as to which see p. 464, *ante*), against interment.

SECT. 2. Making of Cemetery.

be measured from the walls of the dwelling-house, not from the boundary of the curtilage adjoining the house (*b*).

Power to build chapels and lay out grounds.

1078. The company may build upon any land which by the special Act they are authorised to use for the purposes of the cemetery such chapels for the performance of the burial service as they think fit, and may lay out and embellish the grounds of the cemetery as they think fit (*c*).

Making or improvement of roads.

1079. The company, upon any land purchased by them under the Act of 1847 or the special Act, or any Act incorporated therewith, may make new roads to the cemetery, or widen or improve any existing roads thereto, which they think fit; but they may not widen or improve any private road without the consent of the owner thereof, or any public road without the consent of the persons in whom the management of the road is vested by law (*d*). The company and the owners or persons having the management of any such road may enter into such agreements as they think fit for enabling the company to widen or improve any such road, and for maintaining the same (*e*).

fencing.

1080. Every part of the cemetery is to be inclosed by walls or other sufficient fences of the prescribed materials and dimensions, and, if no materials or dimensions be prescribed, by substantial walls or iron railings of the height of eight feet at least (*f*).

Repair.

1081. The company are to keep the cemetery and the buildings and fences thereof in complete repair, and in good order and condition, out of the moneys to be received by them by virtue of the Act of 1847 and the special Act (*g*).

Compensation for damage.

1082. In the exercise of the powers by the Act of 1847 and the special Act granted to the company they are to do as little damage as can be, and are to make full compensation to all parties interested for all damage sustained by them through the exercise of such powers (*h*).

(*b*) *Wright* v. *Wallasey Local Board* (1887), 18 Q. B. D. 783.

(*c*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 11. As to chapels in the case of a cemetery provided under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), see p. 509, *ante*.

(*d*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), ss. 12, 13.

(*e*) *Ibid.*, s. 14.

(*f*) *Ibid.*, s. 15. This provision does not apply to a burial ground provided under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31) (Burial Act, 1900 (63 & 64 Vict. c. 15), s. 10).

(*g*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 16.

(*h*) *Ibid.*, s. 17. In the case of a company with whose special Act the Act of 1847 is incorporated, compensation under this section would apparently, in the absence of provisions to the contrary in the special Act, be assessable and recoverable before justices (subject to appeal to quarter sessions) under the provisions of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20) (as to which see note (*m*), p. 524, *post*), incorporated with the Act of 1847 by s. 62 of that Act. See, however, *Fletcher* v. *Birkenhead Corporation*, [1907] 1 K. B. 205, C. A., where it appears to have been assumed that the machinery of the Lands Clauses Acts was applicable to the assessment of compensation under s. 12 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), the provisions of which as to compensation correspond closely with those of s. 17 of the Cemeteries

SECT. 3.—*Prevention of Nuisances* (*i*).

SECT. 3. Prevention of Nuisances.

1083. The company are required to provide for the proper drainage of the cemetery, and are enabled, subject to obtaining certain consents, to connect their drains with sewers; and the provisions of the Waterworks Clauses Act, 1847 (*k*), as to breaking up streets to lay pipes, are applied for this purpose (*l*).

Drainage of cemetery.

Penalties recoverable by action are imposed on the company if they cause or permit streams etc. to be fouled by offensive matter from the cemetery, and the company are also expressly declared liable in damages in such case to any person entitled to use the water (*m*).

Fouling of streams etc.

SECT. 4.—*Burials in the Cemetery* (*n*).

1084. The bishop of the diocese in which the cemetery is situated may, on the application of the company, consecrate any portion of the cemetery set apart for the burial of the dead according to the rites of the Established Church, if he is satisfied with the title of the company to such portion, and thinks fit to consecrate such portion; and the part which is so consecrated is (subject to the provisions of the Burial Laws Amendment Act, 1880 (*o*)) to be used only for burials according to the rites of the Established Church (*p*). The company are to define by suitable marks the consecrated and unconsecrated portions of the cemetery (*q*).

Consecration of part of cemetery.

Clauses Act, 1847 (10 & 11 Vict. c. 65). In the case of a cemetery under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), it may be, in view of the incorporation of that Act with the Public Health Act, 1875 (38 & 39 Vict. c. 55), that the machinery of the Act of 1875 (ss. 179—181) is applicable with regard to compensation under s. 17 of the Act of 1847.

(*i*) Ss. 18—22 of the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), are headed "With respect to preventing Nuisance from the Cemetery."

(*k*) 10 & 11 Vict. c. 17, ss. 28—34. As to these sections, see title WATER SUPPLY. The procedure with regard to the assessment and recovery of compensation, damages, and penalties under these provisions of the Waterworks Clauses Act, 1847, as incorporated with the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), is, in the absence of provisions to the contrary in the special Act, regulated by the provisions of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 140—160, incorporated with the Cemeteries Clauses Act, 1847, by s. 62 of that Act. See note (*m*), p. 524, *post*. In the case of a cemetery under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), however, it may be, in view of the incorporation of that Act with the Public Health Act, 1875 (38 & 39 Vict. c. 55), that the machinery of the Act of 1875 is applicable to these matters instead of that of the Railways Clauses Consolidation Act, 1845.

(*l*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), ss. 18, 19.

(*m*) *Ibid.*, ss. 20—22. The company might also be liable to proceedings under the Rivers Pollution Prevention Acts and at common law. As to the liability at common law, see *Ballard* v. *Tomlinson* (1885), 29 Ch. D. 115, C. A.; *Womersley* v. *Church* (1867), 17 L. T. 190; and generally, titles NUISANCE; WATERS AND WATERCOURSES.

(*n*) Ss. 23—39 of the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), are headed "With respect to Burials in the Cemetery."

(*o*) 43 & 44 Vict. c. 41; and see pp. 424 *et seq.*, *ante*.

(*p*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 23. As to the consecration of a portion of a cemetery under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), see p. 509, *ante*.

(*q*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 24.

SECT. 4. **Burials in the Cemetery.**

1085. The company are to build within the consecrated part of the cemetery, and according to a plan approved by the bishop of the diocese, a chapel for the performance of the burial service according to the rites of the Established Church (*r*).

Removal of bodies from consecrated ground.

1086. No body buried in the consecrated part of the cemetery may be removed from its place of burial without the like authority as is by law required for the removal of any body buried in the churchyard belonging to a parish church (*s*).

Appointment and licensing of chaplain.

1087. The company are from time to time, with the approval of the bishop of the diocese in which the cemetery is situated, to appoint a clerk in holy orders to officiate as chaplain in the consecrated part of the cemetery; and such chaplain is to be licensed by, and is subject to the jurisdiction of, the bishop, and the bishop has power to revoke any such licence and to remove such chaplain for any cause which appears to him reasonable (*t*).

Burial service over bodies buried in consecrated ground.

The chaplain is when required, unless prevented by sickness or other reasonable cause, to perform the burial service over all bodies brought to be buried in the consecrated part of the cemetery which are entitled to be buried in consecrated ground according to the rites and usage of the Established Church (*a*).

Other clergymen may officiate.

1088. Any clerk in holy orders of the Established Church, not being prohibited by the bishop nor under ecclesiastical censure, at the request of the executor of the will of any deceased person or any other person having the charge of the burial of the body of any deceased person, and with the consent of the chaplain for the time being of the cemetery, or if there be no chaplain with the consent of the bishop, may perform the burial service over the body in the consecrated part of the cemetery (*b*).

Chaplain's stipend.

1089. The company, out of the moneys to be received by virtue of the Act of 1847 and the special Act, are to allow the chaplain such a stipend as is approved of by the bishop of the diocese in which the cemetery is situated; and there are provisions for the payment of the stipend half-yearly, for the apportionment of the stipend in the case of a broken half-year, and for the recovery of the stipend by action (*c*).

(*r*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 25. This provision does not apply to a cemetery under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31) (Burial Act, 1900 (63 & 64 Vict. c. 15), s. 2 (4)). As to chapel accommodation in such a cemetery, see p. 509, *ante*.

(*s*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 26. As to disinterment, see pp. 553 *et seq.*, *post*.

(*t*) *Ibid.*, s. 27. The power of a burial authority acting under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), to appoint a chaplain under this section was taken away by s. 7 of the Burial Act, 1900 (63 & 64 Vict. c. 15). As to the performance of the burial service in the consecrated part of a cemetery under the Act of 1879, see p. 510, *ante*.

(*a*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 28. See the preceding note.

(*b*) *Ibid.*, s. 29. As to the application of the section to cemeteries under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), see note (*b*), pp. 510, 511, *ante*.

(*c*) *Ibid.*, ss. 30, 31. See note (*t*), *supra*.

1090. There are special provisions for the registration of burials in the cemetery (*d*), which will be noticed later.

Appointment of clerk.

1091. The company may, with the consent of the chaplain for the time being, from time to time appoint a clerk to assist in performing the service for burials in the consecrated part of the cemetery, and allow to such clerk such stipend as they think proper out of the moneys to be received by virtue of the Act of 1847 and the special Act, and they may remove such clerk at their pleasure (*e*).

Burial of persons not members of Established Church.

1092. The company may set apart the whole or a portion of the unconsecrated part of the cemetery as a place of burial for the bodies of persons not being members of the Established Church, and may allow such bodies to be buried therein, subject to such regulations as the company appoint (*f*).

Services in chapel on unconsecrated ground.

1093. The company may allow, in any chapel built within the unconsecrated part of the cemetery, a burial service to be performed according to the rites of any church or congregation other than the Established Church by any minister of such church or congregation duly authorised by law to officiate in such church or congregation, or recognised as such by the religious community or society to which he belongs (*g*).

Appointment of gravediggers etc.

1094. The company may appoint gravediggers and other servants necessary for the care and use of the cemetery, and may pay them such wages and allowances as they think fit out of the moneys to be received by virtue of the Act of 1847 and the special Act, and may remove them or any of them at pleasure (*h*).

Regulations.

1095. The company are to make regulations for ensuring that all burials within the cemetery are conducted in a decent and solemn manner (*i*).

No burials near chapels.

1096. No body may be buried in any vault under any chapel of the cemetery, or within fifteen feet of the outer wall of any such chapel (*k*).

(*d*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), ss. 32, 33; and see pp. 559, 560, *post*.

(*e*) *Ibid.*, s. 34. It seems that a local authority maintaining a cemetery under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), may appoint a clerk under this section notwithstanding that they no longer have power to appoint a chaplain. Payment of a stipend, however, to such clerk, though not in terms forbidden by ss. 5 and 7 of the Burial Act, 1900 (62 & 63 Vict. c. 15), is in opposition to the principles of those sections.

(*f*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 35. As to the unconsecrated part of a cemetery under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), see p. 509, *ante*.

(*g*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s 36. As to chapel accommodation in the case of a cemetery under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), see p. 509, *ante*.

(*h*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 37. A bye-law, made by a cemetery company under provisions in their special Act, prohibiting the admission of a discharged servant into the cemetery, and authorising the removal of such person if found within the cemetery, is not unreasonable (*Martin* v. *Wyatt* (1883), 48 J. P. 215).

(*i*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 38.

(*k*) *Ibid.*, s. 39.

SECT. 5. Exclusive Rights of Burial, Monuments, Inscriptions etc.

SECT. 5.—*Exclusive Rights of Burial, Monuments, Inscriptions etc.* (*l*).

Grant of exclusive right of burial in specified part of cemetery.

1097. The company may set apart such parts of the cemetery as they think fit for the purpose of granting exclusive rights of burial therein, and they may sell either in perpetuity or for a limited time, and subject to such conditions as they think fit, the exclusive right of burial in any parts of the cemetery so set apart or the right of one or more burials therein, and they may sell the right of placing any monument or gravestone in the cemetery or any tablet or monumental inscription on the walls of any chapel or other building within the cemetery (*m*).

Plan of parts set apart and book of reference.

1098. The company are to cause a plan of the cemetery to be made upon a scale sufficiently large to show the situation of every burial-place in all the parts of the cemetery so set apart, and in which an exclusive right of burial has been granted; and all such burial-places must be numbered, and such numbers entered in a book, which must contain the names and descriptions of the several persons to whom the exclusive right of burial in any such place of burial has been granted by the company; and no place of burial, with exclusive right of burial therein, may be made in the cemetery without the same being marked out in such plan, and a corresponding entry made in the book. The plan and book are to be kept by the clerk of the company (*n*)

Form of grant.

1099. The grant of the exclusive right of burial in any part of the cemetery, either in perpetuity or for a limited time, and of the right of one or more burials therein, or of placing therein any monument, tablet, or gravestone, may be made in the form scheduled to the Act of 1847, or to the like effect, and where the company are not incorporated it may be executed by the company or any two or more of them (*o*).

Register of grants.

1100. A register of all such grants is to be kept by the clerk to the company, and within fourteen days after the date of any such grant an entry or memorial of the date thereof and of the parties thereto, and also of the consideration for such grant, and also a proper description of the ground described in such grant, so as the situation thereof may be ascertained, is to be made by the clerk in such register. The register may be perused at all reasonable times by any grantee or assignee of any right conveyed in such grant upon payment of the prescribed sum, or if no sum be prescribed, one shilling, to the clerk of the company (*p*).

Grant is personal estate.

1101. The exclusive right of burial in any such place of burial is, whether granted in perpetuity or for a limited time, to be considered

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(*l*) Ss. 40—51 of the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), are headed "With respect to exclusive Rights of Burial, and Monumental Inscriptions, in the Cemetery."

(*m*) *Ibid.*, s. 40.

(*n*) *Ibid.*, s. 41.

(*o*) *Ibid.*, s. 42, and Schedule. For form of grant, see Encyclopædia of Forms, Vol. III., p. 143,

(*p*) *Ibid.*, s. 43.

as the personal estate of the grantee, and may be assigned in his lifetime or bequeathed by his will (*q*).

Every such assignment made in the lifetime of the assignor is to be by deed duly stamped, in which the consideration is to be duly set forth, and may be in the form scheduled to the Act of 1847, or to the like effect (*r*).

Form of assignment of grant.

The assignment is within six months after the execution thereof if executed in Great Britain or Ireland, or within six months after the arrival thereof in Great Britain or Ireland if executed elsewhere, to be produced to the clerk of the company, and an entry or memorial of such assignment is to be made in the register by the clerk of the company, in the same manner as that of the original grant; and until such entry or memorial, no right of burial is acquired under any such memorial (*s*).

Register of assignments.

Register of probates of wills disposing of right.

An entry or memorial of the probate of every will by which the exclusive right of burial within the cemetery is bequeathed, and, in case there be any specific disposition of such exclusive right of burial in the will, an entry of such disposition, is within six months after the probate of the will to be made in the register, in the same manner as that of the original grant; and until such entry, no right of exclusive burial is acquired under the will (*t*).

Fees on entry in register.

For every entry or memorial of a grant, assignment, or probate as above mentioned there is payable to the clerk of the company such sum as the company think fit not exceeding the prescribed sum, or if no sum be prescribed, the sum of two shillings and sixpence (*a*).

No burial without consent in place where exclusive right granted.

1102. No body may be buried in any place wherein the exclusive right of burial has been granted by the company, except with the consent of the owner for the time being of such exclusive right of burial (*b*).

No right to burial in consecrated ground conferred.

1103. No such grant as has been mentioned gives the right to bury within the consecrated part of the cemetery the body of any person not entitled to be buried in consecrated ground according to the rites and usage of the Established Church, or to place any monument, gravestone, tablet, or monumental inscription respecting any such body within the consecrated part of the cemetery (*c*).

(*q*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 44. If the grant be made to the grantee and his heirs, it is doubtful whether this section would have any operation. *Semble* the right would be exercisable according to the terms of the grant (*Matthews* v. *Jeffery* (1880), 6 Q. B. D. 290).

(*r*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 45, and Schedule. For form of assignment, see Encyclopædia of Forms, Vol. III., p. 146.

(*s*) *Ibid.*, s. 46. *Semble*, the last word of this provision should be "assignment," not "memorial," to carry out the obvious intention of the section.

(*t*) *Ibid.*, s. 47.

(*a*) *Ibid.*, ss. 43, 46, 47. The case of a grantee dying intestate does not appear to have been considered. If in such a case there were numerous next of kin, considerable difficulty would arise as to who was the "owner" under s. 48.

(*b*) *Ibid.*, s. 48.

(*c*) *Ibid.*, s. 49.

SECT. 6. Exclusive Rights of Burial, Monuments, Inscriptions etc.

1104. The company may take down and remove any gravestone, monument, tablet, or monumental inscription which has been placed within the cemetery without their authority (*d*).

Bishop's right to object to monuments in consecrated ground.

1105. The bishop of the diocese in which the cemetery is situated and all persons acting under his authority have the same right and power to object to the placing, and to procure the removal, of any monumental inscription within the consecrated part of the cemetery as he by law has to object to or procure the removal of any monumental inscription in any church or chapel of the Established Church, or the burial ground belonging to such church or chapel, or any other consecrated ground (*e*).

SECT. 6.—*Payments to Incumbents and Parish Clerks* (*f*).

Payment to incumbent of parish whence body brought.

1106. The company are, on the burial of every body within the consecrated part of the cemetery, to pay to the incumbent for the time being of the parish or ecclesiastical district from which the body has been removed for burial such sums, if any, as are prescribed for the purpose in the special Act (*g*).

Accounts and mode of payment to incumbents.

Detailed provisions are made requiring the company to keep records to enable the amounts due to the several incumbents to be ascertained; requiring that such records shall be open to inspection by such incumbents; requiring the company on demand to furnish half-yearly accounts of the sums due to such incumbents; providing for the payment of the sums due half-yearly, on or within one month after March 25 and September 29, in each case to the person who was incumbent on March 25 or September 29 or his representatives; rendering the amounts so payable recoverable by action; and providing that an incumbent or the representatives of an incumbent receiving sums that accrued during a preceding incumbency shall account for the sums that so accrued to the preceding incumbent or his representatives (*h*).

Payment to parish clerk.

1107. The company are on the burial of every body in the consecrated part of the cemetery, except where the body is buried

(*d*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 50. But they may not remove a monument the erection of which they have authorised on the ground that it has not been paid for (*Sims* v. *London Necropolis Co.* (1885), 1 T. L. R. 584).

(*e*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 51. As to the jurisdiction of the ordinary over inscriptions in churches and churchyards, see p. 418, *ante*.

(*f*) Ss. 52—57 of the Act are headed "With respect to Payments to Incumbents of Parishes or Ecclesiastical Districts, and to Parish Clerks."

(*g*) *Ibid.*, s. 52. This section and ss. 53—57 are inapplicable in the case of a cemetery under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), as no payments to incumbents or parish clerks are prescribed by that Act. As to the fees payable to incumbents for services rendered in such cemeteries, see pp. 479, 480, 510, *ante*. Where there is a provision in a special Cemetery Act for the payment of a fee to the incumbent of the parish or ecclesiastical district from which a body has been removed for burial in the cemetery, the incumbent of an ecclesiastical district constituted after the passing of such Act has been held entitled to the fee to the exclusion of the incumbent of the mother parish (*Vaughan* v. *South Metropolitan Cemetery Co.* (1860), 1 John. & H. 256; *Bowyer* v. *Stantial* (1878), 3 Ex. D. 315, C. A.).

(*h*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), ss. 53—56. See note (*g*), *ante*.

at the expense of any parish, or ecclesiastical district, or union of parishes for the relief of the poor, to pay to the parish clerk of the parish or ecclesiastical district from which such body has been removed for burial, if he held the office of parish clerk of such parish or ecclesiastical district at the time of the passing of the special Act, such sum, if any, as is prescribed for that purpose in the special Act (*i*).

SECT. 6. **Payments to Incumbents and Parish Clerks.**

SECT. 7.—*Protection of the Cemetery.*

1108. Every person who wilfully destroys or injures any building, wall, or fence, belonging to the cemetery, or destroys or injures any tree or plant therein, or who daubs or disfigures any wall thereof, or puts up any bill therein or on any wall thereof, or wilfully destroys, injures, or defaces any monument, tablet, inscription, or grave-stone within the cemetery, or does any other wilful damage therein, and every person who plays at any game or sport, or discharges firearms, save at a military funeral, in the cemetery, or who wilfully and unlawfully disturbs any persons assembled in the cemetery for the purpose of burying any body therein, or who commits any nuisance in the cemetery, is liable to a penalty not exceeding £5, which is payable to the company (*k*).

Penalty for damage or disturbance.

SECT. 8.—*Accounts.*

1109. The company are every year to cause an account to be prepared showing the total receipt and expenditure of all moneys levied by virtue of the Act of 1847 or the special Act for the year ending December 31, or some other convenient day in each year, under the several distinct heads of receipt and expenditure, with a statement of the balance of such account certified by the chairman of the company and duly audited, and are to send a copy of the same, free of charge, to the clerk of the peace for the county in which the cemetery is situated on or before the expiration of one month from the day on which the account ends. The account is to be open to public inspection on payment of one shilling for every inspection. If the company omit to prepare or send such an account as above stated, they are liable to a penalty of £20 (*l*).

Annual account.

SECT. 9.—*Recovery of Penalties, Damages etc.*

1110. Penalties under the Cemeteries Clauses Act, 1847, for the recovery of which no other provision is made, are recoverable in a

Recovery of penalties and detention of offende

(*i*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 57. See note (*g*), p. 522, *ante*.

(*k*) *Ibid.*, ss. 58, 59. These sections, which are headed "With respect to the Protection of the Cemetery," are incorporated with the Burial Act, 1852 (15 & 16 Vict. c. 85) (see s. 40), and apply accordingly to burial grounds under the Burial Acts as well as to cemeteries to which the Act of 1847 applies generally. As to the recovery of the penalties and of compensation for damage done to property of the company by the offender, and as to the summary arrest of the offender, see *infra*.

(*l*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 60. The section, which is headed "With respect to the Accounts to be kept by the Company," would appear to apply, *mutatis mutandis*, to a local authority maintaining a cemetery under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), as there is no enactment to the contrary. As to the recovery of the penalty, see *infra*.

SECT. 9. Recovery of Penalties, Damages etc.

summary way (*m*); and any officer or agent of the company and all persons called by him to his assistance may seize and detain any person who has committed an offence against the Act of 1847 or the special Act, and whose name and residence are unknown to such officer or agent, and convey him with all convenient despatch before a justice (*n*).

Publication of particulars of offences.

1111. The company must publish the short particulars of the several offences for which any penalty is imposed by the Act of 1847 or the special Act, or by any bye-law of the company affecting other persons than the shareholders, officers, or servants of the company, and of the amount of every such penalty, and must cause such particulars to be painted on a board or printed upon paper and pasted thereon, and must cause such board to be hung up or affixed on some conspicuous part of the principal place of business of the

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(*m*) The provisions of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), with respect to the recovery of damages not specially provided for and of penalties, and to the determination of any other matter referred to justices, are incorporated with the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), and the special Act by s. 62 of the Act of 1847. The provisions of the Act of 1845 in question are contained in ss. 140—161 of that Act, of which ss. 146, 147, 151, 155, 161, and in part ss. 145, 150, 153, and 157, have been repealed as being superseded by provisions in the Summary Jurisdiction Acts or otherwise obsolete (Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), s. 1 and Schedule; Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4 and Schedule; Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), s. 1 and Schedule). Under the unrepealed sections (as to which see title MAGISTRATES) compensation etc., for the determination and recovery of which no other provision is made, is assessable, and, subject to the provisions of the Summary Jurisdiction Acts as to the recovery of civil debts (see *East London Waterworks Co.* v. *Charles*, [1894] 2 Q. B. 730; *R.* v. *Kerswill*, [1895] 1 Q. B. 1), recoverable, before two justices, subject to an appeal to quarter sessions; and penalties are recoverable before two justices, subject, again, to an appeal to quarter sessions. The Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 64, however, expressly enables a magistrate, having by law authority to act alone in lieu of two justices, so to act for the purposes of that Act.

There is some doubt as to the applicability of these provisions in the case of a cemetery under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), for the provisions are many of them expressed to apply only where other provision is not made by the special Act or enactments incorporated therewith; and such other provision might be regarded as made in the case of a cemetery under the Act of 1879 by the Public Health Act, 1875 (38 & 39 Vict. c. 55), with which that Act is incorporated. Again, s. 6 of the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), might be construed as substituting to some extent at least the provisions of the Act of 1875 for those of the Act of 1845. Moreover, the provision in s. 316 of the Act of 1875 that all penalties incurred under the provisions of any Act incorporated with that Act shall be recovered and applied in the same way as penalties incurred under that Act may perhaps apply to penalties under the Act of 1847 as incorporated with the Act of 1879. As to the recovery of penalties under the Act of 1875, see ss. 251, 253, and 254 of that Act, and title PUBLIC HEALTH ETC.

(*n*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 154, as incorporated with the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65). The section provides that "such justice shall proceed with all convenient despatch to the hearing and determining of the complaint against such offender." The justice cannot, however, it seems, act alone, unless indeed such justice may be said to have "by law," *i.e.* by this section, authority to act in lieu of two justices, as proceedings under the Act are required to be before two justices. See note (*m*), *supra*

company; and where any such penalties are of local application must cause such board to be affixed in some conspicuous place in the immediate neighbourhood to which such penalties are applicable or have reference; and such particulars are to be renewed as often as the same or any part thereof is obliterated or destroyed, and no such penalty is recoverable unless it has been published and kept published as thus required (*o*). Penalties recoverable in a summary way are imposed on persons pulling down or injuring such notice boards or obliterating the matter thereon (*p*).

SECT. 9. Recovery of Penalties, Damages etc.

SECT. 10.—*Miscellaneous.*

1112. Provision is made securing, under penalties, that copies of the special Act shall be kept at the office of the company and at the office of the clerk of the peace, and persons interested are given rights to inspect such copies (*q*).

Access to special Act.

1113. Nothing in the Cemeteries Clauses Act, 1847, is to be deemed to exempt the company from any general Act relating to burials in towns or populous places passed in the same session of Parliament in which the special Act is passed or in any future session (*r*).

Saving as to other Acts.

Part X.—Closed and Disused Burial Grounds.

SECT. 1.—*Closing of Burial Grounds and Prohibitions against opening New Burial Grounds.*

1114. No new burial ground or cemetery, parochial or non-parochial, may be provided and used in the metropolis or within two miles of any part thereof without the previous approval of the Local Government Board (*s*).

Prohibition of new burial grounds in or near metropolis.

Elsewhere the opening of any new burial ground in any city or town or within any other limits without the previous approval of the Local Government Board may be prohibited by Order in Council; and where such an Order has been made no new burial ground or cemetery, parochial or non-parochial, may be provided and used in such city or town or within such limits without such previous approval (*t*).

Elsewhere.

(*o*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 143. See note (*m*), p. 524, *ante*.

(*p*) *Ibid.*, s. 144.

(*q*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), ss. 66, 67.

(*r*) *Ibid.*, s. 68.

(*s*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 9, as amended by the substitution of the Local Government Board for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I. As to the meaning of "... polis" for the purposes of the Burial Acts, see pp. 445, 446, *ante*.

(*t*) Burial Act, 1853 (16 & 17 Vict. c. 134), ss. 1, 6, as amended by the substitution of the Local Government Board for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I.

SECT. 1. **Closing of Burial Grounds etc.**

Addition to existing burial ground.

An addition to an existing burial ground is a "new burial ground" within the above prohibitions; but the approval of the Local Government Board is not essential to the validity of a contract entered into by a burial authority for the purchase of land for a burial ground within an area to which such a prohibition extends, for the mere purchase of the land is not in itself the "provision" of a burial ground (*a*).

Order in Council for discontinuance of burials.

1115. Subject to certain exceptions (*b*), an Order in Council may be made ordering that, after a time mentioned in the Order, burials in any part or parts of the metropolis, or in any city or town outside the metropolis, or within any other limits outside the metropolis, or in any burial grounds or places of burial (either within or without the metropolis) shall be discontinued wholly or subject to any exceptions or qualifications mentioned in the Order (*c*).

Liability for breach of Order.

It is unlawful after the time mentioned in an Order in Council for the discontinuance of burials to bury the dead in any church, chapel, churchyard, or burial-place, or elsewhere, within the limits to which the Order extends, or in the burial grounds or places of burial (as the case may be) in which burials have by the Order been ordered to be discontinued, except as by statute or in the Order excepted. Every person who buries or acts or assists in the burial of any body contrary to this provision is guilty of a misdemeanour (*d*), and is also liable to a penalty on summary conviction (*e*).

Deposit of ashes of cremated body.

It is, however, not forbidden to deposit an urn containing the ashes of a cremated body in a church in which burials have been ordered to be discontinued, and in a proper case a faculty may be obtained for that purpose (*f*).

Burial in metropolis of parishioner whose parish burial ground is closed.

1116. After the time from which burials in any place of burial of any parish in the metropolis are required by Order in Council to be discontinued, the body of any parishioner or inhabitant of that parish may not be buried in any burial ground in the metropolis belonging to any other metropolitan parish save where the body of any of the family or relatives of the deceased has been buried there, and the relatives or other persons having the care and direction of the funeral signify a desire on that account that the deceased should also be buried there (such burial ground not being closed for burials under the Burial Acts). Any person having the care or control of

(*a*) *Ward* v. *Portsmouth Corporation*, [1898] 2 Ch. 191, C. A., approved in *Re Bosworth and Gravesend Corporation*, [1905] 2 K. B. 426, C. A., *per* COLLINS, M.R., at p. 434.

(*b*) See pp. 527 *et seq.*, *post*.

(*c*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 2; Burial Act, 1853 (16 & 17 Vict. c. 134), s. 1. The sections apply to the metropolis and to the rest of the country respectively. The Act of 1853 (except ss. 7 and 8 thereof) is declared inapplicable to the metropolis by s. 9. As to the meaning of the "metropolis" for the purposes of the Burial Acts, see pp. 445, 446, *ante*.

(*d*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 4; Burial Act, 1853 (16 & 17 Vict. c. 134), s. 3.

(*e*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 2.

(*f*) *Re Kerr*, [1894] P. 284.

any burial ground who knowingly authorises or permits a burial therein contrary to this provision is guilty of a misdemeanour (*g*).

SECT. 1. Closing of Burial Grounds etc.

1117. The making of an Order in Council for the discontinuance of burials, or prohibiting the opening of new burial grounds, is authorised only upon the representation of the Local Government Board (*h*) that, for the protection of the public health, burials in any part or parts of the metropolis or in any city or town etc. outside the metropolis or in any burial grounds or places of burial should be discontinued, or that the opening of any new burial ground in any city or town etc. should be prohibited, as the case may be.

Representation by Local Government Board.

Notice of the representation and of the time when it will be taken into consideration by the Privy Council is to be published in the *London Gazette*, and affixed on the doors of the churches or chapels of the parishes in which any burial grounds or places of burial affected by the representation are situate, or on some other conspicuous places within the parishes (or, in the case of the metropolis, the part or parts of the metropolis) affected by the representation, one month at least before the representation is so considered; and no such representation is to be made in relation to the burial ground of any parish until ten days' previous notice of the intention to make such representation has been given in the case of a metropolitan parish to the incumbent and the vestry clerk of the parish, or in the case of a parish outside the metropolis to the incumbent and vestry clerk or churchwardens of the parish (*i*).

Notice of representation.

1118. Orders in Council may from time to time be made postponing the time appointed by any Order in Council for the discontinuance of burials, or otherwise varying any Order in Council made under the Burial Acts, whether the time thereby appointed for the discontinuance of burials thereunder or other operation of such Order may or may not have arrived (*k*).

Postponement and variation of Order.

1119. The provisions above referred to do not extend to prevent the interment in St. Paul's Cathedral or in Westminster Abbey of the body of any person where a written permit under the royal sign manual is granted for such interment (*l*).

St. Paul's Cathedral and Westminster Abbey.

No such Order in Council as has been mentioned is to be deemed to extend to any burial ground (either within or without the metropolis) of the people called Quakers, or of the persons of the Jewish persuasion, used solely for the burial of the bodies of such people and persons respectively, unless the same be expressly

Burial grounds of Quakers and Jews.

(*g*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 5. As to the meaning of the "metropolis" for the purposes of the Burial Acts, see pp. 445, 446, *ante*.

(*h*) Substituted for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I.

(*i*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 2; Burial Act, 1853 (16 & 17 Vict. c. 134), s. 1. Whether the provisions as to notice to the churchwardens are affected by the transfer of the civil functions of churchwardens by and under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (b) (and see s. 33), is uncertain.

(*k*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 1.

(*l*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 8.

SECT. 1. Closing of Burial Grounds etc.

mentioned in such Order; and nothing in the Burial Acts is to prevent the burial in any such burial ground in which for the time being interment is not required to be discontinued of the bodies of such people and persons respectively.

No such Order in Council is to be deemed to extend to any non-parochial burial ground being the property of a private person, unless the same be expressly mentioned in the Order (*m*).

Private burial grounds.

Where an exclusive right of burial in a part of land given under the Consecration of Churchyards Act, 1867, for addition to a consecrated churchyard has, in pursuance of that Act, been reserved to the donor, such part may not be included in any Order in Council for closing the churchyard to which it belongs, but it may be closed under a separate Order founded on a special report that the ground is in such a state as to render further interments therein prejudicial to the public (*n*).

Ground in respect of which exclusive right is reserved to donor.

Cemeteries provided under special Acts.

The provisions above mentioned do not authorise an Order in Council to be made for the discontinuance of burials in any of the cemeteries mentioned in Sched. B to the Burial Act, 1852, or in any cemetery established under a special Act of Parliament, or in any burial ground or cemetery provided with the approval of a Secretary of State or of the Local Government Board, as the case may be, under the Burial Acts (*o*).

Licence to exercise right of burial in church etc.

1120. Where by virtue of any faculty legally granted, or by usage or otherwise, there was at the passing of the Burial Act, 1852, or the Burial Act, 1853, as the case may be, any right of interment in or under any church or chapel affected by an Order in Council under the Burial Acts, or in any vault of any such church or chapel, or of any churchyard or burial ground affected by such an Order in Council; and where any exclusive right of interment in any such burial ground had been purchased or acquired before the passing of such Act, the Local Government Board may, on being satisfied that the exercise of the right will not be injurious to health, grant a licence for the exercise of such right, subject to such conditions and restrictions as they may think fit; but there are provisions preventing such licence from operating to enlarge the right (*p*). The owners in fee of a closed burial ground have no

(*m*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 3; Burial Act, 1853 (16 & 17 Vict. c. 134), s. 2.

(*n*) Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), s. 11; and see pp. 441, 442, *ante*.

(*o*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 7; Burial Act, 1853 (16 & 17 Vict. c. 134), s. 5, as amended by the substitution of the Local Government Board for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I. The saving in s. 7 of the Act of 1852 refers to the cemeteries mentioned in Sched. B to the Act, most of which were established by special Acts; that in s. 5 of the Act of 1853 refers to "any cemetery established under the authority of any Act of Parliament." The last-cited words were held in *R.* v. *Manchester Justices* (1855), 5 E. & B. 702, to be confined to cemeteries established under special Acts. The saving for cemeteries provided with the sanction of a Secretary of State (now the Local Government Board) is expressed in each section as applying to cemeteries to be "hereafter" provided with such sanction.

(*p*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 6; Burial Act, 1853 (16 & 17 Vict. c. 134), s. 4, as amended by the substitution of the Local Government

right to interfere with any vaults in which such a right of burial may possibly be exercised or to do any act by which the exercise of such right in the future may be prevented (*q*).

Effect of Order on property in burial ground.

1121. As an Order in Council closing a burial ground may be varied by a subsequent Order (*r*), it follows that such an Order, however absolute in terms, does not extinguish, but merely suspends, any trusts upon which the land is held for a burial ground (*s*). Nor is the property in a burial ground so closed altered by the Order, and if any part of such ground is acquired under the Lands Clauses Acts, and the purchase-money is paid into court in accordance with those Acts, the court will order payment of the dividends accruing to the persons who, but for the Order, would be entitled to the burial fees (*t*). The assessment of the purchase-money in such a case must be based upon the bare value of the land as a closed burial ground, and not upon any augmentation of value by reason of the secularisation of the land (*a*).

Maintenance of closed burial ground

1122. Where an Order in Council has been issued for the discontinuance of burials in any churchyard or burial ground, the burial board (or authority having the powers of a burial board) or (subject to what is said below) the churchwardens, as the case may be, are to maintain such churchyard or burial ground of any parish in decent order, and to do the necessary repair of the walls and other fences thereof; and the costs and expenses are to be repaid by the overseers upon the certificate of the burial board (or authority having the powers of a burial board) or (subject to what is said below) of the churchwardens, as the case may be, out of the poor rate of the parish or place in which such churchyard or burial ground is situate, unless there is some other fund legally chargeable with such costs and expenses (*b*).

On whom obligation to maintain lies

In a rural parish having a parish council, however, if and as soon as the churchwardens issue a certificate in order to obtain repayment of their expenses out of the poor rate, their obligations in the matter pass to the parish council (*c*); and the provisions in this behalf may be applied, *mutatis mutandis*, to a rural parish not

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Board for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I.

(*q*) *Moreland* v. *Richardson* (1857), 24 Beav. 33.

(*r*) Under the Burial Act, 1855 (18 & 19 Vict. c. 128), s. 1; and see p. 527, *ante*.

(*s*) *Re St. Pancras Burial-ground* (1866), L. R. 3 Eq. 173.

(*t*) As being, within s. 70 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the party who would for the time being have been entitled to the rents and profits of the land (*Re St. Pancras Burial-ground, supra*; *Campbell* v. *Liverpool Corporation* (1870), L. R. 9 Eq. 579; *Ex parte Liverpool (Rector)* (1870), L. R. 11 Eq. 15; *Ex parte St. Martin's, Birmingham, (Rector)* (1870), L. R. 11 Eq. 23); and see title COMPULSORY PURCHASE AND COMPENSATION.

(*a*) *Stebbing* v. *Metropolitan Board of Works* (1870), L. R. 6 Q. B. 37.

(*b*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 18; *R.* v. *St. Mary, Islington, Vestry* (1890), 25 Q. B. D. 523, where a vestry (in whom the functions of overseers were vested by a local Act) authorised certain repairs to a closed churchyard, and one of the churchwardens, having entered into contracts by which he made himself personally responsible for the expense, wrote to the vestry asking for the necessary money before the work was begun, and it was held that the vestry were liable to pay the money, and that the letter was a sufficient "certificate."

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (b).

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having a parish council by an order of the county council conferring the powers of a parish council in the matter on the parish meeting (*d*), or to an urban parish or a parish in the county of London, by an order of the Local Government Board conferring such powers on the urban authority or some other representative body, or on the metropolitan borough council, as the case may be (*e*).

In the case of a churchyard the obligation in question falls on the churchwardens or parish council etc. as successors of the churchwardens, notwithstanding that the churchyard is within the area of a burial board or authority with the powers of a burial board, and the expenses are payable out of the poor rate of the parish in which the churchyard is locally situate, notwithstanding that it may be the churchyard of some other parish (*f*).

The obligation does not extend to a private burial ground (*g*).

Powers of urban authority as to closed ground.

1123. An urban authority constituted a burial board may repair and uphold the fences surrounding any burial ground which has been discontinued as such in their jurisdiction, or take down such fences and substitute others in lieu thereof. They are required to take the necessary steps for preventing the desecration of such burial ground and placing it in a proper sanitary condition, and may make bye-laws (subject to the provisions of the Public Health Act, 1875 (*h*)) for the preservation and regulation of all burial grounds within their jurisdiction.

Their expenses in the matter may be defrayed out of any rates authorised to be levied by any urban authority constituted a burial board (*i*).

Disposal of land etc. vested in trustees for purposes of closed ground.

1124. When unconsecrated land or buildings is or are vested in trustees, under a local Act or otherwise, for the purposes of a cemetery or burial ground, and burials in the cemetery or burial ground are, by Order in Council under the Burial Acts, ordered to be wholly or partially discontinued, the trustees are empowered, with the sanction of the Local Government Board (*j*), to lease or sell any part of the cemetery or burial ground in which no interment has taken place.

Application of proceeds.

If the property was held in trust for a parish the proceeds are applicable, after discharging incumbrances and any debts properly

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(*d*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (10).

(*e*) See *ibid.*, s. 33; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 16 (1) (c).

(*f*) *R.* v. *Bishop Wearmouth Burial Board* (1879), 5 Q. B. D. 67, where it was also held that consecrated ground provided (otherwise than by a burial authority) for a parochial burial ground is a churchyard for the purpose of s. 18 of the Burial Act, 1855 (18 & 19 Vict. c. 128), although situate at a distance from the church. In the case of a burial ground declared by or under the Church Building Acts to be part of the parish for which it is provided, though locally beyond the confines thereof (see p. 440, *ante*), special questions may arise as to the rates applicable to its maintenance when closed.

(*g*) *R.* v. *St. John, Westgate, Burial Board* (1862), 2 B. & S. 703.

(*h*) 38 & 39 Vict. c. 55. See ss. 182—186.

(*i*) Local Government Act, 1858, Amendment Act, 1861 (24 & 25 Vict. c. 61), s. 21, re-enacted in Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. V., Part III. As to the ways in which urban authorities may be constituted burial boards, see pp. 484, *et seq.*, *ante*.

(*j*) Substituted for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. [illegible]

incurred by the trustees in their fiduciary capacity, for the benefit of the parish as the vestry direct (*k*). If the property was held in trust for private persons, the proceeds are, after the discharge of incumbrances etc., to be distributed among the *cestuis que trustent* (*l*).

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1125. The vestry, or body with the powers for this purpose of the vestry (*m*), of any parish in which a burial ground closed by Order in Council, and not belonging to the parish, is situate, may, by resolution at a meeting called for the purpose, purchase the same; and such burial ground will thereafter belong to the parish, subject to all conditions affecting the burial grounds of that parish (*n*).

Purchase of closed ground by vestry.

1126. Where a burial ground in which interment is discontinued under the Burial Acts belongs to a parish other than that in which it is locally situate the incumbent and churchwardens of the former parish may, with the consent of the vestry, or persons possessing the powers of vestry for ecclesiastical purposes of or in such parish, and of the bishop, convey any chapel belonging to such parish situate in or attached to such burial ground, and the site thereof, to trustees named by the incumbent and churchwardens of the parish within which the same is situate, with the consent of the vestry, or persons possessing the powers of vestry of or in such parish for ecclesiastical purposes, and of the bishop, upon such trusts and subject to such conditions for and on behalf of the last-mentioned parish, and with such provision for the appointment of new trustees, as to the bishop may seem proper. Such conveyance is effectual to pass all the estate and interest vested in

Conveyance of closed burial ground to trustees for parish in which it is situate.

(*k*) Subject to the exception created by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (3), and to exceptions immaterial with reference to the Burial Acts, the civil functions of the vestry of a rural parish are now vested by ss. 6 (1) (a) and 19 (4) of the Act of 1894 in the parish council, or, if there is no parish council, in the parish meeting. The powers of the vestry which in a rural parish are vested in the parish council may, in the case of an urban parish, be vested in the urban authority or in some other representative body by order of the Local Government Board under s. 33 of the Act of 1894. In London parishes other than the City the civil functions of the vestry are now vested in the metropolitan borough councils under the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4.

(*l*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 24. The section is very elaborate; its main provisions only are stated in the text. The power of the vestry under this section to direct the application of such rents or proceeds is not "a power of the vestry which relates to the affairs of the church" nor "an interest of the vestry in church property" within the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 23, and such power was therefore transferred from the vestry to the metropolitan borough council, to whom its general powers and duties were, under *ibid.*, s. 4, transferred (*Westminster Corporation* v. *St. George's, Hanover Square* (*Rector*), 23rd June, 1908, *per* WARRINGTON, J., not yet reported, but noted (1908) 72 J. P. Jo. 316, where it was assumed that the word "parish" in the section meant a parish according to the interpretation of that term in the Burial Act, 1852 (15 & 16 Vict. c. 85), s. 52 (as to which see p. 448, *ante*), and would not, therefore, include a new or district parish, or a district not coinciding with a parish).

(*m*) See note (*k*), *supra*.

(*n*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 8. There appears to be nothing to authorise expenditure out of the rates on a purchase under the section; nor is any provision made as to the persons to whom the conveyance is to be made, though a vestry, being unincorporate, are incapable of taking the legal estate in land. The latter difficulty might, however, probably be got over by taking the conveyance to trustees, and is obviated where the functions of the vestry have been transferred to a corporate body.

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any persons in trust or in behalf of the parish to which such chapel and site belong; and after the execution of the conveyance all obligation on such last-mentioned parish or any trustees or others on behalf thereof to repair such chapel, or to pay any stipend to the minister thereof, or otherwise in relation to or in connection with such chapel, ceases (*o*).

SECT. 2.—*Building upon Disused Burial Grounds.*

Prohibition against building.

1127. The erection of any buildings upon a disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other place of worship, is prohibited by statute (*p*), except where the burial ground has been sold or disposed of under the authority of any Act of Parliament (*q*), or where a faculty

(*o*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 51. No expenditure out of the rates is authorised by the section, and, that being so, it seems that the powers of the vestry under it can in no case be powers in relation to any expense or rate within the provisions of s. 7 (3) of the Local Government Act, 1894 (56 & 57 Vict. c. 73), referred to in note (*k*), p. 531, *ante*. If so, the powers of the vestry under the section, being clearly for ecclesiastical purposes, are not affected by any of the enactments mentioned in that note.

(*p*) Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), s. 3. There is no statutory provision as to the consequences of breach of the prohibition, and a person contravening it is consequently liable to indictment for misdemeanour, or he may be restrained by injunction in an action by the Attorney-General. In *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109, BUCKLEY, J., held that where a building infringing the prohibition blocked the access of light to a house on adjoining land the owner of the house had, as a person specially damaged by the breach of the prohibition, a good cause of action against those erecting the building. On appeal ([1903] 2 Ch. 556) doubt was expressed as to the correctness of this holding, but decision of the point was evaded, as, after the case had been partly argued before the Court of Appeal, the Attorney-General was added as a plaintiff. The case ultimately went to the House of Lords (*sub nom. Paddington Corporation* v. *A.-G.*, [1906] A. C. 1), where it was held that there had been no contravention of the prohibition. See note (*s*), p. 533, *post*.

In *St. James the Less, Bethnal Green* (*Vicar*) v. *Parishioners*, [1899] P. 55, the Consistory Court of London, notwithstanding the prohibition, granted a faculty, the grant of which was not opposed, for rebuilding and enlarging schools and a parish hall on a disused burial ground, holding that the work came within the saving with regard to the enlargement of a church, chapel, meeting-house, or other place of worship. The decision in that case was, however, in effect, overruled in *London County Council* v. *Dundas*, [1904] P. 1, where the Consistory Court of London refused to revoke, at the instance of the London County Council, a faculty issued for the erection on a disused burial ground of a hall for parochial purposes communicating with a church, together with vestries, lavatories, and a kitchen, in substitution for existing smaller buildings, on the ground that the work authorised was, within the meaning of the section, the enlargement of the church; but on appeal the Court of Arches, while holding that, as the faculty had been obtained without fraud and had not been appealed against, it could not be revoked, held that, in view of the section under consideration, the faculty was a nullity so far as the hall, lavatories, and kitchen were concerned. In *Re St. Sepulchre, Holborn Viaduct* (1903), 19 T. L. R. 723, the Consistory Court, following *London County Council* v. *Dundas*, *supra*, refused a faculty for the rebuilding, for the purposes of enlargement, of schools on a disused burial ground. As to the buildings prohibited by the section, see further note (*s*), p. 533, *post*.

(*q*) Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), s. 5. In *Re St. Saviour's Rectory Trustees and Oyler* (1886), 31 Ch. D. 412, the trustees of a disused burial ground held by them under a private Act of 1883, which gave them express power to sell or let the land for building, proposed to sell the land

for the erection of the building was obtained before August 14, 1884 (*r*).

SECT. 2. Building upon Disused Burial Grounds.

For the purposes of the prohibition the expression "building" includes a temporary or movable building (*s*); and the expression "disused burial ground" means any burial ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and is no longer used (*t*) for interments, whether or not the ground has been partially or wholly closed for burials under the provisions of any statute or Order in Council (*u*), and whether or not the ground has been lawfully set apart as a burial ground (*a*).

Meaning of "building" and "disused burial ground."

The prohibition attaches to the whole of a site which has been set apart as a burial ground, whether it has ever been used for interments or not (*b*); but the site of a church which is pulled down is not "ground set apart for the purpose of interment," although intramural interments have taken place in the church (*c*).

Site of church.

SECT. 3.—*Conveyance and Utilisation of Burial Grounds for Open Spaces.*

1128. The owner (*d*) of any disused burial ground may convey the burial ground to, or grant any term of years or other limited

Conveyance authority.

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in 1885 for building purposes; but BACON, V.-C., held that the purchaser would be precluded from building by the Act of 1884, apparently considering that the exception in s. 5 did not apply to a sale after the Act of 1884 under an earlier Act. In *Re Ecclesiastical Commissioners and New City of London Brewery Co.*, [1895] 1 Ch. 702, however, NORTH, J., held that a sale of a disused burial ground after the Act of 1884 under a scheme made pursuant to the Union of Benefices Act, 1860 (23 & 24 Vict. c. 142), would be a sale under the authority of an Act of Parliament within the meaning of s. 5 of the Act of 1884, and that the purchasers would consequently not be prevented by that Act from building on the land; and in *A.-G.* v. *London Parochial Charities Trustees*, [1896] 1 Ch. 541, STIRLING, J., following the decision of NORTH, J., in preference to that of BACON, V.-C., held that, by reason of the saving in s. 5, the Act of 1884 did not prohibit building on a portion of a disused burial ground acquired, after that Act, by a metropolitan authority for street improvements under the Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), which was sold by that authority as superfluous land under that Act.

(*r*) Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), s. 4.

(*s*) Open Spaces Act, 1887 (50 & 51 Vict. c. 32), s. 4, left unrepealed for this purpose by the Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 23 and Schedule. A band-stand is a building within the prohibition (*A.-G.* v. *St. Pancras Vestry* (1893), 69 L. T. 627); but a wall to separate the ground from a street, the inner side of which is so built as to form an arcade or covered way for the protection of frescoes on that side of the wall, is not such a building (*St. Botolph, Aldersgate Without (Vicar)* v. *Parishioners*, [1900] P. 69), nor is a screen erected to prevent the acquisition of a right to light over the ground (*Paddington Corporation* v. *A.-G.*, [1906] A. C. 1). See also note (*p*), p. 532, *ante*.

(*t*) The words "no longer used" here mean no more than "not used" (*Re Ponsford and Newport District School Board*, [1894] 1 Ch. 451).

(*u*) Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), s. 2, as amended by provisions in the Open Spaces Act, 1887 (50 & 51 Vict. c. 32), s. 4, left unrepealed by the Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 23 and Schedule.

(*a*) *Re Bosworth and Gravesend Corporation*, [1905] 2 K. B. 426.

(*b*) *Re Ponsford and Newport District School Board, supra; Re Bosworth and Gravesend Corporation, supra.*

(*c*) *Re Ecclesiastical Commissioners and New City of London Brewery Co., supra.*

(*d*) The Open Spaces Act, 1906 (6 Edw. 7, c. 25), the provisions of which as to burial grounds form the subject-matter of the ensuing section, is a consolidating Act repealing and replacing, with little alteration in substance, the Open

SECT. 3. Conveyance etc. of Burial Grounds for Open Spaces.

interest therein to, or make any agreement with, any local authority within the meaning of the Open Spaces Act, 1906 (*e*), for the purpose of giving the public access to the burial ground, and preserving the same as an open space accessible to the public and under the control of the local authority, and for the purpose of improving and laying out the same (*f*).

Powers of local authorities.

1129. A local authority within the meaning of the Open Spaces Act, 1906, may, subject to the provisions of that Act, acquire by agreement and for valuable or nominal consideration by way of payment in gross or of rent, or otherwise, or without any consideration, the freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over, any burial ground, whether situate within the district of the local authority or not; and may undertake the entire or partial care, management, and control of any burial ground, whether any interest in the soil is transferred to the local authority or not; and for these purposes may make any agreement with any person or persons authorised by the Act or otherwise to convey or to agree with reference to any burial ground, or with any other persons interested therein (*g*).

Purposes for which local authority may hold burial ground.

1130. A local authority who have acquired any estate or interest in or control over any burial ground under the Act are, subject to any conditions under which the estate, interest, or control was so acquired, to hold and administer the burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of the Act (*h*), and under proper control and regulation, and for no other purpose, and are to maintain and keep the burial ground in a good and decent state.

Spaces Acts, 1877 to 1890 (40 & 41 Vict. c. 35; 44 & 45 Vict. c. 34; 50 & 51 Vict. c. 32; 53 & 54 Vict. c. 15), as amended by s. 17 of the Commons Act, 1899 (62 & 63 Vict. c. 30). In the Act of 1906, unless the context otherwise requires, "owner" used in relation to a burial ground means the person in whom the freehold of the burial ground is vested, whether as appurtenant or incident to any benefice or cure of souls or otherwise; "burial ground" includes any churchyard, cemetery, or other ground, whether consecrated or not, which has been at any time set apart for the purpose of interment; "disused burial ground" means any burial ground which is no longer used for interments, whether or not the ground has been partially or wholly closed for burials under the provisions of a statute or Order in Council; "open space" means any land, whether inclosed or not, on which there are no buildings or of which not more than one twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden, or is used for purposes of [illegible]

are practically the same as those obtaining for the purposes of the Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), as to which see p. 533, *ante*. For other provisions of the Act, see title OPEN SPACES AND RECREATION GROUNDS.

(*e*) The following bodies are local authorities for the purposes of the Open Spaces Act, 1906 (6 Edw. 7, c. 25): the council of any county, of any municipal or metropolitan borough, or of any district; the Common Council of the City of London; and any parish council invested by order of the county council with the powers of the Act, or who had before the Act been invested by such an order with the powers of the Acts thereby repealed (*ibid.* ss. 1, 23 (b)).

(*f*) *Ibid.*, s. 6. See note (*d*), p. 533, *ante*.

(*g*) *Ibid.*, s. 9. See note (*d*), p. 533, *ante*.

(*h*) See note (*d*), p. 533, *ante*.

SECT. 3. Conveyance etc. of Burial Grounds for Open Spaces.

The local authority may inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the above purposes, or any of them (*i*).

The local authority, however, may not exercise any of the powers of management under the Act with reference to any consecrated burial ground unless and until they are authorised so to do by the licence or faculty of the bishop (*k*).

Games or sports.

The playing of any games or sports is not to be allowed in the burial ground, except that in the case of a consecrated burial ground the bishop by licence or faculty, and in the case of an unconsecrated ground the persons from whom the local authority have acquired the estate, interest, or control in or over the same, may expressly sanction any such use of the burial ground, and may specify any conditions as to the extent or nature of such use (*l*).

Removal of tombstones, etc.

1131. In the case of any disused burial ground, at least three months before removing or changing the position of any tombstone or monument, the local authority must (1) prepare a statement sufficiently describing by the name and date appearing thereon the tombstones and monuments standing or being in the ground, and such other particulars as may be necessary, and cause the statement to be deposited with their clerk, and to be open to inspection by all persons, and (2) insert an advertisement of the intention to remove or change the position of such tombstones and monuments three times at least in some newspaper circulating in the neighbourhood, and by that advertisement give notice of the deposit of the above-mentioned statement and of the place at which, and the hours within which, it may be inspected, and (3) place a notice in terms similar to the advertisement on the door of the church (if any) to which the burial ground is attached, and deliver or send by post a notice to any person known or believed by the local authority to be a near relative of any person whose death is recorded on any such tombstone or monument (*m*).

Licence or faculty for removal from consecrated ground.

In the case of a consecrated ground, no tombstone or monument may be removed, or its position changed, without a licence or faculty from the bishop, and no application for such licence or faculty may be made until the expiration of one month at least after the appearance of the last of the advertisements. But on an application for such a licence or faculty the bishop is at liberty to direct or sanction (*n*) the removal or change of position of any tombstone or monument, if he is of opinion that reasonable steps have been taken to bring the intention to effect such removal or change of position to the notice of some person having a family interest in the tombstone or monument (*o*).

(*i*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 10.
(*k*) *Ibid.*, s. 11 (1).
(*l*) *Ibid.*, s. 11 (2)
(*m*) *Ibid.*, s. 11 (3).
(*n*) The words are, "provided that on an application for a licence or faculty nothing shall prevent the bishop from directing" etc.
(*o*) *Ibid.*, s. 11 (4). On an application for such faculty inquiries will not be

SECT. 3. Conveyance etc. of Burial Grounds for Open Spaces

A licence or faculty for the above purposes may be granted by the bishop of the diocese within which the consecrated burial ground is situated on the application of the local authority who have acquired any estate, interest, or control in or over the burial ground, and may be granted subject to such conditions and restrictions as to the bishop may seem fit (*p*).

Burial grounds vested in local authorities.

1132. The powers above mentioned respecting burial grounds may be exercised by a local authority in respect of any burial grounds of a similar nature vested in them in pursuance of any statute or of which they are otherwise the owners (*q*).

Compensation for interests affected.

1133. No estate, interest, or right of a profitable or beneficial nature in, over, or affecting a burial ground, may, except with the consent of the person entitled thereto, be taken away or injuriously affected by anything done under the Open Spaces Act, 1906, without compensation being made for the same; and such compensation is to be paid by the local authority by whom the estate, interest, or right is taken away or affected, and is in case of difference to be assessed as if the same were for lands taken otherwise than by agreement or injuriously affected under the Lands Clauses Acts (*r*).

Bye-laws.

1134. A local authority may with reference to any burial ground in or over which they have acquired any estate, interest, or control under the Open Spaces Act, 1906, make bye-laws for the regulation thereof and of the days and times of admission thereto, and for the preservation of order and prevention of nuisances therein, and may by such bye-laws impose penalties recoverable summarily for the infringement thereof, and provide for the removal of any person infringing any bye-law by any officer of the local authority or police constable (*s*).

Combined exercise of powers.

1135. Local authorities may combine for the purpose of the exercise of the above powers (*t*).

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made into questions of title (*Re Camden Town Burial Ground* (1889), 5 T. L. R. 311). If a vault be in good repair, the faculty will not allow interference therewith without the consent of the family; but if in bad repair, it may sanction its being levelled and filled up (*St. Botolph-without-Aldgate* (*Vicar*) v. *Parishioners* (No. 2), [1892] P. 173).

(*p*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 11 (5).

(*q*) *Ibid.*, s. 12.

(*r*) *Ibid.*, s. 13. As to the Lands Clauses Acts, see title COMPULSORY PURCHASE AND COMPENSATION.

(*s*) *Ibid.*, s. 15. The section specifies, in the case of each class of local authority, the enactments subject to and in accordance with which the power of making the bye-laws is to be exercised.

(*t*) *Ibid.*, s. 16.

Part XI.—Supervision of Burial Grounds by Government Departments.

SECT. 1.—*Sanitary Regulation and Inspection of Burial Grounds.*

SECT. 1. Sanitary Regulation and Inspection of Burial Grounds.

1136. The Local Government Board (*a*) may from time to time make regulations in relation to burial grounds and to places for the reception of bodies previously to interment provided under the Burial Acts for the protection of the public health and the maintenance of public decency; and burial authorities and all other persons having the care of such burial grounds and places for the reception of bodies must conform to and obey such regulations (*b*).

Breach of regulations.

Any person who violates or neglects or fails to comply with any such regulations is liable upon summary conviction to a penalty not exceeding £10 (*c*).

Inspection of burial grounds etc.

The Local Government Board (*d*) are empowered to appoint and authorise persons to inspect any burial ground or cemetery, parochial or non-parochial, or place for the reception of bodies, to ascertain its state and condition, and, where regulations in relation thereto have been made under the powers above referred to, to ascertain whether such regulations have been observed and complied with. Any person having the care of any such burial ground or cemetery or place who obstructs any person so authorised to inspect it is liable on summary conviction to a penalty not exceeding £10 (*e*).

Orders in Council to prevent danger to health.

1137. On the representation of the Local Government Board (*f*) Orders in Council may be made ordering acts to be done by or under the directions of the churchwardens or such other persons as have the care of any vaults or places of burial for preventing them from becoming or continuing dangerous or injurious to the public health. Every such Order must be published in the *London*

(*a*) Substituted for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I.

(*b*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 44. The power of making regulations under this section appears to have been exercised in relation to particular burial grounds only. A series of model regulations issued by the Home Office, as reprinted in 1899, will be found in Mackenzie and Handford, Model Bye-laws, p. 487, and another series also issued by the Home Office, differing in some important particulars from the above, is set out in Brooke Little, Law of Burials, 3rd ed., p. 713. Both series deal with the fencing, draining, and planning of the ground, the area and registration of graves, the closing of vaults after burial, the burial of more than one body in one grave, the reopening of graves, and the depth of graves. The Local Government Board have not themselves issued any model regulations.

(*c*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 8. The penalty is imposed not only in respect of the violation etc. of the regulations in question, but also of "any regulation imposed by this Act." It is difficult to say what the regulations thus referred to are.

(*d*) Substituted for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I.

(*e*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 8.

(*f*) Substituted for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I.

SECT. 1. Sanitary Regulation and Inspection of Burial Grounds.

Gazette, and the churchwardens or other persons must do or cause to be done all acts so ordered, and the expenses incurred in and about the doing thereof are to be paid out of the poor rates of the parish (*g*).

The power to make such Orders in Council does not, however, extend to unconsecrated land which, though it has been used for burial, is no longer so used, and is not subject to any trust preventing its use for purposes other than burial; and an Order in Council purporting to be made under the power in question with regard to such land is consequently a nullity (*h*).

Default in compliance with Order.

If it appears to the Local Government Board (*i*), on the representation of a person authorised by them to inspect any vaults or place of burial in relation to which such an Order in Council has been made, that any acts ordered by such Order to be done by or under the direction of persons other than churchwardens having the care of such vaults or place of burial are not done within a reasonable time and according to the intent of the Order, the Board may authorise and direct the churchwardens of the parish in which the vaults or place of burial may be situate, or the parish council or other authority subject to the civil duties of such churchwardens (*j*), as the case may be, forthwith to do or complete the acts mentioned in the Order, or such of them as remain undone; and the churchwardens, parish council, or other authority must obey such direction, and for that purpose they and all persons acting under their direction have the same powers of entry and otherwise as if they had been directed to do such acts by the Order in Council, and such vaults or place of burial had been under their care; and any person obstructing them or removing or interfering with the work done by them is guilty of a misdemeanour (*k*).

Faculty in aid of Order.

If the Order in Council directs any acts to be done in any church or churchyard, the persons thereby directed to do such acts must, according to the decisions of the Ecclesiastical Courts, first obtain a faculty permitting them to do such acts (*l*).

(*g*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 23. The first branch of the section provides that the Order in Council may "order *such* acts to be done . . . for preventing" etc., and is thus, as it stands, ungrammatical. Probably the word "such" should be rejected as meaningless. The section provides for notice before the representation of the Local Government Board is made. So far as it refers to churchwardens, the section should probably still be read as referring to these officers even in the case of parishes where the civil functions of the churchwardens have been transferred to a parish council or other authority by or under the Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 6 (1) (b), 33, since it appears to be as custodians of vaults etc. that the section enables duties to be imposed on them, and it is in pursuance of their ecclesiastical duties, in ordinary cases at least, that they are such custodians.

(*h*) *Foster* v. *Dodd* (1867), L. R. 3 Q. B. 67; *Jacobson* v. *St. Pancras Vestry* (1880), 44 J. P. 184.

(*i*) Substituted for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I.

(*j*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 6 (1) (b), 33. It would seem that the duties of churchwardens under the section are in no case "ecclesiastical," so as to be reserved to them in a parish where the civil duties of churchwardens have been transferred by or under the Act of 1894, though there might possibly be some doubt upon the point in the case of a consecrated burial ground.

(*k*) Burial Act, 1859 (22 Vict. c. 1), s. 1.

(*l*) *St. Mary-at-Hill etc.* (*Rector*) v. *Parishioners*, [1892] P. 394; *St. Michael*

SECT. 1. Sanitary Regulation and Inspection of Burial Grounds.

Regulations as to burial in common graves.

1138. On the representation of the Local Government Board (*m*), Orders in Council may be made establishing regulations for the protection of the public health, and for the maintenance of public decency, in respect of all burials in common graves in any cemeteries named in Sched. B to the Burial Act, 1852 (*n*), or in any cemetery established under the authority of any local Act. Every such Order must be published in the *London Gazette*, and all persons having the care of such cemeteries must conform to and obey such regulations, and any person violating or wilfully neglecting to observe the same is liable on summary conviction to a penalty not exceeding £10 (*o*).

SECT. 2.—*Inquiries by Secretary of State.*

Appointment of person to make inquiries.

1139. A Secretary of State may appoint a person to inquire into any matter relating to the consecration of any part of a burial ground or the building of any chapel therein, or to the fixing, varying, commutation of, or compensation for, fees payable to ministers of religion, ecclesiastical officers, and sextons in connection therewith, and may assign to such person remuneration not exceeding five guineas a day and an allowance for expenses, payable, except so far as otherwise provided, out of moneys provided by Parliament.

Payment of expenses.

He may, however, make such order as he thinks just as to the payment by the burial authority or other parties of the whole or part of the costs of the inquiry, including such remuneration and expenses. Such order may direct payment to the Exchequer or other parties, and may be enforced as an order of the High Court (*p*).

Part XII.—Burial of Poor Persons.

Meaning of terms.

1140. The expression "poor law union" is, for the purposes of the present Part of this title, used to include a parish with a separate board of guardians (*q*); the expression "union" is used to mean a union consisting of two or more poor law parishes under a board of guardians, whether such union was constituted under the Poor Law Amendment Act, 1834 (*r*), or otherwise; and the

(*Rector*) v. *Parishioners*, [1893] P. 233; *Lee* v. *Hawtrey*, [1898] P. 63. The authority of these decisions is, however, very doubtful, and the decisions themselves are in opposition to the expressed opinion of the law officers of the Crown.

(*m*) Substituted for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I.

(*n*) 15 & 16 Vict. c. 85.

(*o*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 10. The section provides for notice being given before the representation of the Local Government Board is made.

(*p*) Burial Act, 1900 (63 & 64 Vict. c. 15), s. 5.

(*q*) This is in accordance with the definition in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 16 (2).

(*r*) This is in substance the effect of the elaborate definition of "union" in the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 109, the definitions

PART XII. Burial of Poor Persons.

expression "common fund" is used to include the fund out of which the expenses of a board of guardians for a single parish are paid (*s*).

Obligation on poor law authorities.

1141. Boards of guardians are bound, as occupiers of their workhouses, to provide for the burial of poor persons dying therein; and there is a similar obligation on other poor law authorities in respect of poor persons dying in their institutions. Except in the case of persons dying on premises in their occupation, there appears to be no obligation on poor law authorities to provide for the burial of paupers (*t*).

Power of board of guardians to bury poor persons.

1142. It is, however, lawful for a board of guardians to bury, at the expense of the common fund, the body of any poor person which may be within their poor law union (*a*).

Place of burial.

The enactment conferring this power on the guardians contains provisions as to the place where the burial is to take place, the effect of which is not quite clear, but under which it seems that, subject to certain enactments providing that, for the purposes of burial, paupers dying in workhouses and other poor law institutions are to be regarded in some cases as dying elsewhere, and to some exceptions introduced by later legislation (*b*), the burial ought in general to take place in the churchyard or other consecrated burial ground of the parish etc. where the death occurred (*c*).

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in which are applicable to the interpretation of the various Poor Law Amendment Acts referred to in the present part of the article.

(*s*) This is in accordance with the modern practice, though not sanctioned by any general statutory definition.

(*t*) *R.* v. *Stewart* (1840), 12 Ad. & El. 773. The enactments referred to later conferring powers on boards of guardians for the burial of paupers are all expressed as enabling enactments; and there appears to be nothing imposing a legal obligation on the guardians to avail themselves of those powers.

As to the duties of guardians of the poor in general, see title POOR LAW.

(*a*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 31; Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 1.

(*b*) See pp. 541, [illegible].

(*c*) The Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 31, after providing that it shall be lawful for the guardians to bury the body of any poor person which may be within their union or parish, and making provision (now superseded as to parishes in unions) for charging the expense on the poor rate of the parish to which the person in question "may have been chargeable, or in which he may have died, or otherwise in which such body may be," continues as follows: "and unless the guardians, in compliance with the desire expressed by such person in his lifetime, or by any of his relations, or for any other cause, direct the body of such poor person to be buried in the churchyard or burial ground of the parish to which such person has been chargeable (which they are hereby authorised to do), every dead body which the guardians or any of their officers duly authorised shall direct to be buried at the expense of the poor rates shall (unless the deceased person, or the husband or wife or next of kin of such deceased person, have otherwise desired,) be buried in the churchyard or other consecrated burial ground in or belonging to the parish, division of parish, chapelry, or place in which the death may have occurred." The question of the effect of this obscure language is now further complicated by the fact that since the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), the chargeability of paupers has become a chargeability to the union as a whole, and not to any particular parish therein. In s. 2 of the Poor Law Amendment Act, 1850 (13 & 14 Vict. c. 101), it should be added, under which guardians are empowered to provide and contribute to the provision of burial grounds and to

Where guardians or any of their officers duly authorised in that behalf undertake, or contribute money or other aid towards, the burial of a poor person, and the burial cannot take place in the parish where, according to the provisions above referred to, the same would have been required to take place, by reason of the public burial ground of such parish having been closed and no other provided, or where, in consequence of the crowded state of such burial ground, the guardians are of opinion that the burial of such dead body therein would be improper, it is lawful to bury the body in a public burial ground (some part of which has been consecrated) of or in some other parish as near as conveniently may be to the first-mentioned parish (*d*).

Constructive situation of workhouse.

1143. There are provisions under which, for the purposes of the burial of paupers dying in a workhouse, the workhouse is in many cases to be considered as situate in a parish other than that in which it is actually situate. Under these provisions, if the workhouse belongs to a parish not in union, and the pauper was chargeable to that parish, the workhouse is, for the purposes of the pauper's burial, to be considered as situate in that parish; and if the workhouse belongs to a union, and the pauper resided in the union before removal to the workhouse, the workhouse is, for the purposes of the pauper's burial, to be considered as situate in the parish in which the pauper last so resided. The effect of the provisions in other cases is very doubtful (*e*).

Constructive situation of district school or asylum.

If a union is comprised in any school or asylum district, the death of a pauper in the school or asylum of such district is for the purposes of burial to be deemed to have taken place in the

bury paupers dying in the workhouse therein, there is a saving, evidently intended to refer to the provisions of the Act of 1844, above quoted, for "the obligation now imposed by law upon the guardians to bury the dead body of such poor person elsewhere, in case the deceased person, or the husband, or wife, or next of kin of such deceased person, shall have so requested."

(*d*) Poor (Burials) Act, 1855 (18 & 19 Vict. c. 79), s. 1. Although it may be lawful for the guardians to bury the body in a neighbouring parish, there is no express obligation upon the incumbent and churchwardens or upon the burial authority of such parish to allow the interment to take place in the parish churchyard or burial ground.

(*e*) The Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 56, provides that, for the purposes of the burial of the poor, the workhouse of any union or parish and every district school of a school district constituted under that Act shall be considered as situated in the parish to which each poor person to be buried is or has been chargeable; and s. 10 of the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), provides that, "for the purposes of the burial of any poor person dying in the workhouse of any union, such workhouse shall be considered as situated in the parish in the union where such poor person resided last, previously to his removal to the workhouse." The provisions of s. 10 of the Act of 1865, no doubt, in cases where they are applicable, override those of s. 56 of the Act of 1844, but the provisions of the last-named section still apply where the workhouse belongs to a parish not in union, and also, it would seem, where the workhouse belongs to a union, but the provisions of s. 10 of the Act of 1865 are incapable of application, *e.g.*, in the case of the death of a child born in the workhouse and dying there without having left it. The provisions of s. 56 of the Act of 1844 are, however, difficult of application in the case of a union now that paupers are chargeable to the union as a whole, and not to a particular parish. With regard to the provisions of the section as to district schools, see *infra*.

PART XII. Burial of Poor Persons.

parish of the union from which such pauper was sent to such school or asylum, or to the workhouse of the union, as the case may be, and the charges of the burial must be borne by the common fund of the union (*f*). This provision is confined to the case of a pauper sent from a union as distinguished from a parish not in union (*g*). There are, however, provisions under which the death in a district school, or in an asylum of a district founded under the Metropolitan Poor Act, 1867, of a pauper sent from a parish not in union, is in most, if not all, cases to be deemed, for the purposes of burial, to have taken place in that parish, and under which the expenses of burial fall on that parish (*h*).

Payment of fees by guardians.

1144. In all cases of burial under the direction of guardians under the powers above referred to, the fees payable by the custom of the place where the burial may be, or by statute, are to be paid by the guardians for the burial of each such body to the person or persons who by such custom or statute are entitled to receive the same (*i*).

Paupers in receipt of non-resident

1145. A board of guardians may pay the costs of the burial of any poor person dying out of the limits of their poor law union was at the time of the death in receipt of relief from them (*j*). And they may, when necessary, pay the expenses of the burial of any idiotic pauper sent by them to a public asylum or establishment for idiots under the Poor Law Amendment Act, 1868, and of any idiotic, imbecile, or insane pauper sent by them under that Act to the workhouse of another union or parish (*k*).

Reimburse-

1146. In the event of the death of any pauper having in his possession or belonging to him any money or property, the guardians of the union or parish wherein such pauper dies may reimburse themselves the expenses incurred by them in and about the burial of such pauper (*l*); and the cost of burying any poor

(*f*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 21.

(*g*) *Ibid.*, s. 44, incorporates the definitions in the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 109, and "union" in the Act of 1876, therefore, seems clearly not to include a parish not in union.

(*h*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 56; Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), ss. 24, 32. As to s. 56 of the Act of 1844, see note (*e*), p. 541, *ante*. Ss. 24 and 32 of the Act of 1867 provide that with reference to burial an asylum under that Act shall, in reference to each inmate, be deemed to be in the union or parish from which the inmate was sent, and that the expenses incurred by the managers in or about the burial of the inmates shall be separately charged to the unions or parishes from which the inmates are sent. These provisions of the Acts of 1844 and 1867 are, no doubt, overridden by those of s. 21 of the Act of 1876 cited in note (*f*), *supra*, in cases coming within that section, but appear to be still operative in other cases.

(*i*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 31; Poor (Burials) Act, 1855 (18 & 19 Vict. c. 79), s. 1.

(*j*) Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 17.

(*k*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 13.

(*l*) Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 16. The section, after provisions to the effect, briefly, that where a pauper has any money or valuable security for money the guardians of the union or parish to

person by or under the direction of any guardians is recoverable in like manner and from the same parties as the cost of any relief (if given to such person when living) would have been recoverable (*m*). The guardians are not preferential creditors of the deceased pauper for such expenses, and the pauper's executor may accordingly retain a debt due to him from the pauper's estate before satisfying the claim of the guardians (*n*).

Grant of administration to nominee of guardians.

Administration of the effects of a pauper who is buried by the guardians may be granted to a nominee of the guardians on the footing that they are creditors for the expenses of such burial (*o*).

Poor law officers not to derive profit from burial etc.

1147. It is unlawful for any officer connected with the relief of the poor to receive any money for the burial of the body of any poor person which may be within the parish, division of parish, chapelry, or place in which the death may have occurred, or to act as undertaker for personal gain or reward in the burial of any such body, or to receive any money from any dissecting school, or school of anatomy, or hospital, or from any person to whom any such body may be delivered, or to derive any personal emolument whatever for or in respect of the burial or disposal of any such body. A breach of this prohibition is punishable on summary conviction by a penalty not exceeding £5 (*p*)

Consecration of land belonging to guardians.

1148. Where the guardians of any parish or union are possessed of land suitable for the purposes of a burial ground, and the Local Government Board consent to the same being appropriated to the reception of the dead bodies of any poor persons whom the guardians are authorised or required by law to bury, the ordinary may, if he see fit, consecrate the whole or a part of such land for burial purposes, and after consecration the guardians may lawfully direct any such dead body to be buried therein (*q*).

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which he is chargeable may take and appropriate so much of the money or produce of the security, or recover the same as a debt, as will reimburse them for their expenditure on his relief during the preceding year, enacts that, "in the event of the death of any pauper having in his possession or belonging to him any money or property, the guardians . . . may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper at any time during the twelve months previous to the decease." In *Laver* v. *Botham & Sons*, [1895] 1 Q. B. 59, the opinion was expressed that the provisions for the appropriation of money etc. in the first branch of the section cannot be read into the second, and that the effect of the second branch is merely to make the guardians ordinary creditors for the expenses there referred to. The guardians appear, it should be added, to be in the position of ordinary creditors in respect of relief given to a pauper independently of the section. See the cases cited in note (*o*), *infra*, and *Birkenhead Union Guardians* v. *Brookes* (1906), 95 L. T. 359.

(*m*) Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 17. As to the recovery of the cost of relief given to paupers, see title POOR LAW.

(*n*) *Laver* v. *Botham & Sons*, *supra*.

(*o*) See *Cleaver* v. *M'Kenna* (1865), 35 L. J. (P. & M.) 91; *Re Reeves* (1890), 55 J. P. 24; *Re Lillicrap* (1891), 55 J. P. 825; *Windeatt* v. *Sharland* (1871), L. R. 2 P. & D. 217, 266.

(*p*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 31. The prohibition appears to be of general character, though it is enacted in the form of a proviso to the section, the first part of which gives the guardians the powers for the burial of paupers referred to p. 540, *ante*.

(*q*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 6.

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Use of land so consecrated.

The land so consecrated must not thenceforth be used for any other purpose than for burials according to the rites of the Church of England (*r*), and is to be kept in decent order; and the fences thereof, and any building or other erection thereon or adjoining thereto used for the performance of the burial service, are to be maintained by the guardians out of their common fund. But the guardians are not authorised to direct the body of any poor person to be buried in such grounds who, or whose husband, wife, or next of kin, shall, by letter addressed to the master of the workhouse or otherwise, have expressly desired burial to take place elsewhere (*s*).

Contribution by guardians to enlargement etc. of burial ground.

1149. A board of guardians may contribute out of their common fund such sum as the Local Government Board may approve towards the enlargement of any churchyard or the enlargement or obtaining of any consecrated public burial ground in the parish in which the workhouse is situated, or in any other parish of the union; and where such burial ground is enlarged or obtained with the aid of such contribution, they may bury therein the body of any poor person dying in the workhouse, unless, it seems, the husband, wife, or next of kin of such person have expressed a desire that the body should be buried elsewhere (*t*).

Payment of fees.

In all cases of burial under the direction of the guardians in pursuance of this provision, the fee or fees payable by the custom of the place where the burial may be, or by statute, are to be paid by the guardians to the person or persons entitled to receive such fee or fees (*t*).

Agreement with proprietors of cemetery or burial board.

1150. Guardians may make agreements in such form and with such stipulations as the Local Government Board may approve with the proprietors of any cemetery established under the authority of Parliament, or with any burial board or authority exercising the powers etc. of a burial board, for the burial of the bodies of poor persons which they may undertake to bury, or towards the burial of which they may render assistance; and thereupon the burial of any such body under the direction of the guardians or their officer, or with their aid, in such cemetery or in the burial ground of such

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(*r*) It may be doubted whether the provisions of the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), referred to at pp. 424 *et seq.*, *ante*, authorising burial in consecrated ground without the performance of the burial service according to the rites of the Established Church, apply to such burial ground, but as "graveyard" is not defined in that Act in such terms as to exclude such a burial ground, it might well be held to be a "graveyard" within the Act.

(*s*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 6; and see note (*c*), p. 540, *ante*. As the ground is provided under one of the Burial Acts, it may not be used for burials within one hundred yards of a dwelling-house already erected when the ground was provided without certain consents (Burial Act, 1855 (18 & 19 Vict. c. 128), s. 9, as amended by Burial Act, 1906 (6 Edw. 7, c. 44); and see p. 464, *ante*). The Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133) (as to which see p. 441, *ante*), is extended by s. 2 of the Consecration of Churchyards Act, 1868 (31 & 32 Vict. c. 47), to burial grounds attached or belonging to union-houses.

(*t*) Poor Law Amendment Act, 1850 (13 & 14 Vict. c. 101), s. 2. The provisions of the section authorising the burial of paupers in the churchyard or burial ground are subject to the proviso that nothing in the Act shall "discharge or vary the obligation now imposed by law upon the guardians to bury the dead of such poor person elsewhere, in case the deceased person, or the

burial board or authority, is lawful, unless the deceased person, or the husband, wife, or next of kin of the deceased, have otherwise expressly desired (*u*).

Burial in consecrated ground without Church of England service.

1151. The provisions of the Burial Laws Amendment Act, 1880 (*w*), authorising burial in consecrated ground without the performance of the burial service according to the rites of the Church of England, extend to the case of a pauper buried at the expense of the guardians (*x*).

Burial of lunatics.

1152. The visiting committee of an asylum, with the consent of the local authority by whom they are appointed and of a Secretary of State, may provide for the burial of lunatics dying in the asylum and of the officers and servants belonging thereto—(1) by appropriating land belonging to them or acquiring land, not exceeding in either case two acres, for providing a new or enlarging an existing burial ground; (2) by agreeing with any corporation or persons or body of persons willing to provide for the burial of such persons. They may procure consecration of a new or enlarged burial ground, and provide for the appointment of a chaplain for a new burial ground. The incumbent of the parish in which such new or enlarged burial ground is situate is not entitled to any fee for the interment of any person buried therein by direction of the committee (*y*).

Burial in parish in which death did not occur.

Where the visiting committee of an asylum undertake the burial of a pauper lunatic, and the public burial ground of the parish where the death took place is closed or inconveniently crowded, the burial may take place in a public burial ground of some other parish with the consent of the minister and churchwardens of that parish, and in that case the visiting committee must pay to the person entitled thereto the burial fees payable under any statute or custom (*a*).

Expenses of burial of pauper lunatics.

The necessary expenses attending the burial of a pauper lunatic in any institution for lunatics are to be borne by the poor law union to which the lunatic was chargeable, or by the local authority liable for his maintenance when alive, and must be paid by the guardians of the poor law union or the treasurer of the local authority (*b*). This provision applies to expenses of the burial

husband, or wife, or next of kin of such deceased person, shall have so requested." As to the meaning of this proviso, see note (*c*), p. 540, *ante*.

(*u*) Poor (Burials) Act, 1855 (18 & 19 Vict. c. 79), s. 2; and see note (*c*), p. 540, *ante*.

(*w*) 43 & 44 Vict. c. 41; and see pp. 424 *et seq.*, *ante*.

(*x*) For the special provisions applicable in such a case, see p. 425, *ante*.

(*y*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 258. See generally, as to pauper lunatics, title LUNATICS AND PERSONS OF UNSOUND MIND.

(*a*) *Ibid.*, s. 259. If the public burial ground of such other parish is under a burial authority, the visiting committee can obtain their object by agreement with such authority under s. 258, *supra*.

(*b*) *Ibid.*, s. 297. The provisions for determining whether a lunatic is chargeable to a union or whether a local authority is liable for his maintenance are contained in ss. 286—291 of the Act. The provisions of ss. 287 and 291 as to the making of orders on guardians and local authorities for the payment of expenses of lunatics are not expressly extended to burial expenses; but see *Leeds Guardians* v. *Wakefield Guardians* (1857), 7 E. & B. 258; *R.* v. *Bruce*, [1892] 2 Q. B. 136.

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of lunatics in institutions for lunatics who become paupers (*c*); and it also applies to the expenses of the burial of persons confined as pauper lunatics sent to any institution for lunatics under any Act other than the Lunacy Act, 1890, authorising their reception therein as pauper lunatics, and (save as provided by the Lunacy Act, 1890, concerning any lunatic who may appear to have any real or personal property applicable to his maintenance) of all other lunatics sent to any institution for lunatics under an order of a justice or justices made before May 1, 1890, or under a summary reception order made by a justice under the Lunacy Act, 1890, or under an order made by two or more of the Lunacy Commissioners at any time, as if such last-mentioned lunatics were, at the time of being so sent, actually chargeable to the poor law union from which they are sent (*d*).

Pauper lunatics received from other areas.

A resolution of the visiting committee under s. 270 of the Lunacy Act, 1890, for the reception into their asylum of pauper lunatics from areas other than their own, may require that no pauper lunatic should be admitted under the resolution without an undertaking by minute of the guardians of the poor law union to which the lunatic is chargeable for the payment of the expenses of, *inter alia*, his burial if he dies in the asylum (*e*).

Limitation of fees in certain cases.

1153. When any body is buried in any of the cemeteries mentioned in Sched. B to the Burial Act, 1852, at the expense of any union or parish, or in any other cemetery established under the authority of Parliament, at the expense either of any union or parish or of any hospital or infirmary, the fee or sum to be paid or payable on the interment or otherwise in respect of such body to the incumbent of the parish or ecclesiastical district from which such body is removed for interment is not to exceed one shilling, or where the incumbent formerly received in respect of the like burial in the ground of his parish more than a shilling is not to exceed the sum then received, and is in no case to exceed two shillings and sixpence. No fee or sum whatever is payable in respect of such interment to any person as officer of or for or on behalf of such parish or district (*f*).

(*c*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 22.
(*d*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 298.
(*e*) *Ibid.*, s. 270.
(*f*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 49, which applied originally to the cemeteries (most of them established by companies under special Acts) mentioned in *ibid.*, Sched. B, as extended by Burial Act, 1853 (16 & 17 Vict. c. 134), s. 7, to all other cemeteries "established under the authority of Parliament." These words, in the context, seem clearly to mean established under special Acts, so that the enactment would not, *e.g.*, extend to the burial ground of a burial board. See *R.* v. *Manchester Justices* (1855), 5 E. & B. 702, decided on s. 5 of the Act of 1853. The words of s. 49 of the Act of 1852 referring to the fees formerly received by incumbents are "where the incumbent *now* receives" etc., so that as regards the cemeteries mentioned in Sched. B to that Act the critical date is that of the passing of that Act (July 1, 1852). As regards other cemeteries the critical date would seem to be that of the passing of the Act of 1853 (August 20, 1853).

Part XIII.—Burial of Persons found Drowned.

PART XIII. Burial of Persons found Drowned.

1154. The overseers (including the churchwardens where they are *ex officio* overseers (*g*)) of any parish in which any dead human body or bodies may be found thrown in or cast on shore from the sea by wreck or otherwise, or found in or cast on shore from any tidal or navigable waters, or found floating or sunken in any such waters and brought to the shore or bank, must upon notice to them that any such body or bodies are thrown or cast on shore by the sea, or as the case may be, and that the same is or are lying within the parish, cause the same to be removed forthwith to some convenient place, and with all convenient speed cause the same to be decently interred in the churchyard or burial ground of the parish, so that the expenses attending such burial do not exceed the sum which at the time is allowed in the parish for a pauper funeral (*h*). Duty of overseers to bury bodies found drowned.

Any overseer neglecting to remove, or cause to be removed, such body or bodies from the shore or bank (*i*) to a convenient place, prior to the interment thereof, for the space of twelve hours after notice given to him or left in writing at his last or usual place of abode by any person whomsoever, or neglecting or refusing to perform his other statutory duties in the matter, is liable to a penalty of £5 (*k*), to be paid personally by him, and not by the parish (*l*). Penalty for default by overseers.

1155. The minister, clerk, and sexton of the parish must, without any improper loss of time, admit such bodies to be interred in Duties of minister etc.

(*g*) The reference in the Burial of Drowned Persons Act, 1808 (48 Geo. 3, c. 75), is to the churchwardens and overseers. In rural parishes, under provisions in s. 5 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), the churchwardens have ceased to be *ex officio* overseers, and as regards such parishes statutory references to churchwardens and overseers (except in relation to affairs of the church) are to be construed as references to the overseers. These provisions of s. 5 of the Act of 1894 apply also, *mutatis mutandis*, in the majority of urban parishes by virtue of orders of the Local Government Board made under s. 33 of that Act. As regards metropolitan parishes, except the City of London, the metropolitan borough councils are the overseers under s. 11 of the London Government Act, 1899 (62 & 63 Vict. c. 14), and by s. 23 (3) of that Act statutory references to the churchwardens and overseers (except in relation to affairs of the church) are to be construed as references to those councils.

(*h*) Burial of Drowned Persons Act, 1808 (48 Geo. 3, c. 75), s. 1, as extended by Burial of Drowned Persons Act, 1886 (49 & 50 Vict. c. 20). This latter Act was passed in consequence of the decision in *Woodwich Overseers* v.

sions as to places where there are no overseers; but it has been thought unnecessary to refer to these provisions in the present title, as there are hardly any, if any, such places left.

(*i*) The expression in the Act of 1808 is "sea-shore"; but an extended meaning must be given to it by virtue of the Act of 1886.

(*k*) Burial of Drowned Persons Act, 1808 (48 Geo. 3, c. 75), s. 7. As to penalties under the Act, see p. 548.

(*l*) *Ibid.*, s. 12.

PART XIII. Burial of Persons found Drowned.

the parish churchyard or burial ground, and perform their customary duties in respect of the burial, and are entitled by way of compensation to such sums as are usually paid on pauper funerals (*m*).

Expenses.

1156. The necessary expenses attending such removal and burials must be paid in the first instance by the overseers (*n*); and a justice of the peace, having jurisdiction in the county or place where any such body is buried, may then by writing under his hand order the treasurer of the county to pay to such officers such sum in respect thereof (*o*) as may seem to such justice reasonable and necessary, and the treasurer must forthwith pay such sum to the person or persons empowered to receive the same, and will be allowed the same in his accounts (*p*).

Payment to persons giving notice.

1157. Any person or persons finding any such body or bodies as above mentioned, and within six hours thereafter giving notice thereof to some one of the overseers of the parish, or causing such notice to be left at his last or usual place of abode, or giving notice to a police constable (who is bound to communicate such notice forthwith to an overseer), is entitled to receive from the overseers of the parish the sum of five shillings for his, her, or their trouble. Such sum is to be paid to the person or persons first giving notice only, and no greater sum than five shillings is to be paid for any one notice, although there may be more bodies than one (*q*).

Duty to give notice.

Any person or persons finding any such body, and omitting to give such notice within six hours thereafter as above mentioned, is liable to a penalty of £5 (*r*).

Recovery of penalties.

1158. All penalties which may be incurred in respect of any of the matters above mentioned are recoverable summarily (*s*), and when recovered are to be paid to the informer or informers (*t*).

Appeal to quarter sessions.

1159. Any person aggrieved by any judgment or determination, or by any matter or thing done in pursuance of any of the foregoing provisions, may appeal to quarter sessions, who may mitigate any penalty, and also order such further satisfaction to be made to the

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(*m*) Burial of Drowned Persons Act, 1808 (48 Geo. 3, c. 75), s. 2.

(*n*) *Ibid.*, s. 5.

(*o*) The words of the statute are, "for his or their costs and expenses in or about the execution of this Act."

(*p*) Burial of Drowned Persons Act, 1808 (48 Geo. 3, c. 75), s. 6. The justice's order must show that the expenses were incurred in and about the execution of the Acts, so that it may appear or be inferred that he had jurisdiction to make the order, otherwise the treasurer need not, and will not be compelled to, pay (*R.* v. *Kent County Treasurer* (1889), 22 Q. B. D. 603).

(*q*) Burial of Drowned Persons Act, 1808 (48 Geo. 3, c. 75), by Burial of Drowned Persons Act, 1886 (49 & 50 Vict. c. 20).

(*r*) Burial of Drowned Persons Act, 1808 (48 Geo. 3, c. 75), s. 4.

(*s*) Provisions in *ibid.*, ss. 8, 9, 11, regulating the recovery of penalties under the Act, are repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4; and the Summary Jurisdiction Acts are applied to the recovery thereof by s. 5 of that Act. As to the Summary Jurisdiction Acts, see title

(*t*) Burial of Drowned Persons Act, 1808 (48 Geo. 3,

party injured as they shall judge reasonable, and whose determinations therein are final (*a*).

PART XIII. Burial of Persons found Drowned.

1160. Where the lord of any manor claims to be entitled to wrecks, he may if so disposed, as evidence of his right to wreckage, pay to the parish officers the like sums that have been usually paid by him for burying any such body or bodies as have been cast up on the manor, such sums to go in part payment of the expenses to be incurred in respect of such body or bodies by such officers, and to be credited in their accounts (*b*).

Payments by lord of manor

Part XIV.—Burial of Persons dying of Infectious Diseases.

SECT. 1.—*Provisions applicable to London.*

1161. In London, where (1) the body of a person who has died of any infectious disease is retained in a room in which persons live or sleep, or (2) the body of a person who has died of any dangerous infectious disease is retained without the sanction of the medical officer of health or any legally qualified medical practitioner for more than forty-eight hours elsewhere than in a room not used at the time as a dwelling-place, sleeping-place, or workroom, or (3) any dead body is retained in any house or room so as to endanger the health of the inmates thereof or of any adjoining or neighbouring house or building, a justice may, on a certificate signed by a medical officer of health or other legally qualified medical practitioner, direct that the body be removed, at the cost of the sanitary authority, to any available mortuary, and be buried within the time limited by the justice, and may if it is the body of a person who has died of an infectious disease, or if he considers immediate burial necessary, direct that the body be buried immediately without removal to the mortuary.

Removal and burial of body on justice's order.

Unless the friends or relations of the deceased undertake to bury and do bury the body within the time so limited, it is the duty of the relieving officer to bury such body, and any expense so incurred must be paid in the first instance by the guardians of the poor law union, but may be recovered by them in a summary manner from any person legally liable to pay the expense of such burial.

Expenses of burial.

Any person who obstructs the execution of any direction given by a justice as above mentioned is liable, on summary conviction, to a fine not exceeding £5 (*c*).

Penalty for obstruction.

(*a*) Burial of Drowned Persons Act, 1808 (48 Geo. 3, c. 75), s. 10. The provisions of the section regulating the procedure are repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4, as superseded by the provisions of the Summary Jurisdiction Acts as to appeals to quarter sessions from courts of summary jurisdiction. As to such appeals, see title MAGISTRATES.

(*b*) Burial of Drowned Persons Act, 1808 (48 Geo. 3, c. 75), s. 13.

(*c*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 89. This Act

SECT. 1. Provisions applicable to London.

Retention of body unburied.

1162. In London a person must not, without the sanction in writing of the medical officer of health or of a legally qualified medical practitioner, retain unburied for more than forty-eight hours elsewhere than in a room not used at the time as a dwelling-place, sleeping-place, or work-room, the body of any person who has died of any dangerous infectious disease. A person acting in contravention of this prohibition is, on the information of the sanitary authority, liable to a penalty, recoverable summarily, not exceeding £5 (*d*).

Removal of body from hospital.

1163. If in London a person dies in a hospital from any dangerous infectious disease, and the medical officer of health or any legally qualified medical practitioner certifies that in his opinion it is desirable, in order to prevent the risk of communicating such infectious disease, that the body be not removed from such hospital except for the purpose of being forthwith buried, it is not lawful for any person to remove the body except for that purpose; and the body when taken out of the hospital must be forthwith taken direct to the place of burial, and there buried. But this provision does not prevent the removal of a dead body from a hospital to a mortuary, and such mortuary is, for the purposes of the provision, to be deemed part of such hospital. A person wilfully offending against the above provisions is, on the information of the sanitary authority, liable to a fine, recoverable summarily, not exceeding £10 (*e*).

Meaning of "dangerous infectious disease."

1164. The expression "infectious disease" is not defined for the purpose of the foregoing provisions, and therefore includes every infectious disease. But the expression "dangerous infectious disease" is defined as meaning any of the following diseases: small-pox, cholera, diphtheria, membranous croup, erysipelas, the disease known as scarlatina or scarlet fever, and the fevers known by any of the following names, typhus, typhoid, enteric, relapsing, continued, or puerperal, and any other infectious disease to which the provisions in question may have been applied in the manner provided by the Public Health (London) Act, 1891 (*f*).

SECT. 2.—*Provisions of the Infectious Disease (Prevention) Act*, 1890.

Justice's order for removal and burial.

1165. Where in an area in which the provisions of the Infectious Disease (Prevention) Act, 1890, in that behalf are in force (*g*) the body of any person who has died from any infectious disease remains

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applies to the administrative county of London only, but is in force throughout it.

(*d*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 72.

(*e*) *Ibid.*, s. 73. The expression "hospital" in the Act means any premises or vessels for the reception of the sick, whether permanently or temporarily applied for that purpose, and includes an asylum of the Metropolitan Asylum Managers (*ibid.*, s. 141).

(*f*) *Ibid.*, ss. 55 (8), 56, 58.

(*g*) The Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), or any section or sections of that Act may be adopted for any urban or rural district, and such adoption may be subsequently rescinded (*ibid.*, ss. 3, 21); and the Local Government Board may assign to any port sanitary authority any

unburied elsewhere than in a mortuary or in a room not used at the time as a dwelling-place, sleeping-place, or work-room, for more than forty-eight hours after death without the sanction of the medical officer of health or of a registered medical practitioner, or where the dead body of any person is retained in any house or building so as to endanger the health of the inmates thereof or of any adjoining or neighbouring house or building, any justice may, on the application of the medical officer of health, order the body to be removed at the cost of the local authority to any available mortuary, and direct the same to be buried within a time to be limited in the order; and any justice may in the case of the body of any person who has died of any infectious disease, or in any case in which he shall consider immediate burial necessary, direct the body to be so buried.

Duty to bury.

Unless the friends or relatives of the deceased undertake to bury and do bury the body within the time limited by such order, it is the duty of the relieving officer of the relief district from which the body has been removed to the mortuary, or in which the body shall be if it has not been so removed, to bury such body, and any expense so incurred may be charged by the relieving officer in his accounts, and may be recovered by the board of guardians in a summary manner from any person legally liable to pay the expenses of such burial (*h*).

Retention of body unburied.

1166. Where the provisions of the above-mentioned Act in that behalf are in force, no person, without the sanction in writing of the medical officer of health or of a registered medical practitioner, may retain unburied elsewhere than in a public mortuary or in a room not used at the time as a dwelling-place, sleeping-place, or work-room, for more than forty-eight hours, the body of any person who has died of any infectious disease (*i*).

Removal from hospital etc.

1167. If, where the provisions of the above-mentioned Act in that behalf are in force, any person dies from any infectious disease in any hospital or place of temporary accommodation for the sick, and the medical officer of health or any other registered medical practitioner certifies that in his opinion it is desirable, in order to prevent the risk of communicating any infectious disease or of spreading infection, that the body shall not be removed from the hospital or place except for the purpose of being forthwith buried,

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powers, rights, duties, capacities, and obligations under the Act with the necessary modifications (Public Health (Ports) Act, 1896 (59 & 60 Vict. c. 20), s. 1).

(*h*) Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 10. The "local authority" for the purposes of the Act are the urban authority, rural district council, or port sanitary authority for whose area its provisions are in force (*ibid.*, ss. 2, 3; Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 16; Public Health (Ports) Act, 1896 (59 & 60 Vict. c. 20), s. 1). "Medical officer of health" for the purposes of the *A*

the meaning
f the Act, see

title PUBLIC HEALTH ETC.

(*i*) *Ibid.*, s. 8.

Provisions of the Infectious Disease (Prevention) Act, 1890.

it is not lawful for any person to remove the body from the hospital or place except for that purpose, and when the body is taken out of the hospital or place for that purpose it must be forthwith carried or taken direct to some cemetery or place of burial and be forthwith there buried. But this provision does not prevent the removal of any dead body from any hospital or temporary place for the accommodation of the sick to any mortuary, and such mortuary is for the purposes of the provision to be deemed part of such hospital or place (*k*).

Penalties.

1168. Penalties, recoverable summarily, are imposed for breach of the foregoing provisions and for obstructing their execution (*l*).

Meaning of "infectious disease."

1169. For the purposes of the foregoing provisions "infectious disease" means any of the following diseases: small-pox, cholera, diphtheria, membranous croup, erysipelas, the disease known as scarlatina or scarlet fever, and the fevers known by any of the following names, typhus, typhoid, enteric, relapsing, continued, or puerperal, and any other infectious disease to which the provisions in question may have been applied in the statutory manner (*m*).

SECT. 8.—*Provisions of the Public Health Act*, 1875.

Burial of body dangerous to

1170. Where (except in London) the dead body of anyone who has died of any infectious disease is retained in a room in which persons live or sleep, or any dead body which is in such a state as to endanger the health of the inmates of the same house or room is retained in such house or room, any justice may, on a certificate signed by a legally qualified medical practitioner, order the body to be removed, at the cost of the local authority, to any mortuary provided by such authority, and direct the same to be buried within a time limited in such order. Unless the friends or relations of the deceased undertake to bury the body within the time so limited, and do bury the same, it is the duty of the relieving officer to bury such body at the expense of the poor rate, and any expense so incurred may be recovered by the relieving officer in a summary manner from any person legally liable to pay the expense of such burial (*n*).

(*k*) Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 9. See note (*h*), p. 551, *ante*.

(*l*) *Ibid.*, ss. 9, 16, 18.

(*m*) *Ibid.*, s. 2; Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 6.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 142. The section is apparently confined to areas for which the local authority have provided a mortuary (see p. 566, *post*); but, subject to this limitation, it is of general application outside London. It is, however, practically superseded by the similar, but more stringent, provisions of the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 10, as to which see pp. 550 *et seq.*, *ante*, where those provisions are in force. "House" for the purposes of the Act of 1875 includes schools, also factories and buildings in which persons are employed. See the definition of "house" in s. 4 of the Act of 1875 as amended, by the repeal of certain words, by the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), s. 107. "Infectious disease" is not defined for the purposes of the section.

SECT. 4.—*Miscellaneous.*

SECT. 4. Miscellaneous.

1171. There are provisions in the Public Health Acts Amendment Act, 1907 (*o*), which may be brought into force in certain areas, with or without modification, as in that Act provided (*p*), prohibiting, under penalties, the holding of a wake over the body of any person who has died of infectious disease (*q*). Prohibition of wake.

1172. Special provisions are made by orders of the Local Government Board with regard to the disposal of the bodies of persons dying of cholera, yellow fever, or plague on board ships detained in quarantine (*r*). Deaths on ships in quarantine.

Part XV.—Disinterment of Dead Bodies.

1173. As there is no property in a corpse, it cannot be the subject of larceny (*s*); but it is a common law misdemeanour to disinter a dead body without lawful authority, whether for the purpose of dissection or sale or other indignity (*t*), or even for a pious and laudable purpose (*a*). Unauthorised disinterment.

1174. Except in cases where a body is removed from one consecrated place of burial to another by faculty, it is unlawful to remove any body, or the remains of any body, which may have been interred in any place of burial, without licence of a Secretary of State, or without observing such precautions as may be prescribed by the Secretary of State as the condition of such licence; and any person who removes any such body or remains contrary to this provision, or who neglects to observe the precautions prescribed Licence of Secretary of State.

(*o*) 7 Edw. 7, c. 53.

(*p*) See *ibid.*, s. 3.

(*q*) *Ibid.*, s. 68. For the purposes of the Act "infectious disease," by s. 13, means any infectious disease to which the Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), for the time being applies within the district of the local authority, *i.e.*, any of the specific diseases mentioned on p. 552, *ante*, and any other infectious disease to which the Act of 1889 may have been duly applied. See ss. 6, 7 of the Act of 1889.

(*r*) See art. 17 of the Regulations of the Local Government Board dated September 9, 1907, made under s. 130 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the amending enactments, with regard to cholera, yellow fever, and plague on ships arriving from foreign ports (Stat. R. and O., 1907, No. 710). Certain ports are excepted from the operation of that order, and are subject to special orders of similar character. See title PUBLIC HEALTH ETC.

(*s*) Compare *Haynes's Case* (1614), 12 Co. Rep. 113. It was, however, at one time felony to steal dead bodies for the purpose of witchcraft (stat. 1 Jac. 1, c. 12, repealed by the Witchcraft Act, 1735 (9 Geo. 2, c. 5). As a corpse cannot possess property, the shroud in which it is buried remains the property of him in whom it was when wrapped round the dead body, and should be so described in an indictment for stealing the shroud after burial (*Haynes's Case, supra*).

(*t*) *R.* v. *Lynn* (1788), 2 Term Rep. 733; *Foster* v. *Dodd* (1867), L. R. 3 Q. B. 67, *per* BYLES, J., at p. 77.

(*a*) *R.* v. *Sharpe* (1857), Dears. & B. 160.

PART XV. Disinterment of Dead Bodies.

as the condition of the licence, is liable on summary conviction to a penalty not exceeding £10 (*b*).

1175. It is an offence against ecclesiastical law to remove the remains of the dead from consecrated ground without a faculty in that behalf (*c*).

Removal from consecrated ground.

Faculties are frequently granted to authorise the removal of the remains of the dead from one consecrated place of burial to another. And in a proper case a faculty will even issue for the removal of a dead body from consecrated to unconsecrated ground (*d*).

Considerations governing grant of faculty.

On an application for a faculty for the removal of a body from one place of burial to another consideration will be paid to the expressed wishes of the deceased as to the place of burial (*e*).

Removal for sanitary reasons.

In a proper case a faculty will also be decreed for the removal of remains from consecrated ground for sanitary reasons, and provisions will be inserted in the faculty authorising members of families whose relatives are buried therein to remove the remains of their relatives to any consecrated ground selected by them (*f*).

Purposes for which faculty granted.

The jurisdiction of the ordinary to grant a faculty for the disinterment of remains is not confined to cases where the purpose is to remove such remains to another place of burial. It extends to cases where the exhumation is required for purposes of identification (*g*), or for the purpose of taking out of the coffin papers etc. which have been buried with the dead body (*h*).

Effect of faculty.

1176. A faculty for the disinterment of a dead body, though it prevents the disinterment of the body from being an ecclesiastical offence or, it would seem, an offence at common law, does not dispense with statutory restrictions upon the disinterment of the dead. Consequently, where such a faculty has been obtained in a

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(*b*) Burial Act, 1857 (20 & 21 Vict. c. 81), s. 25.

(*c*) *Adlam* v. *Colthurst* (1867), L. R. 2 A. & E. 30; and see *Foster* v. *Dodd*, (1867) L. R. 3 Q. B. 67, *per* BYLES, J., at p. 77.

(*d*) *Re Talbot*, [1901] P. 1, where a faculty was granted to the superior of a college for the removal of the remains of a former superior from a churchyard to a vault in unconsecrated ground under the college chapel; and the court pointed out that, since by the provisions of s. 25 of the Burial Act, 1857 (20 & 21 Vict. c. 81), above referred to, the removal of dead bodies from unconsecrated places of burial has been subjected to the control of the Secretary of State, the objection to the grant of a faculty for the removal of remains to unconsecrated ground formerly arising from the absence of adequate protection against their disturbance no longer exists. The faculty was granted subject to a condition that it should not be acted upon until a licence from the Secretary of State had been obtained. See note (*k*), p. 555, *post*.

(*e*) See *Re Dixon*, [1892] P. 386, *per* Dr. TRISTRAM, at pp. 391, 392, referring, *inter alia*, to an unreported case of *Smith* v. *Roberts*. In *Re Dixon*, *supra*, the court refused a faculty for the disinterment of a body that had been buried for eighteen years in consecrated ground in order that it might be cremated, although the deceased had expressed a wish that his wife, at whose instance the faculty was applied for, should have the option either of burying or cremating his remains.

(*f*) *St. Helen's, Bishopsgate, with St. Mary Outwich (Rector etc.)* v. *Parishioners*, [1892] P. 259.

(*g*) *Re Pope (Sarah)* (1851), 15 Jur. 614; *R.* v. *Tristram (Dr.)* (No. 1), [1898] 2 Q. B. 371.

(*h*) *Re Hall (Edward)* (1893), not reported, cited in *R.* v. *Tristram (Dr.)* (No. 1), *supra*, at p. 373.

case where the disinterment is desired for a purpose other than that of the removal of the body from one consecrated place of burial to another, the disinterment cannot lawfully take place unless, in addition to the faculty, the licence of a Secretary of State (*i*) has been obtained; but it is not essential to the validity of the faculty that it should contain a clause providing that it is not to be acted upon unless a licence is obtained (*k*). The Ecclesiastical Court has no jurisdiction to insert in a faculty for the disinterment of a dead body buried in the consecrated part of a cemetery belonging to a cemetery company an order requiring the company to disinter or permit the disinterment of the body (*l*).

Revocation of faculty.

1177. If a faculty for the removal of human remains from consecrated ground has been obtained by misrepresentation, or if the permission thereby granted be exceeded, the Ecclesiastical Court may revoke the faculty and order the remains removed to be decently reinterred in their original position (*m*).

Coroner's order.

1178. By the common law a coroner may order a body to be disinterred within a reasonable time after death either for the purpose of taking an original inquisition where none has been taken, or a further inquisition where the first was insufficient (*n*).

Part XVI.—Registration of Burials.

SECT. 1.—*Burials in Churchyards etc.*

Register to be kept.

1179. Registers of burials solemnised according to the rites of the Church of England within all parishes or chapelries in England, whether subject to the ordinary or peculiar or other jurisdiction, are to be made and kept by the rector, vicar, curate, or officiating minister of every parish, or of any chapelry where the ceremony of burial has been usually and may according to law be performed, for the time being, in books to be provided for the purpose (*o*).

(*i*) Under s. 25 of the Burial Act, 1857 (20 & 21 Vict. c. 81), referred to pp. 553, 554, *ante*.

(*k*) *R.* v. *Tristram* (*Dr.*) (No. 1), [1898] 2 Q. B. 371; *R.* v. *Tristram* (*Dr.*) (No. 2) (1899), 80 L. T. 414, where the High Court did not accept the view expressed by Dr. TRISTRAM in *Druce* v. *Young*, [1899] P. 84, that the faculty might be acted upon without a licence from the Secretary of State.

(*l*) *R.* v. *Tristram* (*Dr.*) (No. 2), *supra*.

(*m*) *St. Pancras Vestry* v. *St. Martin-in-the-Fields* (*Vicar etc.*) (1860), 6 Jur. (N. S.) 540.

(*n*) Stanforde's Les Pleas del Coron. 51; Hale's Summary, p. 170; 2 Hawk. P. C., c. 9, s. 23. It is still undecided whether the licence of a Secretary of State is necessary to legalise the disinterment of a corpse under a coroner's order. See also title CORONERS.

(*o*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 1. This Act, which forms the basis of the existing law with regard to the registration of burials, originally provided for the keeping of registers of baptisms, marriages, and burials, but now applies only to registers of baptisms and burials, having been repealed as regards the registration of marriages by the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 1. Its chief object appears from the preamble to have been to facilitate proof of pedigree. The chapelries in which

SECT. 1. Burials in Church-yards etc.

The books are to be provided from time to time by the churchwardens or chapelwardens of each parish or chapelry, at the expense of the parish or chapelry (*p*), on the requisition of the rector etc., and must apparently be obtained from the King's Printers. Detailed provisions are made as to the form of such books and of the entries to be made therein (*q*).

Duty to make entries.

It is the duty of the rector etc. as soon as possible after the burial (and in no case, unless prevented by sickness or other unavoidable impediment, later than within seven days thereafter) to record and enter in a fair and legible handwriting in the register book the several particulars contained in the prescribed form, *i.e.*, "name," "abode," "when buried," "age," "by whom the ceremony was performed," and to sign the entry (*r*).

Burial elsewhere than in churchyard etc.

1180. If the ceremony is performed in any other place than the parish church or churchyard of any parish or the chapel or chapel yard of any chapelry providing its own distinct registers, and is performed by a minister not being the rector, vicar, minister, or curate of such parish or chapelry, the minister who performs the ceremony must on the same or the next day transmit to the rector, vicar, or other minister of the parish or chapelry, or his curate, a certificate of the burial in a statutory form, and the rector, vicar, minister, or curate of the parish or chapelry must thereupon enter the burial, according to the certificate, in the register, adding to the entry, "according to the certificate of the Rev. , transmitted to me on the day of " (*s*).

Burial in extra-parochial place.

In all cases of burial according to the rites of the Established Church in any extra-parochial place where there is no church or chapel, it is lawful for the officiating minister within one month after the burial to deliver to the rector, vicar, or curate of such parish immediately adjoining the place where the burial takes place as the ordinary shall direct, a memorandum of the burial signed by the person employed about the same, together with two of the persons attending the same; the memorandum is to contain all such particulars as are required for filling in the register; and every such memorandum delivered to the rector, vicar, or curate of such adjoining parish or chapelry is to be entered in the register of his parish and to form part thereof (*t*).

registers are to be kept under s. 1 of the Act are there described as chapelries "where the ceremonies of baptism, marriage, *and* burial" have been usually performed etc.; but these words must doubtless be read disjunctively. Neither "parish" nor "chapelry" is defined for the purpose of the Act.

(*p*) The fund out of which the expense is to be met is not specified.

(*q*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), ss. 1—3; see Encyclopædia of Forms, Vol. III., p. 135. The provision of the register books appears to be an ecclesiastical purpose, so that the duties of churchwardens in the matter are not affected by the transfers of the civil functions of churchwardens that have taken place under the Local Government Act, 1894 (56 & 57 Vict. c. 73).

(*r*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 3.

(*s*) *Ibid.*, s. 4. It is expressly provided by s. 16 of the Burial Act, 1857 (20 & 21 Vict. c. 81), that s. 4 of the Act of 1812 shall not apply in the case of burial in a burial ground provided under the Burial Acts.

(*t*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 10.

SECT. 1. Burials in Churchyards etc.

1181. The register books, and also all register books in use before the Parochial Registers Act, 1812 (*a*), are to be deemed to belong to the parish or chapelry, and are to be kept by and remain in the power and custody of the rector, vicar, curate, or other officiating minister thereof (*b*).

Custody of books.

The books are to be kept in a dry well-painted iron chest, to be provided and repaired as occasion may require at the expense of the parish or chapelry (*c*); and detailed provisions are made for the care of the chest, and the constant keeping of the books in it under lock and key, except when temporarily removed for certain specified purposes, such as making fresh entries and inspection (*d*).

Searches and certified copies.

1182. Every rector, vicar, or curate who has the keeping for the time being of any register book of burials must at all reasonable times allow searches to be made of any register book in his keeping, and must give a copy certified under his hand of any entry or entries in the same on payment of the fees following: for every search extending over a period not more than one year, one shilling, and sixpence additional for every additional year; and two shillings and sixpence for every single certificate (*e*). The copy is subject to stamp duty of one penny, payable by the person requiring the copy. An adhesive stamp, which must be cancelled by the person signing the copy before he delivers it out of his hands, custody, or power, may be used (*f*).

(*a*) There were statutory provisions for the keeping of registers of burials before the Act of 1812; but these provisions, though not repealed by that Act, have since been repealed. The practice of keeping such registers, moreover, dates back to a time prior to the first statutory provisions on the subject. See Phillimore, Ecclesiastical Law, 2nd ed., pp 496, 497.

(*b*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 5. The Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 17 (8), which made new provision as to the custody of parish documents in rural parishes, expressly preserves the existing law as to the custody of registers of burials.

(*c*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 5. There is no provision as to the person by whom the chest is to be provided, nor as to the fund out of which the expense is to be met. It has been suggested, but apparently without good ground, that the enactment in the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (c) (ii.), transferring the functions of the churchwardens and overseers as to the provision of a "parish chest," refers to this iron chest.

(*d*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 5.

(*e*) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 35. The section provides that "every rector, vicar, or curate, and every registrar, registering officer, and secretary, who shall have the keeping for the time being of any register book of births, deaths, or marriages," shall allow searches etc. But it is obvious that the expression "register of deaths" in the section must include registers of burials kept by rectors etc., as these persons keep no registers of deaths as distinguished from registers of burials; and the section is treated as applicable to registers of burials kept by rectors etc. in the Burial Act, 1853 (16 & 17 Vict. c. 134), s. 8, and the Registration of Burials Act, 1864 (27 & 28 Vict. c. 97), s. 6. See title EVIDENCE.

(*f*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 64, and Schedule, Copy or Extract, Certified. These provisions impose a stamp duty of 1*d.* on any certified copy of or extract from a register of births, baptisms, marriages, deaths, or burials, subject to some exemptions which appear not to apply to the copies of registers of burials to be furnished under the provisions above referred to.

SECT. 1. Burials in Churchyards etc.

1183. Provisions are made for the annual transmission of copies of entries in the register to the registrar of the diocese, and for the preservation of such copies by the registrar (*g*), of which the effect is as follows:—

Copies for diocesan registrar.

Two months after the end of every year (December 31) copies of all the entries of burials which took place during the preceding year are to be made by the rector etc. or under his direction, and to be verified and signed by him in a specified manner, and his signature is to be attested by the churchwardens or chapelwardens, who are, on or before June 1, to transmit these copies to the registrar of the diocese, or if, owing to the default of the rector etc. in duly verifying and signing the copies, they cannot do so, to certify to that effect to the registrar. The registrar is to cause the copies transmitted to him to be arranged and indexed, and is to preserve them; and the copies with the indices are to be open to public search on payment of the usual fees (*h*). The registrar is to report annually to the bishop with regard to the transmission of the copies to him.

Fees; penalties, etc.

1184. Besides the provisions above referred to, the Parochial Registers Act, 1812, contains a section preserving the existing law as to fees payable to any minister in respect of the performance of the duties with which the Act deals (*i*); a section providing for the application of pecuniary penalties (*k*); and a section providing for the extension of the Act to cathedral and collegiate churches and college and hospital chapels and burial grounds belonging thereto (*l*).

Correction of errors.

1185. The rector, vicar, curate, or officiating minister of any parish, district parish, or chapelry, who discovers any error in the form or substance of the entry in the register of any burial by him solemnised, may, within one calendar month after the discovery of the error, in the presence of two persons who attended at the burial, or in case of the death or absence of such persons, then in the presence of the churchwardens or chapelwardens, correct the entry, according to the truth of the case, by entry in the margin of the register, without any alteration or obliteration of the original entry, and sign the entry in the margin, adding the date when the correction is made. The correction and signature are to be attested by the persons in whose presence they are directed to be made, and in the copy of the register transmitted to the registrar of the diocese the rector, vicar, curate, or officiating minister is to certify the corrections so made by him (*m*).

(*g*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), ss. 6—9, 11, 12.

(*h*) It is possible that s. 35 of the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), applies to the inspection of these copies; see note (*e*), p. 557, *ante*.

(*i*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 16. It is difficult to see how there can be any right to such fees, seeing that the duties are statutory, and the statute does not provide for the payment of fees.

(*k*) *Ibid.*, s. 18. The Act does not impose any pecuniary penalties.

(*l*) *Ibid.*, s. 20.

(*m*) Forgery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 66), s. 21. The section is expressed as a proviso on earlier provisions of the Act (now repealed and replaced) imposing penalties for forgery etc. of registers, to the effect that if

SECT. 2.—*Burials in Burial Grounds, Cemeteries etc.*

SECT. 2. Burials in Burial Grounds, Cemeteries etc.

Registration.

1186. All burials in any burial ground provided under the Burial Acts, 1852 to 1906 (*n*), in any cemetery provided under the Public Health (Interments) Act, 1879 (*o*), in any cemetery provided under a local Act incorporating the Cemeteries Clauses Act, 1847 (*p*), so far as the special Act contains nothing to the contrary, or in any other burial ground (an expression for this purpose including a vault or other place where any body is buried) not subject to special statutory provisions as to the registration of burials, are to be registered in register books provided, as the case may be, by the burial authority, or the company, body, or persons to whom the cemetery or burial ground belongs, and kept for that purpose in accordance with the laws by which registers are to be kept by rectors, vicars, and curates of parishes or ecclesiastical districts (*q*).

Officer to keep register.

In the case of a cemetery under a local Act incorporating the Cemeteries Clauses Act, 1847 (*r*), or of a cemetery under the Public Health (Interments) Act, 1879 (*s*), for which a chaplain is still in office, the register book, as regards burials in the consecrated part

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the course stated in the text is followed, the rector etc. shall not be liable to such penalties.

(*n*) See p. 445, *ante*.

(*o*) 42 & 43 Vict. c. 31. See p. 506, *ante*.

(*p*) 10 & 11 Vict. c. 65. See p. 514, *ante*.

(*q*) Burial Act, 1853 (16 & 17 Vict. c. 134), s. 8; Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 32; Registration of Burials Act, 1864 (27 & 28 Vict. c. 97), ss. 1, 7. The Burial Act, 1853, s. 8, applies in terms to burial grounds provided under that Act or the Burial Act, 1852 (15 & 16 Vict. c. 85), but extends to all burial grounds provided under the Burial Acts by virtue of the incorporation of the more important of those Acts with each other. See p. 448, *ante*. The provisions of the Cemeteries Clauses Act, 1847, as to the registration of burials, are confined to burials in the consecrated part of the cemetery. Besides applying to burials in the consecrated part of a cemetery provided under a local Act incorporating the Act of 1847 so far as the local Act contains nothing to the contrary, they apply to burials in the consecrated part of a cemetery provided under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), if a chaplain appointed for the cemetery is still in office. See p. 510, *ante*. If, however, there is no chaplain in office for a cemetery under the Act of 1879, burials in the consecrated part of the ground are by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 7, to be registered in like manner and subject to the like provisions as burials in the unconsecrated part of the cemetery, that is, under the provisions of the Registration of Burials Act, 1864. The last-mentioned Act, by s. 1, applies to the registration of burials in any burial ground burials in which are not "now by law" required to be registered; and by s. 7 of that Act it is provided that "the term 'burial ground' includes a vault or other place where any body is buried." The Act of 1864 thus applies to burials in the unconsecrated part of a cemetery provided under a local Act incorporating the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), or in a cemetery provided under a local Act not incorporating the Act of 1847, in the absence of provisions in the local Act for the registration of such burials; to burials in cemeteries under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), except as regards the consecrated part of the ground in the cases above referred to where a chaplain appointed for the cemetery is still in office; and also, it seems, to any burial in private ground. As to the legality of such burials, see p. 512, *ante*. The law with regard to the keeping of registers of burials by rectors, etc. applied by the enactments above mentioned is stated at pp. 555, 556.

(*r*) 10 & 11 Vict. c. 65.

(*s*) 42 & 43 Vict. c. 31.

SECT. 2. Burials in Burial Grounds, Cemeteries etc.

of the ground, is to be kept by the chaplain of the cemetery (*t*). In other cases it is to be kept by an officer appointed to that duty by the burial authority or by the company, body, or persons to whom the burial ground or cemetery belongs, as the case may be (*u*).

Particulars to be inserted.

In the case of a burial ground provided under the Burial Acts it is required that in the register books shall be distinguished in what parts of the burial ground the several bodies the burials of which are entered in such register books are buried, and, where the whole of the burial ground is not consecrated, whether in the consecrated or unconsecrated portion; and where the burial ground has been provided for more than one parish, the register must be kept or indexed so as to facilitate searches for entries in the register books in respect of bodies from the several parishes (*w*).

Searches etc.

1187. The register books kept under the above provisions, both for burial grounds provided under the Burial Acts and for all other burial grounds, are as to searches therein and copies thereof and extracts therefrom subject to the regulations of the Births and Deaths Registration Act, 1836 (*x*), so far as those regulations relate to register books of burials kept by rectors, vicars, or curates (*y*).

Registers or copies etc. to be evidence.

1188. The register books kept under the foregoing provisions, or copies thereof or extracts therefrom, are to be received in all courts as evidence of the burials entered therein (*z*).

Copies for diocesan registrar.

1189. Copies or transcripts of the register books kept under the foregoing provisions must from time to time be sent to the registrar of the diocese to be kept with the copies of the register books of the parishes within the diocese (*a*).

Penalty for default.

1190. Where a register of burials is required to be kept by the Registration of Burials Act, 1864, wilful failure on the part of the company, body, or persons to whom the burial ground belongs, or

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(*t*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 32.

(*u*) Burial Act, 1853 (16 & 17 Vict. c. 134), s. 8; Registration of Burials Act, 1864 (27 & 28 Vict. c. 97), s. 2; and see note (*q*), p. 559, *ante*.

(*w*) Burial Act, 1853 (16 & 17 Vict. c. 134), s. 8; and see note (*q*), p. 559, *ante*.

(*x*) 6 & 7 Will. 4, c. 86.

(*y*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 33; Burial Act, 1853 (16 & 17 Vict. c. 134), s. 8; Registration of Burials Act, 1864 (27 & 28 Vict. c. 97), s. 6. As to the application of these enactments, see note (*q*), p. 559, *ante*. For the regulations of the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 35, see p. 557, *ante*.

(*z*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 32; Burial Act, 1853 (16 & 17 Vict. c. 134), s. 8; Registration of Burials Act, 1864 (27 & 28 Vict. c. 97), s. 5.

(*a*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 32; Burial Act, 1853 (16 & 17 Vict. c. 134), s. 8; Registration of Burials Act, 1864 (27 & 28 Vict. c. 97), s. 3. The sections are not equally explicit as to the sending of the copies. S. 32 of the Act of 1847 merely provides that the copies or transcripts of the register shall be sent; s. 8 of the Act of 1853 provides that copies or transcripts verified and signed by the officer appointed to the duty of keeping the register shall be sent; and s. 3 of the Act of 1864 provides that copies or transcripts shall from time to time be made, verified, and signed by the officer appointed to the duty of keeping the register and sent by him. As to the application of the several sections, see note (*q*), p. 559, *ante*.

any officer or person appointed by them to the duty of keeping the register, to fulfil the obligations imposed on them or him as above stated is punishable on summary conviction by a penalty for every such offence not exceeding £5 (*b*).

SECT. 2. Burials in Burial Grounds, Cemeteries etc.

SECT. 3.—*Burials in Consecrated Ground without Church of England Service.*

Registration of burials under Burial Laws Amendment Act, 1880.

1191. When any burial has taken place in the consecrated ground of a churchyard or graveyard without the rites of the Church of England under the Burial Laws Amendment Act, 1880, the person having the charge of or being responsible for such burial must on the day thereof, or the next day thereafter, transmit a certificate of such burial in the form scheduled to the Act or in a form to the like effect to the rector, vicar, incumbent, or other officiating minister in charge of the parish or district in which the churchyard or graveyard is situate or to which it belongs, or in the case of any burial ground or cemetery vested in a burial authority to the person required by law to keep the register of burials therein, who must thereupon enter such burial in the register of burials of such parish or district or of such burial ground or cemetery. Such entry, instead of stating by whom the ceremony of burial was performed, must state by whom the same is certified.

Default.

Any person wilfully making a false statement in such certificate, and any rector, vicar, minister, or other person as aforesaid receiving such certificate and refusing or neglecting duly to enter such burial in the register, is guilty of a misdemeanour (*c*).

A rector etc. refusing to enter such burial may be compelled by mandamus to make the entry (*d*).

SECT. 4.—*Destruction, Forgery, and Falsification of Register.*

Destroying or forging registers etc.

1192. It is a felony, for which the maximum punishment is penal servitude for life, unlawfully to destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any register of burials by law authorised or required to be kept or any part thereof, or any certified copy thereof or any part thereof, or to forge or fraudulently alter in any such register any entry relating to any burial or any part of such register, or any certified copy thereof or of any part thereof, or knowingly and unlawfully to insert or cause or permit to be inserted in such register or in any certified copy thereof any false entry of any matter relating to any burial, or

(*b*) Registration of Burials Act, 1864 (27 & 28 Vict. c. 97), s. 4. As to the application of this Act, see note (*q*), p. 559, *ante*. The section imposes the penalty if the company etc. "wilfully fail to comply with any of the provisions of this Act." There does not appear to be any corresponding provision with regard to registers of burials required to be kept under the Burial Acts or the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65).

(*c*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 10, and Sched. B., extended to cemeteries under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), by Burial Act, 1900 (63 & 64 Vict. c. 15), s. 9. As to burials under the Act of 1880, see pp. 424 *et seq.*, *ante*; and for the definition of "graveyard" for the purposes of that Act, see note (*f*), p. 424, *ante*.

(*d*) *R.* v. *Hall* (1881), 45 J. P. 436.

SECT. 4. Destruction, Forgery, and Falsification of Register.

knowingly and unlawfully to give any false certificate relating to any burial, or to certify any writing to be a copy or extract from any such register knowing such writing or the part of the register of which it is a copy or extract to be false in any material particular, or to forge or counterfeit the seal of, or belonging to, any register office or burial board, or to offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or any copy of any entry in any such register knowing the entry to be false, forged, or altered (*e*).

Making false entries etc.

It is also a felony, for which the maximum punishment is penal servitude for life, to do any of the following things to any copy of any register of burials directed or required by law to be transmitted to any registrar or other officer—that is to say, knowingly and wilfully to insert or cause or permit to be inserted therein any false entry of any matter relating to any burial, or to forge or alter, or to offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such copy; knowingly and wilfully to sign or verify any such copy which shall be false in any part thereof knowing the same to be false; unlawfully to destroy, deface, or injure any such copy; or for a fraudulent purpose to take any such copy from its place of deposit or to conceal it (*f*).

SECT. 5.—*Coroner's Order and Registrar's Certificate for Burial.*

Order on inquest by coroner for burial.

1193. A coroner upon holding an inquest upon any body may if he thinks fit, after view of the body, by order under his hand, authorise the body to be buried before verdict and before registry of the death, and in such case must deliver the order to the relative of the deceased or other person who causes the body to be buried, or to the undertaker or other person having charge of the funeral; but, except upon holding an inquest, no order, warrant, or other document for the burial of a body is to be given by a coroner (*g*).

A registrar of births, deaths, and marriages, upon registering any death, or upon receiving a written requisition to attend at a house to register a death, or upon receiving written notice of the occurrence of a death, accompanied by due medical certificate, must forthwith, or as soon after as he is required, give, without fee or reward, either to the person giving information concerning the death or sending the requisition or notice, or to the undertaker or other person having charge of the funeral of the deceased, a

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(*e*) Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 36. The Burial Act, 1857 (20 & 21 Vict. c. 81), s. 15, contains similar, though slightly less elaborate, provisions, expressed to apply with reference to "any register book of burials kept according to the provisions of this Act." The requirements of the Burial Acts as to the registration of burials are, however, contained, not in the Act of 1857, but in the Burial Act, 1853 (16 & 17 Vict. c. 134), s. 8. See p. 559, *ante*. As to forgery, see title CRIMINAL LAW AND PROCEDURE.

(*f*) Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 37. See further, title CRIMINAL LAW AND PROCEDURE.

(*g*) Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 17, as amended by Coroners Act, 1887 (50 & 51 Vict. c. 71), ss. 18 (6), 45 and Sched. III. As to coroners generally, see title CORONERS.

certificate under his hand that he has registered or received notice of the death, as the case may be.

SECT. 5. Coroner's Order and Registrar's Certificate for Burial.

Every such order of the coroner and certificate of the registrar is to be delivered to the person who buries or performs any funeral or religious service for the burial of the body of the deceased; and any person to whom such order or certificate was given by the coroner or registrar who fails so to deliver or cause to be delivered the same is liable on summary conviction to a penalty not exceeding forty shillings.

Order or certificate to be delivered to person performing service.

The person who buries or performs any funeral or religious service for the burial of any dead body as to which no order or certificate as above provided is delivered to him must within seven days after the burial give notice thereof in writing to the registrar, and if he fails so to do is liable on summary conviction to a penalty not exceeding £10 (*h*).

Notice to registrar of non-delivery.

1194. If, however, the body of the deceased is buried in consecrated ground without the rites of the Church of England under the Burial Laws Amendment Act, 1880, the order of the coroner or certificate of the registrar is to be delivered to the relative, friend, or legal representative of the deceased having the charge of or being responsible for the burial, instead of to the person who buries or performs any funeral or religious service for the burial of the body of the deceased; and any person to whom the order or certificate is given by the coroner or registrar who fails so to deliver or cause to be delivered the same is liable to a penalty not exceeding forty shillings; and any such relative, friend, or legal representative above mentioned to whom no such order or certificate is delivered must within seven days after the burial give notice thereof in writing to the registrar, and if he fails to do so is liable to a penalty not exceeding £10 (*i*).

Burial in consecrated ground without Church of England service.

SECT. 6.—*Still-born Children.*

1195. A person may not wilfully bury or procure to be buried the body of any deceased child as if it were still-born.

Child born alive not to be buried as still-born

A person who has control over or ordinarily buries bodies in any burial ground may not permit to be buried in such burial ground the body of any deceased child as if it were still-born, and may not permit to be buried or bury in such burial ground any still-born child, before there is delivered to him either—(a) a written certificate that such child was not born alive, signed by a registered medical practitioner who was in attendance at the birth or has examined the body of such child, or (b) a declaration signed by some person who would, if the child had been born alive, have been required by the Births and Deaths Registration Act, 1874, to give information concerning the birth, that is to say, the father or

Conditions of burial of child as still-born.

(*h*) Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), ss. 17, 45.
(*i*) Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 11, as amended by Burial and Registration Acts (Doubts Removal) Act, 1881 (44 & 45 Vict. c. 2), s. 2. As there is no express provision for the recovery of the penalties under these Acts, they appear only to be recoverable by action at the instance of the Crown. See *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354.

SECT. 6. Still-born Children.

mother, or the occupier of the house in which to his knowledge the child was born, or any person present at the birth, to the effect that no registered medical practitioner was present at the birth, or that his certificate cannot be obtained, and that the child was not born alive, or (c), if there has been an inquest, an order of the coroner.

Any person acting in contravention of any of these provisions is liable on summary conviction to a penalty not exceeding £10 (*k*).

SECT. 7.—*Coffins containing more than one Body.*

Particulars to be furnished to person performing service.

1196. Where there is in the coffin in which any deceased person is brought for burial the body of any other deceased person or the body of any still-born child, the undertaker or other person who has charge of the funeral must deliver to the person who buries or performs any funeral or religious service for the burial of such body or bodies notice in writing signed by such undertaker or other person, and stating to the best of his knowledge and belief with respect to each such body the following particulars: (a) if the body is the body of a deceased person, the name, sex, and place of abode of the said deceased person; (b) if the body has been found exposed, and the name and place of abode are unknown, the fact of the body having been so found and of the said particulars being unknown; and (c) if the body is that of a deceased child without a name, or a still-born child, the name and place of abode of the father, or, if it is illegitimate, of the mother of such child.

Every person failing to comply with any of these provisions is liable on summary conviction to a penalty not exceeding £10 (*l*).

Part XVII.—Mortuaries.

Power of elective burial boards to provide mortuaries.

1197. An elective burial board may, with the approval of the vestry or body having the powers of the vestry in this behalf (with the necessity for which approval the Local Government Board (*m*) have, however, power to dispense (*n*)), and subject to the provisions of the Burial Acts and the regulations to be made thereunder (*o*), hire, take on lease, or otherwise provide fit and proper places for the reception of bodies previous to interment, and make arrangements for the reception and care of bodies to be deposited therein, and for providing such places may exercise all the powers vested in them under the Burial Acts for providing a burial ground (*p*).

(*k*) Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), ss. 1, 18, 40 (3), 45.

(*l*) *Ibid.*, ss. 19, 45.

(*m*) Substituted for a Secretary of State by the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 4 and Sched. I.

(*n*) Burial Act, 1855 (18 & 19 Vict. c. 128), s. 6. See p. 461, *ante*.

(*o*) As to regulations under the Burial Acts, see p. 537, *ante*. No regulations of a general kind have been made under the Acts with regard to mortuaries.

(*p*) Burial Act, 1852 (15 & 16 Vict. c. 85), s. 42. As to the body to whom the functions of the vestry now attach where an elective burial board act for a rural parish or part of a rural parish, see pp. 493, 499, *ante*. There is no general

This power of providing a mortuary may be exercised also by authorities (other than elective burial boards) in whom the powers of a burial board are vested, and in some cases is exercisable without any approval on the part of a vestry or body substituted for a vestry (*q*).

Other authorities with similar power.

The enactment conferring the power above mentioned also enables a mortuary to be provided for a parish not under a burial board or an authority having the powers of a burial board, but there is some doubt as to the authority by whom and the manner in which this power is exercisable (*r*).

In parishes not under burial board.

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provision substituting any other body for the vestry for the purposes of the section in the case of an urban parish; and if, as is probably the better view, the approval of the vestry required is "in relation to any expense or rate" within s. 7 (3) of the Local Government Act, 1894 (56 & 57 Vict. c. 73), so that the power of approval is exercisable by the parish meeting in the case of a rural parish with a parish council, it follows that the power of approval could not be transferred from the vestry in the case of an urban parish by order under s. 33 of the Act of 1894.

(*q*) See pp. 485, 488, 490, 502, *ante*.

(*r*) The Burial Act, 1852 (15 & 16 Vict. c. 85), s. 42, gives the power to provide a mortuary, subject to the provisions of the Burial Acts and of the regulations to be made thereunder, not only to any burial board, but also to "the churchwardens and overseers of the poor of any parish [*in the metropolis*] for which a burial board shall not have been appointed under this Act, by the direction of the vestry," and provides that such churchwardens and overseers may exercise all such powers as under the Poor Relief Act, 1819 (59 Geo. 3, c. 12), or otherwise "the churchwardens and overseers of any parish not having a workhouse might exercise for providing a workhouse for such parish." The words referring to the metropolis were impliedly repealed by the Burial Act, 1853 (16 & 17 Vict. c. 134), s. 7, and expressly by the Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56), s. 1 and Sched. I. At the time when the Burial Act, 1852, was passed, the powers of the churchwardens and overseers under the Poor Relief Act, 1819, for the provision of workhouses had by the Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), s. 4, been declared to be exercisable, under the control and subject to the rules etc. of the Poor Law Commissioners (afterwards the Poor Law Board and now the Local Government Board), by the overseers (including the churchwardens as *ex officio* overseers, see *ibid.*, s. 9) in any parish not under a board of guardians, and by the guardians of any union or parish formed or established by virtue of any Act of Parliament. In 1852, though there were still numerous parishes elsewhere not under any board of guardians, there appears to have been no longer any such parish in the metropolis. Consequently there was no parish to which, as originally passed, the Act of 1852 applied, in which the churchwardens and overseers had actually any power to provide a workhouse under the Act of 1819. S. 42 of the Act of 1852 refers, however, not to the powers which the churchwardens and overseers "exercise," but to those which they "might exercise," and must, doubtless, be read as meaning that the churchwardens and overseers shall, for the purpose of providing a mortuary, have the powers that they would have under the Act of 1819 and otherwise for providing a workhouse if their parish were not under a board of guardians. Ss. 8—10 of the Act of 1819, which empowered churchwardens and overseers to provide workhouses, are repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), but under the provisoes to that Act are still in force for the purposes of s. 42 of the Burial Act, 1852. The other enactments as to the provision of workhouses by churchwardens and overseers still in force are—Poor Relief Act, 1601 (43 Eliz. c. 2), s. 4 (s. 5 in some editions of the Statutes); Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 21, 23; Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69); and Union and Parish Property Act, 1837 (7 Will. 4 & 1 Vict. c. 50). See also Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58), s. 14; Commons Act, 1899 (62 & 63 Vict. c. 30), s. 22 and Sched. I.

It remains to be considered, in the view of the effect of s. 42 of the

PART XVII. Mortuaries.

Powers of local authorities under Public Health Acts.

1198. Any local authority under the Public Health Acts may, and if required by the Local Government Board must, and every sanitary authority in London must, provide and fit up a mortuary, *i.e.*, a proper place for the reception of dead bodies before interment, and may make bye-laws with respect to the management and charges for use of the same. They may also provide for the decent and economical interment, at charges to be fixed by such bye-laws, of any dead body which may be received into a mortuary (*s*).

Buildings for conduct of *post-mortem* examinations.

1199. A local authority under the Public Health Acts may provide and maintain a proper place (otherwise than at a workhouse or at a mortuary) for the reception of dead bodies during the time required to conduct any *post-mortem* examination ordered by a coroner or other constituted authority, and may make regulations with respect to the management of such place (*t*); and a sanitary authority in London may, and (except in the case of the Common Council of the City (*u*)), if required by the London County Council, must, provide and maintain a proper building (otherwise than at a workhouse) for the reception of dead bodies during the time required to conduct any *post-mortem* examination ordered by a coroner or other constituted authority, and may make regulations

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Burial Act, 1852, taken above, in whom the powers of the vestry and churchwardens and overseers under consideration are now vested. In the case of a rural parish with a parish council the powers of the vestry appear to be vested in the parish council under s. 6 (1) (a) of the Local Government Act, 1894 (56 & 57 Vict. c. 73), for s. 7 (3) of that Act, substituting the parish meeting for the vestry for certain purposes of the Burial Acts, appears only to apply where the Burial Acts have been adopted. By s. 6 (1) (e) (iii.) of the Act of 1894, the powers of the churchwardens and overseers as to the "holding or management of parish property" are in such a parish transferred to the parish council; but these powers would not seem to include the powers of the churchwardens and overseers for the provision of a mortuary.

The best view accordingly seems to be that in a rural parish with a parish council the powers in question are exercisable by the overseers alone (see *ibid.*, s. 5 (2)) under the direction of the parish council. Possibly, however, the conveyance of the land acquired should be made to the parish council. Similarly it seems that in the case of a rural parish not under a parish council the powers would be exercisable by the overseers alone under the direction of the parish meeting. See *ibid.*, s. 19 (4). In the case of an urban parish, in the absence of an order under *ibid.*, s. 33, affecting the matter, the power would still be exercisable by the churchwardens and overseers under the direction of the vestry. In the county of London the powers in question for the provision of a mortuary appear to attach in all cases to the metropolitan borough council. See Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 8; Metropolis Management Amendment Act, 1856 (19 & 20 Vict. c. 112), s. 3; London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 4, 23 (3).

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 141; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 88. As to the removal of the bodies of persons dying of infectious diseases to such mortuaries, see pp. 549 *et seq.*, *ante*. The Local Government Board have issued a series of model bye-laws for mortuaries under the Act of 1875 (series 15). See Mackenzie and Handford, Model Bye-laws, p. 507.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 143.

(*u*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 133. The Common Council are the sanitary authority for the City in succession to the City Commissioners of Sewers under the City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.).

with respect to the management of such building. The building may be provided in connection with a mortuary, but this provision does not authorise the conducting of any *post-mortem* examination in a mortuary (*a*).

Coroner's order for removal.

A coroner may order the removal of a dead body to or from a place so provided for the purpose of conducting a *post-mortem* examination (*b*).

Arrangements between several authorities.

Any sanitary authorities in London may, with the approval of the London County Council, execute their duty with respect to mortuaries and buildings for *post-mortem* examinations by combining for that purpose, or by contracting for the use by one of the contracting authorities of any such mortuary or building provided by another of such contracting authorities, upon terms to be agreed upon (*c*). Similar arrangements might be made by local authorities under the Public Health Acts under their general powers of combination for the purposes of those Acts (*d*).

Borrowing powers.

Borrowing powers are available to local and sanitary authorities for the above purposes (*e*).

Accommodation for inquests in London.

The London County Council are required to provide and maintain proper accommodation for the holding of inquests, and may, by agreement with a sanitary authority, provide and maintain the same in connection with a mortuary or a building for *post-mortem* examinations provided by that authority, or with any building belonging to that authority, and may do so on such terms as may be agreed on with the authority (*f*).

Reception of unidentified dead bodies in London.

1200. The London County Council are also empowered to provide and fit up one or two buildings as mortuaries for the reception, under a coroner's order, of unidentified dead bodies found in London (*g*).

(*a*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 90.
(*b*) Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 24.
(*c*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 91.
(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 285.
(*e*) The general borrowing powers of the Public Health Act, 1875 (see *ibid.*, ss. 233—244), are available for the provision of a mortuary or place for *post-mortem* examinations under that Act, as for other purposes of the Act; see title LOCAL GOVERNMENT. The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 105 (2) (c), expressly enables sanitary authorities in London to borrow for the purpose.
(*f*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 92. See title CORONERS.
(*g*) *Ibid.*, s. 93. The section contains somewhat detailed provisions as to such buildings, the reception etc. of dead bodies therein, and the holding of inquests over such dead bodies.

Part XVIII.—Cremation.

SECT. 1. Statutory Provisions.

SECT. 1.—*Statutory Provisions.*

SUB-SECT. 1.—*Introductory.*

Statutory regulation of cremation.

1201. It is not unlawful at common law to burn a dead body instead of burying it, provided that the burning is done in such a manner as not to amount to a nuisance (*h*). But the place and manner and conditions of burning are now defined by the Cremation Act, 1902 (*i*), and the regulations made by the Home Secretary under that Act, and it is an offence to effect any cremation in contravention thereof (*j*).

Definitions.

1202. In the Cremation Act, 1902, "burial authority" is defined as meaning any burial board, any council, committee, or other local authority having the powers and duties of a burial board, and any local authority maintaining a cemetery under the Public Health (Interments) Act, 1879 (*k*), or under any local Act; and "crematorium" is defined as meaning any building fitted with appliances for the purpose of burning human remains, and as including everything incidental or ancillary thereto (*l*).

SUB-SECT. 2.—*Crematoria.*

Provision by burial authority.

1203. The powers of a burial authority to provide and maintain burial grounds or cemeteries, or anything essential, ancillary, or incidental thereto, extend to and include the provision and maintenance of crematoria; but no human remains may be burned in any such crematorium until the plans and site thereof have been approved by the Local Government Board, and until the crematorium has been certified by the burial authority to the Secretary of State to be complete, built in accordance with such plans, and properly equipped for the purpose of the disposal of human remains by burning (*m*).

Approval of plans etc.

(*h*) *R.* v. *Price* (1884), 12 Q. B. D. 247; *R.* v. *Stephenson* (1884), 13 Q. B. D. 331.

(*i*) 2 Edw. 7, c. 8.

(*j*) *Ibid.*, s. 8; and see p. 575, *post*.

(*k*) 42 & 43 Vict. c. 31.

(*l*) Cremation Act, 1902 (2 Edw. 7, c. 8), s. 2. The definition of "burial authority" is the same as that in the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 11. See p. 450, *ante*.

(*m*) Cremation Act, 1902 (2 Edw. 7, c. 8), s. 4. It will be observed that the section leaves the provision of a crematorium optional. A burial board or an authority with the powers of a burial board are bound, under s. 25 of the Burial Act, 1852 (15 & 16 Vict. c. 85), to provide a burial ground, unless they avail themselves of the alternative of contracting with a cemetery company for interments under s. 26 of that Act. See p. 460, *ante*. Such a burial authority consequently, though they may provide a crematorium in addition to a burial ground, cannot provide a crematorium in substitution for a burial ground. Similarly a local authority within the meaning of the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), can only provide a crematorium in addition to, but not in substitution for, a burial ground, since it is only where such a local authority are maintaining a burial ground that they come within the definition of "burial authority."

A crematorium may not be constructed nearer to any dwelling-house than 200 yards, except with the consent in writing of the owner, lessee, and occupier of such house, nor within fifty yards of any public highway, nor in the consecrated part of the burial ground of any burial authority (*n*). Statutory Provisions. Position.

A burial authority may accept a donation of land for the purpose of a crematorium, and a donation of money or other property for enabling them to acquire, construct, or maintain a crematorium (*o*). Donations.

SUB-SECT. 3.—*Incumbents and Coroners.*

1204. The incumbent of any ecclesiastical parish is not, with respect to his parishioners or persons dying in his parish, under any obligation to perform a funeral service before, at, or after the cremation of their remains, within the ground of a burial authority, but upon his refusal so to do any clerk in holy orders of the Established Church not being prohibited under ecclesiastical censure may, with the permission of the bishop and at the request of the executor of the deceased person, or of the burial authority or other person having charge of the cremation or interment of the cremated remains, perform such service within such ground (*p*). Incumbent not bound to perform service.

1205. Nothing in the Cremation Act, 1902, is to interfere with the jurisdiction of any coroner, or authorise a burial authority to create or permit a nuisance (*q*). Saving for coroners; liability for nuisance.

SUB-SECT. 4.—*Fees.*

1206. A burial authority may demand payment of any such charges or fees for the burning of human remains in any crematorium provided by them as may be authorised by any table approved by the Local Government Board, and such charges or fees, and any other expenses properly incurred in or in connection with the cremation of a deceased person, are to be deemed to be part of the funeral expenses of the deceased (*r*). Fees charged.

In any table of fees respecting burials to be made or approved by the Secretary of State, a fee may be fixed in respect of a burial service before, at, or after cremation, and if no fee is fixed, the fee, if any, fixed in respect of a burial service applies (*s*). Minister's fees.

(*n*) Cremation Act, 1902 (2 Edw. 7, c. 8), s. 5. The distance of 200 yards is to be measured as the crow flies (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 34) from the walls of the dwelling-house, not from the boundary of the curtilage adjoining the house (*Wright* v. *Wallasey Local Board* (1887), 18 Q. B. D. 783). For the meaning of "any public highway," see title HIGHWAYS, STREETS AND BRIDGES.

(*o*) Cremation Act, 1902 (2 Edw. 7, c. 8), s. 6.

(*p*) *Ibid.*, s. 11.

(*q*) *Ibid.*, s. 10. It is a misdemeanour at common law to burn or otherwise dispose of a dead body with intent thereby to prevent the holding upon such body of an intended inquest where the inquest is one which the coroner has jurisdiction to hold (*R.* v. *Price* (1884), 12 Q. B. D. 247; *R.* v. *Stephenson* (1884), 13 Q. B. D. 331).

(*r*) Cremation Act, 1902 (2 Edw. 7, c. 8), s. 9. As to funeral expenses, see pp. 406, 407, *ante*.

(*s*) *Ibid.*, s. 12. As to such table of fees, see Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3; and pp. 479, 480,

SECT. 1. Statutory Provisions.

Payment to incumbents.

If the ashes of any cremated body are disposed of or interred by a statutory cemetery company, the company are in some cases required to pay fees to the incumbent and clerk of the parish or ecclesiastical district from which the body of the deceased was removed for cremation (*a*).

SUB-SECT. 5.—*Repeal of certain Enactments.*

Substitution for existing provisions.

1207. By virtue of the Cremation Act, 1902, any provisions in any previous local and personal Act for the like purpose as that Act and any bye-laws or regulations made thereunder, so far as they related to that purpose, ceased to be in operation as from the date when regulations under that Act came into force, *i.e.*, August 11, 1903 (*b*).

SECT. 2.—*Regulations for Cremation.*

SUB-SECT. 1.—*Definitions.*

Definitions.

1208. For the purposes of the Cremation Regulations, 1903 (*c*), the expression "cremation authority" means any burial authority or any company or person by whom a crematorium has been established; and "medical referee" means a medical referee or deputy medical referee appointed in pursuance of the provisions in the regulations in that behalf (*d*).

Other expressions in the regulations have, unless the contrary intention appears, the same respective meanings as in the Cremation Act, 1902 (*e*).

SUB-SECT. 2.—*Maintenance and Inspection of Crematoria.*

Maintenance.

1209. Every crematorium must be (1) maintained in good working order, (2) provided with a sufficient number of attendants,

(*a*) Cremation Act, 1902 (2 Edw. 7, c. 8), s. 13, by which ss. 52 and 57 of the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65) (as to which see pp. 522, 523, *ante*), and any similar provisions in any local and personal Act authorising the making of a cemetery, are to apply to the disposition or interment of the ashes of a cremated body as if it were the burial of a body.

(*b*) Cremation Act, 1902 (2 Edw. 7, c. 8), s. 14; and see note (*c*), *infra*.

(*c*) The regulations referred to in the present section are contained in an order of the Home Secretary (Stat. R. and O. Rev., 1904, Vol. IV., "Cremation (England)") dated March 31, 1903, and made under s. 7 of the Cremation Act, 1902 (2 Edw. 7, c. 8). That section empowers the Secretary of State to make regulations with regard to various matters there enumerated in connection with cremation, and provides that a copy of regulations so made shall be laid before both Houses of Parliament, and that, after having lain for forty days before Parliament, they shall, unless an address is presented by either House praying His Majesty to withhold assent therefrom, have effect as if enacted in the Act. The Regulations of 1903 were duly laid before Parliament, and, no address having been presented against them, came into force on May 11, 1903, when they had lain before Parliament for forty days. In view of the provision that the regulations shall have effect as if enacted in the Act, they must be taken conclusively to be *intra vires* (*Institute of Patent Agents* v. *Lockwood*, [1894] A. C. 347). The regulations have no short title, and are referred to in the present part of this title as the Cremation Regulations, 1903.

A schedule to the regulations contains a series of forms for the certificates etc. required by the regulations in connection with cremation. The regulations do not contemplate any departure from the prescribed forms, for they prescribe the use of the scheduled forms in absolute terms, and not only the use of these forms or forms to the like effect.

(*d*) **Cremation Regulations, 1903, preliminary provisions.**

(*e*) **Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 31.**

and (3) kept constantly in a cleanly and orderly condition. But a crematorium may be closed by order of the cremation authority if not less than one month's notice be given by advertisement in two papers circulating in the locality, and by written notice fixed at the entrance to the crematorium. The cremation authority must give notice in writing to the Secretary of State of the opening or closing of any crematorium (*f*).

Inspection.

Every crematorium must be open to inspection at any reasonable time by any person appointed for that purpose by the Secretary of State or by the Local Government Board (*g*).

SUB-SECT 3.—*Conditions under which Cremation may take place.*

Notice of opening of crematorium.

1210. No cremation of human remains may take place except in a crematorium of the opening of which notice has been given to the Secretary of State (*h*).

When cremation unlawful.

It is not lawful to cremate the remains of any person who is known to have left a written direction to the contrary, or to cremate human remains which have not been identified (*i*).

Registration of death.

No cremation is to be allowed until the death of the deceased has been duly registered, except where an inquest has been held and a certificate given by a coroner (*k*).

Application for cremation.

No cremation is to be allowed to take place unless application therefor be made, and the particulars stated in the application be confirmed by statutory declaration. Such application must be signed and the statutory declaration made by an executor or by the nearest surviving relative of the deceased, or, if made by any other person, must show a satisfactory reason why the application is not made by an executor or by the nearest surviving relative (*l*).

Certificates etc.

1211. No cremation is to be allowed to take place unless (1) a certificate be given by a registered medical practitioner who has attended the deceased during his last illness, and who can certify definitely as to the cause of death, and a confirmatory medical certificate be given by another medical practitioner, who must be qualified as hereinafter mentioned (*m*), or (2) a *post-mortem* examination has been made by a medical practitioner expert in pathology, appointed by the cremation authority (or in case of emergency appointed by the medical referee), and a certificate given by him (*n*), or (3) an inquest has been held and a certificate has been given by the coroner (*o*). And no cremation may, in any case, take place except on the written authority of the medical referee (*p*).

Confirmatory certificate.

The confirmatory medical certificate above mentioned, if not

(*f*) Cremation Regulations, 1903, r. 1.
(*g*) *Ibid.*, r. 2.
(*h*) *Ibid.*, r. 3.
(*i*) *Ibid.*, rr. 4, 5.
(*k*) *Ibid.*, r. 6. For the prescribed form, see *ibid.*, Schedule, Form E.
(*l*) *Ibid.*, r. 7. For the prescribed form, see *ibid.*, Schedule, Form A.
(*m*) *Ibid.*, r. 8. For the prescribed forms, see *ibid.*, Schedule, Forms B and C.
(*n*) *Ibid.* For the prescribed form, see *ibid.*, Schedule, Form D.
(*o*) *Ibid.* For the prescribed form, see *ibid.*, Schedule, Form E.
(*p*) *Ibid.* For the prescribed form, see *ibid.*, Schedule, Form F.

SECT. 2. Regulations for Cremation.

given by the medical referee, must be given by a registered medical practitioner of not less than five years' standing, who must either (1) be appointed for the purpose by the cremation authority, or (2) hold one of the following appointments: medical officer of health; police surgeon; certifying surgeon under the Factory and Workshop Act, 1901 (*q*); medical referee under the Workmen's Compensation Act, 1906 (*r*), or (3) hold an appointment as physician or surgeon in a public general hospital containing not less than fifty beds (*s*).

Medical referee and deputy.

1212. A cremation authority must appoint a medical referee, who must be a registered medical practitioner of not less than five years' standing and possess such experience and qualifications as will fit him for the discharge of the duties required of him by the Cremation Regulations of 1903. If otherwise qualified he may be a person holding the office of coroner or of medical officer of health. They must also appoint a deputy medical referee possessing the like qualifications to act in the absence of the medical referee and in any case in which the medical referee has been the medical attendant of the deceased. On making any such appointment they must notify the name, address, and qualifications of the medical referee or deputy medical referee to the Secretary of State (*t*).

Certificate by medical referee.

The medical referee, if he has personally investigated the cause of death, may give the prescribed confirmatory certificate, and if he has made the *post-mortem* examination may give the prescribed *post-mortem* certificate. He may also, if a coroner, himself give the prescribed coroner's certificate (*u*).

Duties of medical referee.

1213. The duties of the medical referee are as follows:—

When cremation must not be allowed.

He must not allow any cremation to take place if it appears that the deceased left a written direction to the contrary, nor (except where an inquest has been held and a certificate given by a coroner in the prescribed form) unless he is satisfied that the death of the deceased has been duly registered, by the production of a "certificate of registry of death" on one of the forms provided by the Registrar-General for production in case of burial.

Examination of certificates.

He must, before allowing the cremation, examine the application and certificates and ascertain that they are such as are required by the Cremation Regulations, 1903, and that the inquiry made by the persons giving the certificates has been adequate. He may make any inquiry with regard to the application and certificates that he may think necessary.

Application

He must not allow the cremation unless he is satisfied that the application is made by an executor or by the nearest surviving relative of the deceased, or, if made by any other person, that the

1 Edw. 7, c. 22.

The regulations refer to the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), for which the Act of 1906 (6 Edw. 7, c. 58), s. 10, is now substituted.

(*s*) Cremation Regulations, 1903, r. 9.

(*t*) *Ibid.*, r. 10.

(*u*) *Ibid.*, r. 11. For the prescribed forms, see *ibid.*, Schedule, Forms C—E.

fact that the executor or nearest relative has not made the application is sufficiently explained, and that the person making the application is a proper person to do so, nor unless he is satisfied that the fact and cause of death have been definitely ascertained; and in particular, if the cause of death assigned in the medical certificates be such as, regard being had to all the circumstances, might be due to poison, to violence, to any illegal operation, or to privation or neglect, he must require a *post-mortem* examination to be held, and if that fails to reveal the cause of death, or if it appears that death was due to poison, to violence, to any illegal operation, or to privation or neglect, or if there is any suspicious circumstance whatsoever, whether revealed in the certificates or otherwise coming to his knowledge, he must decline to allow the cremation unless an inquest be held and a certificate given by the coroner in the prescribed form.

No reason to suspect cause of death.

If a coroner has given notice that he intends to hold an inquest on the body, he must not allow the cremation to take place until the inquest has been held.

Inquest.

The medical referee may in any case decline to allow the cremation without stating any reason.

Prohibition without reason assigned.

In the case of the remains of a person who has died in any place out of England the medical referee may accept a declaration containing the prescribed particulars if it be made before any person having authority in that place to administer an oath or to take a declaration; and he may accept medical certificates if they be signed by any medical practitioners who are shown to his satisfaction to possess qualifications substantially equivalent to those prescribed in the case of each certificate by the Cremation Regulations, 1903 (*v*).

Persons dying abroad.

1214. The regulations above referred to, save those prohibiting cremation except in a crematorium of the opening of which due notice has been given, and prohibiting the cremation of the remains of a person who has left written directions to the contrary (*w*), do not apply to the cremation of the remains of a deceased person who has already been buried for not less than one year. Such remains may be cremated, subject to such conditions as the Secretary of State may impose in the exhumation licence granted by him or otherwise; and any such cremation in which those conditions are not observed is to be deemed a contravention of the Cremation Regulations, 1903 (*x*).

Cremation of bodies already buried.

1215. In the case of any person dying of plague, cholera, or yellow fever on board ship or in a hospital or temporary place of reception of the sick provided by a port or other local authority under the Public Health Acts or by a hospital committee under the Isolation Hospital Acts, the medical referee, if satisfied as to the cause of death, may dispense with any of the requirements of certain

Suspension of regulations.

(*v*) Cremation Regulations, 1903, r. 12. For the prescribed forms of declaration and medical certificates, see *ibid.*, Schedule, Forms A—D.

(*w*) *Ibid.*, rr. 3, 4; and see p. 571, *ante*.

(*x*) *Ibid.*, r. 13.

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of the regulations above referred to (*a*). These regulations may also be temporarily suspended or modified in any district during an epidemic or for other sufficient reason by an order of the Secretary of State on the application of a local authority (*b*).

Still-born child.

1216. Notwithstanding the foregoing regulations, the medical referee may permit the cremation of the remains of a still-born child if it be certified to be still-born by a registered medical practitioner after examination of the body, and if the referee after such inquiries as he may think necessary is satisfied that it was still-born, and that there is no reason for further examination (*c*).

SUB-SECT. 4.—*Disposal of Ashes.*

Ashes.

1217. After the cremation of the remains of a deceased person the ashes must be given into the charge of the person who applied for the cremation if he so desires. If not, they must be retained by the cremation authority, and, in the absence of any special arrangement for their burial or preservation, must be decently interred in a burial ground or in land adjoining the crematorium reserved for the burial of ashes. In the case of ashes left temporarily in the charge of the cremation authority and not removed within a reasonable time, a fortnight's notice must be given to the person who applied for the cremation before the remains are interred (*d*).

SUB-SECT. 5.—*Registration of Cremations etc.*

Registration.

1218. A cremation authority must appoint a registrar, who must keep a register in a prescribed form of all cremations carried out by the cremation authority. He must make the entries relating to each cremation immediately after the cremation has taken place, except the entry in the last column, relating to the disposal of the ashes, which he must make as soon as the remains of the deceased have been handed to the relatives or otherwise disposed of (*e*).

All applications, certificates, statutory declarations, and other documents relating to any cremation must be marked with a number corresponding to the number in the register, filed in order, and carefully preserved by the cremation authority. All such registers and documents may be inspected at any reasonable hour by any person appointed for that purpose by the Secretary of State, the Local Government Board, or the chief officer of any police force (*f*).

Custody of registers on closing of crematorium.

When any crematorium is closed as hereinbefore mentioned, the cremation authority must send all registers and documents relating to the cremations which have taken place therein to the Secretary of State, or otherwise dispose of them as he may direct (*g*).

(*a*) *I.e.*, Cremation Regulations, 1903, rr. 4—9 and 12.
(*b*) *Ibid.*, r. 14.
(*c*) *Ibid.*, r. 15.
(*d*) *Ibid.*, r. 16.
(*e*) *Ibid.*, r. 17. As to the prescribed form of register, see *ibid.*, Schedule, Form G.
(*f*) *Ibid.*, r. 18.
Ibid., r. 19.

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1219. All statutory provisions relating to the destruction and falsification of registers of burials, and the admissibility thereof as evidence in courts and otherwise (*h*), apply to the register of cremations, and the provisions as to stamp duty on certified copies of registers of burials (*i*) apply to the register as if it were a register of burials (*j*).

Forgery etc. of register and copies.

1220. The Secretary of State may make any inquiry he thinks fit as to the carrying out of the Cremation Regulations, 1903, in connection with any crematorium (*k*).

Inquiry by Secretary of State.

SECT. 3.—*Penalty for Breach of Statute or Regulations.*

1221. Any person who contravenes any regulations made under the Cremation Act, 1902 (*l*), or knowingly carries out or procures or takes part in the burning of any human remains except in accordance with such regulations and the provisions of the Act, is (in addition to any liability or penalty which he may otherwise incur) liable on summary conviction to a penalty not exceeding £50; but any person aggrieved by such conviction may appeal to quarter sessions.

Contravention of Act or regulations.

Any person who wilfully makes any false declaration or representation, or signs or utters any false certificate, with a view to procuring the burning of any human remains, is (in addition to any penalty or liability which he may otherwise incur) liable to imprisonment, with or without hard labour, not exceeding two years.

False statement to procure burning.

Any person who, with intent to conceal the commission or impede the prosecution of any offence, procures or attempts to procure the cremation of any body, or, with such intent, makes any declaration or gives any certificate under the Cremation Act, 1902, is liable on conviction on indictment to penal servitude for a term not exceeding five years (*m*).

Cremation to avoid criminal proceedings.

(*h*) As to these provisions, see pp. 555 *et seq.*, *ante*.
(*i*) Stamp Act, 1891 (54 & 55 Vict. c. 19), ss. 1, 64, Sched. I., Copy or Extract Certified.
(*j*) Cremation Act, 1902 (2 Edw. 7, c. 8), s. 7.
(*k*) Cremation Regulations, 1903, r. 20.
(*l*) 2 Edw. 7, c. 8.
(*m*) *Ibid.*, s. 8.

BYE-LAWS.

See COMPANIES; LOCAL GOVERNMENT; OPEN SPACES AND RECREATION GROUNDS; PUBLIC HEALTH ETC.; RAILWAYS AND CANALS; and other titles *passim*.

CABLES.

See TELEGRAPHS AND TELEPHONES.

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